8/chap.1/pt.1-51/990

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Federal Acquisition Regulations System

48

CHAPTER 1 (Parts 1 TO 51)
Revised as of October 1, 1990

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Federal Acquisition Regulations System

48

CHAPTER 1 (Parts 1 to 51)

Revised as of October 1, 1990

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF OCTOBER 1, 1990

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records
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the Federal Register

1985

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Cite this Code: **CFR**

To cite the regulations in this volume use title, part and section number. Thus, 48 CFR 1.000 *refers to title 48, part 1, section 000.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.. as of January 1
Title 17 through Title 27..as of April 1
Title 28 through Title 41..as of July 1
Title 42 through Title 50.. as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, October 1, 1990), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR titles, chapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

REPUBLICATION OF MATERIAL

There are no restrictions on the republication of material appearing in the Code of Federal Regulations.

INQUIRIES AND SALES

For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, DC 20402 (telephone 202-783-3238).

MARTHA L. GIRARD,
Director,
Office of the Federal Register.

October 1, 1990.

THIS TITLE

Title 48—**Federal Acquisition Regulations System** is composed of seven volumes. The chapters in these volumes contain all current regulations and are arranged as follows: Chapter 1 (Parts 1 to 51), Chapter 1 (Parts 52 to 99), Chapter 2 (Parts 201 to 251), Chapter 2 (Parts 252 to 299), Chapters 3 to 6, Chapters 7 to 14 and Chapter 15 to End. The contents of these volumes represent all current regulations codified under this title of the CFR as of October 1, 1990.

The Federal acquisition regulations in Chapter 1 are those government-wide acquisition regulations jointly issued by the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration. Chapters 2 through End are acquisition regulations issued by individual government agencies. Parts 1 to 69 in each of Chapters 2 through End are reserved for agency regulations *implementing* the Federal acquisition regulations in Chapter 1 and are numerically keyed to them. Parts 70 to 99 in Chapters 2 through End contain agency regulations *supplementing* the Federal acquisition regulations.

The OMB control numbers for the Federal Acquisition Regulations System appear in § 1.105 of Chapter 1. For the convenience of the user, § 1.105 is reprinted in the Finding Aids section of the second volume containing Chapter 1 (Parts 52 to 99).

The two volumes containing Chapter 1 include a subject index to the Federal acquisition regulations. The second volume, containing Chapter 1 (Parts 52 to 99), includes contract clauses and forms. The volume containing Chapter 2 also contains a subject index to the Department of Defense regulations. The volume containing Chapters 7 to 14 includes a Distribution Table for Chapter 9.

For this volume, Jacquelyn J. Demsky was Chief Editor. The Code of Federal Regulations publication program is under the direction of Richard L. Claypoole, assisted by Alomha S. Morris.

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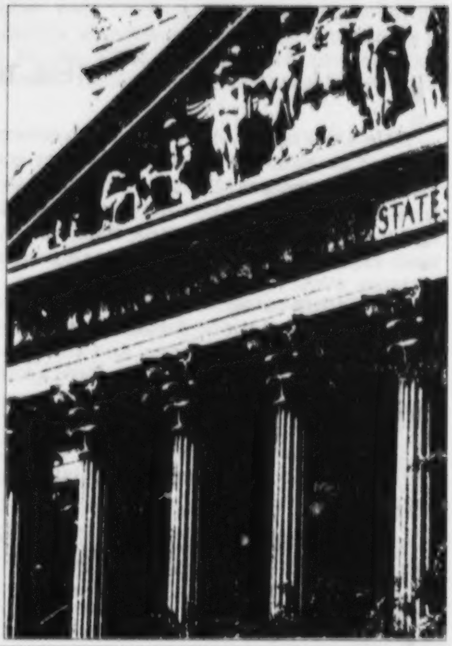

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Title 48—Federal Acquisition Regulations System

(This book contains Chapter 1, Parts 1 to 51)

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CHAPTER 1—Federal Acquisition Regulation 1

CHAPTER 1—FEDERAL ACQUISITION REGULATION

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EDITORIAL NOTE: The Federal Acquisition Regulations Index also follows the text of Chapter 1 in 48 CFR Chapter 1, Parts 52-99.

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42103, Sept. 19, 1983, unless otherwise noted.

1.000 Scope of part.

This part sets forth basic policies and general information about the Federal Acquisition Regulations System including purpose, authority, applicability, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation. Subparts 1.2, 1.3, and 1.4 prescribe administrative procedures for maintaining the FAR System.

Subpart 1.1—Purpose, Authority, Issuance

1.101 Purpose.

The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986]

1.102 Authority.

(a) The development of the FAR System is in accordance with the requirements of the Office of Federal Procurement Policy (OFPP) Act of 1974 (Pub. L. 93-400), as amended by Pub. L. 96-83, and OFPP Policy Letter 85-1, Federal Acquisition Regulations System, dated August 19, 1985.

(b) The FAR is prepared, issued, and maintained, and the FAR System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986]

1.103 Applicability.

The FAR applies to all acquisitions as defined in part 2 of the FAR, except where expressly excluded.

1.104 Issuance.

1.104-1 Publication and code arrangement.

(a) The FAR is published in (1) the daily issue of the Federal Register, (2) cumulated form in the Code of Federal Regulations (CFR), and (3) a separate loose-leaf edition.

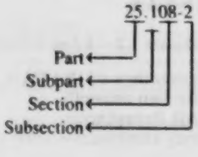
(b) The FAR is issued as Chapter 1 of Title 48, CFR. Subsequent chapters are reserved for agency acquisition regulations that implement or supplement the FAR (see subpart 1.3). The CFR Staff will assign chapter numbers to requesting agencies.

(c) Each numbered unit or segment (e.g., part, subpart, section, etc.) of an agency acquisition regulation that is codified in the CFR shall begin with the chapter number. However, the chapter number assigned to the FAR will not be included in the numbered units or segments of the FAR.

1.104-2 Arrangement of regulations.

(a) *General.* The FAR is divided into subchapters, parts (each of which deals with a separate aspect of acquisition), subparts, sections, and subsections.

(b) *Numbering.* (1) The numbering system permits the discrete identification of every FAR paragraph. The digits to the left of the decimal point represent the part number. The numbers to the right of the decimal point and to the left of the dash, represent, in order, the subpart (one or two digits), and the section (two digits). The number to the right of the dash represents the subsection. Subdivisons may be used at the section and subsection level to identify individual paragraphs. The following example illustrates the make-up of a FAR number citation (note that subchapters are not used with citations):



(2) Subdivisions below the section or subsection level shall consist of parenthetical alphanumerics reading from highest to lowest indenture as follows: lower case alphabet, Arabic numbers, lower case Roman numerals, and upper case alphabet. The following example is illustrative:

(a)(1)(i)(A)

Subdivisions, below the 4th level shall repeat the sequence.

(c) *References and citations.* (1) Unless otherwise stated, cross-references indicate parts, subparts, sections, subsections, paragraphs, subparagraphs, or subdivisions of this regulation.

(2) This regulation may be referred to as the Federal Acquisition Regulation or the FAR.

(3) Using the FAR coverage at 9.106-4(d) as a typical illustration, reference to the—

(i) Part would be "FAR Part 9" outside the FAR and "Part 9" within the FAR.

(ii) Subpart would be "FAR Subpart 9.1" outside the FAR and "Subpart 9.1" within the FAR.

(iii) Section would be "FAR 9.106" outside the FAR and "9.106" within the FAR.

(iv) Subsection would be "FAR 9.106-4" outside the FAR and "9.106-4" within the FAR.

(v) Paragraph would be "FAR 9.106-4(d)" outside the FAR and "9.106-4(d)" within the FAR.

(4) Citations of authority (e.g., statutes or executive orders) in the FAR shall follow the Federal Register form guides.

1.104-3 Copies.

Copies of the FAR in Federal Register, loose-leaf, and CFR form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402.

1.105 OMB approval under the Paperwork Reduction Act.

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) imposes a requirement on Federal agencies to obtain approval from the Office of Management and Budget (OMB) before collecting information from ten or more members of the public. The information collection and recordkeeping requirements contained in this regulation have been approved by the OMB. The following OMB control numbers apply.

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SF 1406	9000-0011
SF 1407	9000-0011
SF 1408	9000-0011
SF 1411	9000-0013
SF 1412	9000-0013
SF 1413	9000-0014

FAR Segment	OMB Control No.
SF 1416	9000-0045
SF 1417	9000-0037
SF 1423	9000-0015
SF 1424	9000-0015
SF 1426	9000-0015
SF 1427	9000-0015
SF 1428	9000-0015
SF 1429	9000-0015
SF 1430	9000-0015
SF 1431	9000-0015
SF 1432	9000-0015
SF 1433	9000-0015
SF 1434	9000-0015
SF 1435	9000-0012
SF 1436	9000-0012
SF 1437	9000-0012
SF 1438	9000-0012
SF 1439	9000-0012
SF 1440	9000-0012
SF 1443	9000-0010
SF 1444	9000-0069
SF 1445	9000-0069
SF 1446	9000-0089
All other requirements	9000-0063

[49 FR 12973, Mar. 30, 1984]

EDITORIAL NOTE: For Federal Register citations affecting § 1.105, see the List of CFR Sections Affected in the Finding Aids section of this volume.

Subpart 1.2—Administration

1.201 Maintenance of the FAR.

1.201-1 The two councils.

(a) Subject to the authorities discussed in 1.102, revisions to the FAR will be prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulatory Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council). Members of these councils shall—

(1) Represent their agencies on a full-time basis;

(2) Be selected for their superior qualifications in terms of acquisition experience and demonstrated professional expertise; and

(3) Be funded by their respective agencies.

(b) The chairperson of the CAA Council shall be the representative of the Administrator of General Services. The other members of this council shall be one each representative from the (1) Departments of Agriculture, Commerce, Energy, Health and Human Services, Interior, Labor, State, Transportation, and Treasury, and (2) Environmental Protection Agency, Small Business Administration, and Department of Veterans Affairs.

(c) The Director of the DAR Council shall be the representative of the Secretary of Defense. The operation of the DAR Council will be as prescribed by the Secretary of Defense. Membership shall include representatives of the military Departments, the Defense Logistics Agency, and the National Aeronautics and Space Administration.

(d) Responsibility for processing revisions to the FAR is apportioned by the two councils so that each council has cognizance over specified parts or subparts.

(e) Each council shall be responsible for—

(1) Agreeing on all revisions with the other council;

(2) Submitting to the FAR Secretariat (see 1.201-2) the information required under paragraphs 1.501-2(b) and (e) for publication in the FEDERAL REGISTER of a notice soliciting comments on a proposed revision to the FAR;

(3) Considering all comments received in response to notice of proposed revisions;

(4) Arranging for public meetings;

(5) Preparing any final revision in the appropriate FAR format and language; and

(6) Submitting any final revision to the FAR Secretariat for publication in the FEDERAL REGISTER and printing for distribution.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985; 50 FR 26903, June 28, 1985; 51 FR 2649, Jan. 17, 1986; 54 FR 29280, July 11, 1989]

1.201-2 FAR Secretariat.

(a) The General Services Administration is reponsible for establishing and operating the FAR Secretariat to print, publish, and distribute the FAR through the Code of Federal Regulations system (including a loose-leaf edition with periodic updates).

(b) Additionally, the FAR Secretariat shall provide the two councils with centralized services for—

(1) Keeping a synopsis of current FAR cases and their status;

(2) Assigning FAR case numbers;

(3) Maintaining official files;

(4) Assisting parties interested in reviewing the files on completed cases; and

(5) Performing miscellaneous administrative tasks pertaining to the maintenance of the FAR.

1.202 Agency compliance with the FAR.

Agency compliance with the FAR (see 1.304) is the responsibility of the Secretary of Defense (for the military departments and defense agencies), the Administrator of General Services (for civilian agencies other than NASA), and the Administrator of NASA (for NASA activities).

Subpart 1.3—Agency Acquisition Regulations

1.301 Policy.

(a)(1) Subject to the authorities in paragraph (c) below and other statutory authority, an agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its suborganizations, and contractors or prospective contractors.

(2) Subject to the authorities in (c) below and other statutory authority, an agency head may issue or authorize the issuance of internal agency guidance at any organizational level (e.g., designations and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements).

(b) Agency heads shall establish procedures to ensure that agency acquisition regulations are published for comment in the FEDERAL REGISTER in conformance with the procedures in subpart 1.5 and as required by section 22 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 418b), and other applicable statutes, when they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors. However, publication is not required for issuances that merely implement or supplement higher level issuances that have previously undergone the public comment process, unless such implementation or supplementation results in an additional significant cost or administrative impact on contractors or offerors or effect beyond the internal operating procedures of the issuing organization. Issuances under 1.301(a)(2) need not be publicized for public comment.

(c) When adopting acquisition regulations, agencies shall ensure that they comply with the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) as implemented in 5 CFR part 1320 (see 1.105) and the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Normally, when a law requires publication of a proposed regulation, the Regulatory Flexibility Act applies and agencies must prepare written analyses or certifications as provided in the law.

(d) Agency acquisition regulations implementing or supplementing the FAR are, for—

(1) The military departments and defense agencies, issued subject to the authority of the Secretary of Defense;

(2) NASA activities, issued subject to the authorities of the Administrator of NASA; and

(3) The civilian agencies other than NASA, issued by the heads of those agencies subject to the overall authority of the Administrator of General Services or independent authority the agency may have.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985; 54 FR 5054, Jan. 31, 1989]

1.302 Limitations.

Agency acquisition regulations shall be limited to—

(a) Those necessary to implement FAR policies and procedures within the agency; and

(b) Additional policies, procedures, solicitation provisions, or contract clauses that supplement the FAR to satisfy the specific needs of the agency.

1.303 Publication and codification.

(a) Agency-wide acquisition regulations shall be published in the FEDERAL REGISTER as required by law, shall be codified under an assigned chapter in Title 48, Code of Federal Regulations, and shall parallel the FAR in format, arrangement, and numbering system (but see 1.104-1(c)). Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title. Supplementary material for which there is no counterpart in the FAR shall be codified using chapter, part, subpart, section, or subsection numbers of 70 and up (e.g., for the Department of Interior, whose assigned chapter number in Title 48 is 14, part 1470, subpart 1401.70, section 1401.370, or subsection 1401.301-70.)

(b) Issuances under 1.301(a)(2) need not be published in the FEDERAL REGISTER.

[48 FR 42103, Sept. 19, 1983, as amended at 50 FR 2269, Jan. 15, 1985]

1.304 Agency control and compliance procedures.

(a) Under the authorities of 1.301(c), agencies shall control and limit issuance of agency acquisition regulations and shall establish formal procedures for the review of these regulations to assure compliance with this part 1.

(b) Agency acquisition regulations shall not—

(1) Unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR or higher-level agency acquisition regulations; or

(2) Except as required by law or as provided in subpart 1.4, conflict or be inconsistent with FAR content.

(c) Agencies shall evaluate all regulatory coverage in agency acquisition regulations to determine if it could apply to other agencies. Coverage that is not peculiar to one agency shall be recommended for inclusion in the FAR.

Subpart 1.4—Deviations from the FAR

1.400 Scope of subpart.

This subpart prescribes the policies and procedures for authorizing deviations from the FAR. Exceptions pertaining to the use of forms prescribed by the FAR are covered in part 53 rather than in this subpart.

1.401 Definition.

Deviation means any one or combination of the following:

(a) The issuance or use of a policy, procedure, solicitation provision (see definition in 52.101(a)), contract clause (see definition in 52.101(a)), method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.

(b) The omission of any solicitation provision or contract clause when its prescription requires its use.

(c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR (see definitions of *modification* and *alternate* in 52.101(a)).

(d) The use of a solicitation provision or contract clause prescribed by the FAR on a *substantially as follows* or *substantially the same as* basis (see definitions in 52.101(a)), if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.

(e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure prescribed by the FAR.

(f) The issuance of policies or procedures that govern the contracting process or otherwise control contracting relationships that are not incorporated into agency acquisition regulations in accordance with 1.301(a).

1.402 Policy.

Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specific needs and requirements of each agency. The development and testing of new techniques and methods of acquistion should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods. Refer to 31.101 for instructions concerning deviations pertaining to the subject matter of part 31, Contract Cost Principles and Procedures. Deviations are not authorized with respect to part 30. Refer to 30.201-5 for instructions concerning waivers pertaining to Cost Accounting Standards.

[48 FR 42103, Sept. 19, 1983, as amended at 52 FR 35612, Sept. 22, 1987]

1.403 Individual deviations.

Individual deviations affect only one contracting action, and, unless 1.405(e) is applicable, may be authorized by agency heads or their designees. The justification and agency approval shall be documented in the contract file and a copy of the approved deviation shall be furnished to the FAR Secretariat through a central agency control point.

1.404 Class deviations.

Class deviations affect more than one contracting action. When it is known that a class deviation will be required on a permanent basis, an agency should propose an appropriate FAR revision to cover the matter. A copy of each approved class deviation shall be furnished to the FAR Secretariat.

(a) For civilian agencies except NASA, class deviations may be authorized by agency heads or their designees, unless 1.405(e) is applicable. Delegation of this authority shall not be made below the head of a contracting activity. Authorization of class deviations by agency officials is subject to the following limitations:

(1) An agency official who may authorize a class deviation, before doing so, shall consult with the chairperson of the Civilian Agency Acquisition Council (CAA Council), unless that agency official determines that urgency precludes such consultation.

(2) Recommended revisions to the FAR shall be transmitted to the FAR Secretariat by agency heads or their designees for authorizing class deviations.

(b) For DOD, class deviations shall be controlled and approved by the Deputy Under Secretary of Defense Research and Engineering (Acquisition Management) and shall be processed in accordance with agency regulations.

(c) For NASA, class deviations shall be controlled and approved by the Assistant Administrator for Procurement after consultation with the Deputy Under Secretary of Defense Research and Engineering (Acquisition Management). Deviations shall be processed in accordance with agency regulations.

1.405 Deviations pertaining to treaties and executive agreements.

(a) *Executive agreements,* as used in this section, means Government-to-Government agreements, including agreements with international organizations, to which the United States is a party.

(b) Any deviation from the FAR required to comply with a treaty to which the United States is a party is authorized, unless the deviation would be inconsistent with FAR coverage based on a law enacted after the execution of the treaty.

(c) Any deviation from the FAR required to comply with an executive agreement is authorized unless the deviation would be inconsistent with FAR coverage based on law.

(d) A copy of the text of any deviation authorized under paragraphs (b) or (c) of this section shall be transmitted to the FAR Secretariat through a central agency control point.

(e) If a deviation required to comply with a treaty or an executive agreement is not authorized by paragraphs (b) or (c) of this section, then the request for deviation shall be processed through the FAR Secretariat to the appropriate council.

Subpart 1.5—Agency and Public Participation

SOURCE: 50 FR 2269, Jan. 15, 1985, unless otherwise noted.

1.501 Solicitation of agency and public views.

1.501-1 Definition.

Significant revisions, as used in this subpart, means revisions that alter the substantive meaning of any coverage in the FAR System having a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of the issuing agency. This expression, for example, does not include editorial, stylistic, or other revisions that have no impact on the basic meaning of the coverage being revised.

1.501-2 Opportunity for public comments.

(a) Views of agencies and nongovernmental parties or organizations will be considered in formulating acquisition policies and procedures.

(b) The opportunity to submit written comments on proposed significant revisions shall be provided by placing a notice in the FEDERAL REGISTER. Each of these notices shall include—

(1) The text of the revision or, if it is impracticable to publish the full text, a summary of the proposal;

(2) The address and telephone number of the individual from whom copies of the revision, in full text, can be requested and to whom comments thereon should be addressed; and

(3) When 1.501-3(b) is applicable, a statement that the revision is effective on a temporary basis pending completion of the public comment period.

(c) A minimum of 30 days and, normally, at least 60 days will be given for the receipt of comments.

1.501-3 Exceptions.

(a) Comments need not be solicited when the proposed coverage does not constitute a significant revision.

(b) Advance comments need not be solicited when urgent and compelling circumstances make solicitation of comments impracticable prior to the effective date of the coverage, such as when a new statute must be implemented in a relatively short period of time. In such case, the coverage shall be issued on a temporary basis and shall provide for at least a 30 day public comment period.

1.502 Unsolicited proposed revisions.

Consideration shall also be given to unsolicited recommendations for revisions that have been submitted in writing with sufficient data and rationale to permit their evaluation.

1.503 Public meetings.

Public meetings may be appropriate when a decision to adopt, amend, or delete coverage is likely to benefit from significant additional views and discussion.

Subpart 1.6—Contracting Authority and Responsibilities

1.601 General.

Authority and responsibility to contract for authorized supplies and services are vested in the agency head. The agency head may establish contracting activities and delegate to heads of such contracting activities broad authority to manage the agency's contracting functions. Contracts may be entered into and signed on behalf of the Government only by contracting officers. In some agencies, a relatively small number of high level officials are designated contracting officers solely by virtue of their positions. Contracting officers below the level of a head of a contracting activity shall be selected and appointed under 1.603.

1.602 Contracting officers.

1.602-1 Authority.

(a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

1.602-2 Responsibilities.

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall—

(a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;

(b) Ensure that contractors receive impartial, fair, and equitable treatment; and

(c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

1.602-3 Ratification of unauthorized commitments.

(a) *Definitions.*

Ratification, as used in this subsection, means the act of approving an unauthorized commitment by an official who has the authority to do so.

Unauthorized commitment, as used in this subsection, means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.

(b) *Policy.* (1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel.

(2) Subject to the limitations in paragraph (c) of this subsection, the head of the contracting activity, unless a higher level official is designated by the agency, may ratify an unauthorized commitment.

(3) The ratification authority in subparagraph (b)(2) of this subsection may be delegated in accordance with agency procedures, but in no case shall the authority be delegated below the level of chief of the contracting office.

(4) Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the General Accounting Office for resolution. (See 1.602-3(d).)

(5) Unauthorized commitments that would involve claims subject to resolution under the Contract Disputes Act of 1978 should be processed in accordance with subpart 33.2, Disputes and Appeals.

(c) *Limitations.* The authority in subparagraph (b)(2) of this subsection may be exercised only when—

(1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

(2) The ratifying official could have granted authority to enter or could have entered into a contractual commitment at the time it was made and still has the authority to do so;

(3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;

(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

(5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;

(6) Funds are available and were available at the time the unauthorized commitment was made; and

(7) The ratification is in accordance with any other limitations prescribed under agency procedures.

(d) *Nonratifiable commitments.* Cases that are not ratifiable under this subsection may be subject to resolution as recommended by the General Accounting Office under its claim procedure (GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, Chapter 2), or as authorized by FAR part 50. Legal advice should be obtained in these cases.

[53 FR 3689, Feb. 8, 1988]

1.603 Selection, appointment, and termination of appointment.

1.603-1 General.

Consistent with 1.301(c), the agency shall establish a system for the selection, appointment, and termination of appointment of contracting officers. Agency heads or their designees may select and appoint contracting officers and terminate their appointments.

1.603-2 Selection.

In selecting contracting officers, the appointing official shall consider the complexity and dollar value of the acquisitions to be assigned and the candidate's experience, training, education, business acumen, judgment, character, and reputation. Examples of selection criteria include—

(a) Experience in Government contracting and administration, commercial purchasing, or related fields;

(b) Education or special training in business administration, law, accounting, engineering, or related fields;

(c) Knowledge of acquisition policies and procedures, including this and other applicable regulations;

(d) Specialized knowledge in the particular assigned field of contracting; and

(e) Satisfactory completion of acquisition training courses.

1.603-3 Appointment.

Contracting officers shall be appointed in writing on a "Certificate of Appointment," SF 1402, which shall state any limitation on the scope of authority to be exercised, other than limitations contained in applicable laws or regulations. Appointing officials shall maintain files containing copies of all Certificates of Appointment that have not been terminated.

1.603-4 Termination.

Termination of a contracting officer appointment will be by letter, unless the Certificate of Appointment contains other provisions for automatic termination. Terminations may be for reasons such as reassignment, termination of employment, or unsatisfactory performance. No termination shall operate retroactively.

Subpart 1.7—Determinations and Findings

SOURCE: 50 FR 1726, Jan. 11, 1985 (interim rule), and 50 FR 52429, Dec. 23, 1985 (final rule), unless otherwise noted.

1.700 Scope of subpart.

This subpart prescribes general policies and procedures for the use of determinations and findings (D&F's). Requirements for specific types of D&F's can be found with the appropriate subject matter.

1.701 Definition.

Determination and Findings (D&F) means a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contracting actions. The *determination* is a conclusion or decision supported by the *findings*. The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

1.702 General.

(a) A D&F shall ordinarily be for an individual contract action. Unless otherwise prohibited, class D&F's may be executed for classes of contract action (see 1.703). The approval granted by a D&F is restricted to the proposed contract action(s) reasonably described in that D&F. D&F's may provided for a reasonable degree of flexibility. Furthermore, in their application, reasonable variations in estimated quantities or prices are permitted, unless the D&F specifies otherwise.

(b) When an option is anticipated, the D&F shall state the approximate quantity to be awarded initially and the extent of the increase to be permitted by the option.

1.703 Class determinations and findings.

(a) A class D&F provides authority for a class of contracting actions. A class may consist of contracting actions for the same or related supplies or services or other contracting actions that require essentially identical justification.

(b) The findings in a class D&F shall fully support the proposed action either for the class as a whole or for each action. A class D&F shall be for a specified period, with the expiration date stated in the document.

(c) The contracting officer shall ensure that individual actions taken pursuant to the authority of a class D&F are within the scope of the D&F.

1.704 Content.

Each D&F shall set forth enough facts and circumstances to clearly and convincingly justify the specific determination made. As a minimum, each D&F shall include, in the prescribed agency format, the following information:

(a) Identification of the agency and of the contracting activity and specific identifications of the document as a *Determination and Findings*.

(b) Nature and/or description of the action being approved.

(c) Citation of the appropriate statute and/or regulation upon which the D&F is based.

(d) Findings that detail the particular circumstances, facts, or reasoning essential to support the determination. Necessary supporting documentation shall be obtained from appropriate requirements and technical personnel.

(e) A determination, based on the findings, that the proposed action is justified under the applicable statute or regulation.

(f) Expiration date of the D&F, if required (see 1.706(b)).

(g) The signature of the official authorized to sign the D&F (see 1.706) and the date signed.

1.705 Supersession and modification.

(a) If a D&F is superseded by another D&F, that action shall not render invalid any action taken under the original D&F prior to the date of its supersession.

(b) A modification of the D&F will not require cancellation of the solicitation if the D&F, as modified, supports the contracting action.

1.706 Expiration.

Expiration dates are required for class D&F's and are optional for individual D&F's. Authority to act under an individual D&F expires when it is exercised or on an expiration date specified in the document, whichever occurs first. Authority to act under a class D&F expires on the expiration date specified in the document. When a solicitation has been furnished to prospective offerors before the expiration date, the authority under the D&F will continue until award of the contract(s) resulting from that solicitation.

1.707 Signatory authority.

When a D&F is required, it shall be signed by the appropriate official in accordance with agency regulations. Authority to sign or delegate signature authority for the various D&F's is as shown in the applicable FAR part.

PART 2—DEFINITIONS OF WORDS AND TERMS

Sec.
2.000 Scope of part.

Subpart 2.1—Definitions

2.101 Definitions.

Subpart 2.2—Definitions Clause

2.201 Contract clause.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42107, Sept. 19, 1983, unless otherwise noted.

2.000 Scope of part.

This part defines words and terms commonly used in this regulation. Other terms are defined in the part or subpart with which they are particularly associated (see the Index for locations).

Subpart 2.1—Definitions

2.101 Definitions.

As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular part or portion of a part.

Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

Affiliates means associated business concerns or individuals if, directly or indirectly, (a) either one controls or can control the other or (b) a third party controls or can control both.

Agency head (see *head of the agency*).

Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilaterial contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see part 16.

Contract administration office means an office that performs (a) assigned postaward functions related to the administration of contracts and (b) assigned preaward functions.

Contracting means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

Contracting activity means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.

Contracting office means an office that awards or executes a contract for supplies or services and performs postaward functions not assigned to a contract administration office.

Contracting officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. *Administrative contracting officer (ACO)* refers to a contracting officer who is administering contracts. *Termination contracting officer (TCO)* refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation to administrative contracting officer or termination contracting officer does not (a) require that a duty be performed at a particular office or activity or (b) restrict in any way a contracting officer in the performance of any duty properly assigned.

Executive agency means an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

Facsimile means electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document, e.g., facsimile bid, the term refers to a document (in the example given, a bid) that has been transmitted to and received by the Government via facsimile.

Federal agency means any executive agency or any independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).

Head of the agency (also called *agency head*) means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency and, for the Department of Defense, the Under Secretary and any Assistant Secretary of the Departments of the Army, Navy, and Air Force and the Director and Deputy Director of Defense agencies; and the term *authorized representative* means any person, persons, or board (other than the contracting officer) authorized to act for the head of the agency or Secretary.

Head of the contracting activity includes the official who has overall responsibility for managing the contracting activity.

May denotes the permissive. However, the words *no person may...* mean that no person is required, authorized, or permitted to do the act described.

National defense means any activity related to programs for military or atomic energy production or construction, military assistance to any foreign nation, stockpiling, or space.

Offer means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called *bids* or sealed bids; responses to requests for proposals (negotiation) are offers called *proposals;* responses to requests for quotations (negotiation) are *not* offers and are called *quotes.* For unsolicited proposals, see subpart 15.5.

Possessions includes the Virgin Islands, Johnston Island, American Samoa, Guam, Wake Island, Midway Island, and the guano islands, but does not include Puerto Rico, leased bases, or trust territories.

Senior procurement executive means the individual appointed pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) who is responsible for management direction of the acquisition system of the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency.

Shall denotes the imperative.

Supplies means all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing.

United States, when used in a geographic sense, means the 50 States and the District of Columbia.

[48 FR 42107, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 4221, Jan. 30, 1985; 50 FR 26903, June 28, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2649, Jan. 17, 1986; 52 FR 19802, May 27, 1987; 54 FR 48981, Nov. 28, 1989]

Subpart 2.2—Definitions Clause

2.201 Contract clause.

The contracting officer shall insert the clause at 52.202-1, Definitions, in solicitations and contracts except when (a) a fixed-price research and development contract that is expected to be $2,500 or less is contemplated or (b) a purchase order is contemplated. If the contract is for personal services; construction; architect-engineer services; or dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I. Additional definitions may be included; *provided,* they are consistent with this clause and the Federal Acquisition Regulation.

[48 FR 42107, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42108, Sept. 19, 1983, unless otherwise noted.

3.000 Scope of part.

This part prescribes policies and procedures for avoiding improper business practices and personal conflicts of interest and for dealing with their apparent or actual occurrence.

Subpart 3.1—Safeguards

3.101 Standards of conduct.

3.101-1 General.

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

3.101-2 Solicitation and acceptance of gratuities by Government personnel.

As a rule, no Government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who (a) has or is seeking to obtain Government business with the employee's agency, (b) conducts activities that are regulated by the employee's agency, or (c) has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Certain limited exceptions are authorized in agency regulations.

3.101-3 Agency regulations.

(a) Agencies are required by Executive Order 11222 of May 8, 1965, and 5 CFR part 735 to prescribe *Standards of Conduct*. These agency standards contain—

(1) Agency-authorized exceptions to 3.101-2; and

(2) Disciplinary measures for persons violating the standards of conduct.

(b) Requirements for employee financial disclosure and restrictions on private employment for former Government employees are in Office of Personnel Management and agency regulations implementing Public Law 95-521, which amended 18 U.S.C. 207.

3.102 Officials not to benefit.

3.102-1 General.

41 U.S.C. 22 requires that most Government contracts explicitly state that no member of Congress shall be admitted to any share or part of the contract or any benefit arising from it. If a contract is made between the U.S. Government and any member of or delegate to Congress, or resident commissioner, it may constitute a violation of 18 U.S.C. 431 and 432, resulting in—

(a) Both the officer or employee of the Government who awarded the contract and the member, delegate, or resident commissioner being subject to criminal penalties;

(b) The contract being void; and

(c) The contractor having to return any consideration paid by the Government under the contract.

3.102-2 Contract clause.

The contracting officer shall insert the clause at 52.203-1, Officials Not to Benefit, in solicitations and contracts, except those related to agriculture that are exempted by 41 U.S.C. 22.

3.103 Independent pricing.

3.103-1 Solicitation provision.

The contracting officer shall insert the provision at 52.203-2, Certificate of Independent Price Determination, in solicitations when a firm-fixed-price contract or fixed-price contract with economic price adjustment is contemplated, unless—

(a) The acquisition is to be made under the small purchase procedures in part 13;

(b) [Reserved]

(c) The solicitation is a request for technical proposals under two-step sealed bidding procedures; or

(d) The solicitation is for utility services for which rates are set by law or regulation.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 25526, June 21, 1990]

3.103-2 Evaluating the certification.

(a) *Evaluation guidelines.* (1) None of the following, in and of itself, constitutes *disclosure* as it is used in subparagraph (a)(2) of the Certificate of Independent Price Determination (hereafter, the certificate):

(i) The fact that a firm has published price lists, rates, or tariffs covering items being acquired by the Government.

(ii) The fact that a firm has informed prospective customers of proposed or pending publication of new or revised price lists for items being acquired by the Government.

(iii) The fact that a firm has sold the same items to commercial customers at the same prices being offered to the Government.

(2) For the purpose of subparagraph (b)(2) of the certificate, an individual may use a blanket authorization to act as an agent for the person(s) responsible for determining the offered prices if—

(i) The proposed contract to which the certificate applies is clearly within the scope of the authorization; and

(ii) The person giving the authorization is the person within the offeror's organization who is responsible for determining the prices being offered at the time the certification is made in the particular offer.

(3) If an offer is submitted jointly by two or more concerns, the certification provided by the representative of each concern applies only to the activities of that concern.

(b) *Rejection of offers suspected of being collusive.* (1) If the offeror deleted or modified subparagraph (a)(1) or (a)(3) or paragraph (b) of the certificate, the contracting officer shall reject the offeror's bid or proposal.

(2) If the offeror deleted or modified subparagraph (a)(2) of the certificate, the offeror must have furnished with its offer a signed statement of the circumstances of the disclosure of prices contained in the bid or proposal. The chief of the contracting office shall review the altered certificate and the statement and shall determine, in writing, whether the disclosure was made for the purpose or had the effect of restricting competition. If the determination is positive, the bid or proposal shall be rejected; if it is negative, the bid or proposal shall be considered for award.

(3) Whenever an offer is rejected under subparagraph (1) or (2) above, or the certificate is suspected of being false, the contracting officer shall report the situation to the Attorney General in accordance with 3.303.

(4) The determination made under subparagraph (2) above shall not prevent or inhibit the prosecution of any criminal or civil actions involving the occurrences or transactions to which the certificate relates.

[48 FR 42108, Sept. 19, 1983, as amended at 55 FR 25526, June 21, 1990]

3.103-3 The need for further certifications.

A contractor that properly executed the certificate before award does not have to submit a separate certificate with each proposal to perform a work order or similar ordering instrument issued pursuant to the terms of the contract, where the Government's requirements cannot be met from another source.

3.104 Procurement integrity.

[55 FR 36784, Sept. 6, 1990]

3.104-1 General.

(a) Section 3.104 implements section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) as amended by section 814 of Pub. L. 101-189 (hereinafter referred to as *the Act*). Agency supplementation of 3.104 and any clauses required by 3.104 must be approved at a level not lower than the Senior Procurement Executive of the agency, unless a higher level of approval is required by law for that agency.

(b) Agency employees are reminded that much of the conduct prohibited by the Act is also prohibited by other statutes and regulations. For example—

(1) The offer or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201, 10 U.S.C. 2207, 5 U.S.C. 7353, and 5 CFR parts 735 and 2635;

(2) Employment discussions are covered by 18 U.S.C. 208, which precludes a Government employee from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is negotiating for employment;

(3) Post-employment restrictions are covered by 18 U.S.C. 207, which prohibits certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract on which the former employee worked while employed by the Government; and

(4) FAR parts 14 and 15, which place restrictions on the release of information related to procurements and other contractor information which must be protected under 18 U.S.C. 1905. In addition, 5 CFR part 735 protects non-public Government information.

[55 FR 36784, Sept. 6, 1990]

3.104-2 Applicability.

This subsection implements section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) (OFPP Act) as amended by section 814 of Pub. L. 104-189. Conduct and procurement activities on or after July 16, 1989, are subject to the prohibitions and restrictions of section 27 as follows:

(a) Conduct and procurement activities occurring during the period from July 16, 1989 through November 30, 1989, are subject to the prohibitions and restrictions in section 27 of the Office of Federal Procurement Policy Act as originally enacted on November 17, 1988, and as implemented by Federal Acquisition Circular 84-47 (see 48 CFR 3.104 through 3.104-12, 4.802(e), 9.105-3(c), 9.106-3(b), 15.805-5 (l) and (m), 37.207(f), 37.208, 43.106, 52.203-8 through 52.203-10 and 52.237-9, October 1, 1989 edition). In addition, the performance of procurement activities during the period from July 16, 1989 through November 30, 1989, may subject an individual to prohibitions and restrictions applicable after December 1, 1990, as provided in subparagraphs (c)(1) and (c)(2) of this subsection.

(b) Section 27 of the OFPP Act was suspended from December 1, 1989, through November 30, 1990. The prohibitions and restrictions under section 27, either as originally enacted or as amended, do not apply during the suspension period. In addition, an individual does not become a procurement official under section 27 as originally enacted or as amended if the individual's participation in a procurement was solely during the suspension period. The suspension does not interrupt the running of the 2-year period of any post-employment restriction that attached during the period from July 16, 1989, through November 30, 1989.

(c) Conduct and procurement activities occurring on or after December 1, 1990, are subject to section 27 of the amended law. In addition:

(1) For procurements begun prior to December 1, 1989, which have not been completed by November 30, 1990, the prohibitions on gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information under subsections 27 (b) and (d), of the amended law, apply on or after December 1, 1990, to an individual who was a procurement official under section 27, as originally enacted, and whose activities prior to December 1, 1989, would meet the definition of a procurement official under section 27, of the amended law.

(2) The post-employment restrictions of subsection 27(f), of the amended law, apply on or after December 1, 1990, to an individual who was a procurement official under section 27, as originally enacted, and whose activities prior to December 1, 1989, would meet the definition of a procurement official under section 27, of the amended law, provided that the 2-year period of the restrictions has not expired.

[55 FR 36784, Sept. 6, 1990]

3.104-3 Statutory prohibitions and restrictions.

As provided in section 27 of the Act, the following conduct is prohibited:

(a) *Prohibited conduct by competing contractors (subsection 27(a) of the Act).* During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly—

(1) Make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in 3.104-6(b);

(2) Offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

(3) Solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

(b) *Prohibited conduct by procurement officials (subsection 27(b) of the Act).* During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

(1) Solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of a competing contractor, except as provided in 3.104-6(a);

(2) Ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

(3) Disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(c) *Disclosure to unauthorized persons (subsection 27(d) of the Act).* During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(d) *Restrictions resulting from procurement activities of Government officers or employees who are or were procurement officials (subsection 27(f) of the Act).* (1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—

(i) Participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement; or

(ii) Participate personally and substantially on behalf of the competing contractor in the performance of such contract.

The restrictions in subdivisions (d)(1)(i) and (d)(1)(ii) of this subsection apply during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

(2) This subsection does not apply to any participation referred to in subdivisions (d)(1)(i) and (d)(1)(ii) of this subsection with respect to a subcontractor who is a competing contractor unless—

(i) The subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of $100,000; or

(ii) The subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award, modification, or extension of the prime contract personally directed or recommended the particular subcontractor to the prime contractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award, modification, or extension of the subcontract.

[55 FR 36784, Sept. 6, 1990]

3.104-4 Definitions.

As used in this subsection—

(a) *Agency ethics official* means the designated agency ethics official described in 5 CFR 2638.201 and any other person, including deputy ethics officials described in 5 CFR 2638.201, to whom authority under 3.104-6(f) and 3.104-8(e) has been delegated by the designated agency ethics official.

(b)(1) *Competing contractor,* with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services means any entity (such as an individual, partnership, corporation, educational institution, nonprofit or not for profit organization, or business unit) legally capable of entering into a contract or subcontract in its own name that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

(2) The term *competing contractor* includes the incumbent contractor in the case of a contract modification.

(3) An entity shall not be considered a competing contractor whenever, by action of the Government or the entity, it is clear that the entity will not, or will no longer, participate in a particular procurement.

(4) For purposes of subsections 27(a) and 27(b) of the Act, the phrase *representative, agent, or consultant of a competing contractor* means any entity, other than an officer or employee of a competing contractor, acting on behalf of, or providing advice to, a competing contractor with regard to a particular Federal agency procurement.

(c)(1) *During the conduct of any Federal agency procurement of property or services* means, except for broad agency announcements, small business innovative research programs, and unsolicited proposals (see subparagraphs (c)(3) and (c)(4) of this subsection), the period beginning on the earliest date upon which an identifiable, specific action is taken for the particular procurement and concluding upon the award or modification of a contract or the cancellation of the procurement; provided, however, that in no event shall the conduct of the procurement be deemed to have begun prior to the decision by an authorized agency official to satisfy a specific agency need or requirement by procurement. These actions are—

(i) Drafting a specification or a statement of work;

(ii) Review and approval of a specification;

(iii) Requirements computation at an inventory control point;

(iv) Development of procurement or purchase requests;

(v) Preparation or issuance of a solicitation;

(vi) Evaluation of bids or proposals;

(vii) Selection of sources;

(viii) Conduct of negotiations; or

(ix) Review and approval of the award of a contract or contract modification.

(2) Each contract award and each contract modification constitutes a separate procurement action, i.e., a separate period to which the prohibitions and the requirements of the Act apply.

(3) For broad agency announcements and small business innovative research programs, each proposal received by an agency shall constitute a separate procurement for purposes of the Act. The conduct of each procurement shall be deemed to have begun upon the date a Commerce Business Daily announcement was made regarding the availability of the broad agency announcement or the date a solicitation was released for the small business innovative research program. The conduct of the procurement shall end upon the award of a contract or contract modification incident to each proposal or the written rejection of each specific proposal.

(4) Each unsolicited proposal shall be considered a separate procurement for purposes of the Act. For unsolicited proposals, the conduct of the procurement shall be deemed to have begun upon the publication date of a general statement of agency needs (see 15.503(d)), or if an agency does not publicize a general statement of agency needs, upon the provision of advance guidance related to agency needs (see 15.504(a)(1)) or the receipt of the unsolicited proposal, whichever is earlier. The conduct of the procurement shall end upon the award of a contract or contract modification or the rejection of the proposal.

(d) *Government officer or employee* means a person who is employed by a Federal agency (see subpart 2.1) and who is in such status during the period July 16, 1989 through November 30, 1989, or on or after December 1, 1990. This includes—

(1) A member of the uniformed services as defined in section 101(3) of title 37 U.S.C.;

(2) A person who is appointed to a position in the Federal Government under title 5 U.S.C., or any other title authorizing such appointments, including a person under a temporary appointment; and

(3) A special Government employee as defined in section 202 of title 18 U.S.C.

(e) *Modification* means the addition of new work to a contract, or the extension of a contract, which requires a justification and approval (see subpart 6.3). It does not include an option where all the terms of the option, including option prices, are set forth in the contract and all requirements for option exercise have been satisfied, change orders, administrative changes, or any other contract changes that are within the scope of the contract.

(f)(1) *Gratuity or other thing of value* includes any gift, favor, entertainment, or other item having monetary value. The phrase includes services, conference fees, vendor promotional training, transportation, lodgings and meals, as well as discounts not available to the general public and loans extended by anyone other than a bank or financial institution. The phrase does not include—

(i) Anything for which market value is paid by the procurement official, or on his behalf, by someone other than a competing contractor, or a representative, agent, or consultant of the competing contractor;

(ii) Anything which is paid for by the Government, secured under Government contract, or accepted by the Government under specific statutory authority;

(iii) Plaques or certificates having no intrinsic value; or

(iv) Any unsolicited item, other than money, having a market value of $10 or less per event or presentation.

For these purposes, market value means the retail cost the procurement official would incur to purchase the item and, in the case of items such as tickets, refers to their face value. A thing of value given or received or otherwise offered or sought *directly or indirectly* includes a thing of value directed to a person other than a procurement official, such as a spouse or child, solely because of that person's relationship to the procurement official or on the basis of designation, recommendation, or suggestion by the procurement official.

(2) Promotional vendor training does not include training provided by a vendor, when a vendor's products are furnished under contract to the Government and the training is to facilitate the use of those products.

(g) *Participated personally and substantially* means active and significant involvement of the individual in activities directly related to the procurement. To participate *personally* means directly, and includes the participation of a subordinate when actually directed by the supervisor in the matter. To participate *substantially* means that the employee's involvement must be of significance to the matter. For example, the review of procurement documents solely to determine compliance with applicable regulatory, administrative, or budgetary requirements or procedures does not constitute substantial participation in a procurement. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

(h)(1) *Procurement official* means any civilian or military official or employee of an agency who has participated personally and substantially in any of the following activities for a particular procurement—

(i) Drafting a specification or a statement of work for that procurement;

(ii) Review and approval of a specification or statement of work developed for that procurement;

(iii) Preparaton or development of procurement or purchase requests for that procurement;

(iv) The preparation or issuance of a solicitation for that procurement;

(v) Evaluation of bids or proposals for that procurement;

(vi) Selection of sources for that procurement;

(vii) Negotiations to establish the price or terms and conditions of a particular contract or contract modification; or

(viii) Review and approval of the award of a contract or contract modification.

(2) For purposes of 3.104-4(h), the term *employee of an agency* includes a contractor, subcontractor, consultant, expert, or advisor (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

(3) Generally, an individual will not become a procurement official solely by participating in the following activities—

(i) Federal advisory committees that are established and function in accordance with the Federal Advisory Committee Act, 5 U.S.C. app. 2, unless the Federal advisory committee is established or used for the purpose of performing a function listed in subparagraph (h)(1) of this subsection and the individual member's participation in that function is personal and substantial;

(ii) Agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;

(iii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;

(iv) Clerical functions supporting the conduct of a particular procurement; and

(v) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of *most efficient organization* analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

(4) An employee of an agency does not become a procurement official for a particular procurement until the onset of the employee's personal and substantial participation in that particular procurement.

(i) *Property* means supplies as defined in 2.101.

(j)(1) *Proprietary information* means information contained in a bid or proposal or otherwise submitted to the Government by a competing contractor in response to the conduct of a particular Federal agency procurement, or in an unsolicited proposal, that has been marked by the competing contractors as proprietary information in accordance with applicable law and regulation.

(2) Information shall be considered proprietary information, for purposes of section 27 of the Act, only when—

(i) An attached transmittal document, such as a cover page or the label of a magnetic media storage container, is clearly marked with a restrictive legend; and

(ii) The specific portions of the information whose disclosure the competing contractor desires to restrict are clearly and separately marked.

(3) Proprietary information does not include information—

(i) That is otherwise available without restrictions to the Government, another competing contractor, or the public;

(ii) Contained in bid documents following bid opening (but see 14.404-4); or

(iii) That the contracting officer determines to release in accordance with 3.104-5(d).

(k)(1) *Source selection information* is information, including information stored in electronic, magnetic, audio or video formats, which is prepared or developed for use by the Government to conduct a particular procurement and—

(i) The disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

(ii) Is required by statute, regulation, or order to be secured in a source selection file or other facility to prevent disclosure.

(2) Source selection information is limited to—

(i) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices prior to public bid opening;

(ii) Proposed costs or prices submitted in response to a Federal agency solicitation (for other than sealed bids), or lists of those proposed costs or prices;

(iii) Source selection plans;

(iv) Technical evaluation plans;

(v) Technical evaluations of proposals;

(vi) Cost or price evaluations of proposals;

(vii) Competitive range determinations which identify proposals that have a reasonable chance of being selected for award of a contract;

(viii) Rankings of bids, proposals, or competitors;

(ix) The reports and evaluations of source selection panels or boards or advisory councils; or

(x) Other information marked as "SOURCE SELECTION INFORMATION—SEE FAR 3.104" based upon a case-by-case determination by the Head of the Agency, his designee, or the contracting officer that the information meets the standards in subdivisions (k)(1) (i) and (ii) of this subsection.

(l) *Possible violation* means, for purposes of the certification requirements under 3.104-9, specifically identified or documented circumstances that provide a reasonable basis to believe that a violation of the Act may have occurred. Rumor and hearsay are not, by themselves, a reasonable basis to conclude that a possible violation exists.

[55 FR 36785, Sept. 6, 1990]

3.104-5 Disclosure, protection, and marking of proprietary and source selection information.

(a) Except as specifically provided for in this subsection, no person or other entity may disclose proprietary or source selection information to any person other than a person authorized by the Head of the Agency to receive such information. A person or entity who does not know if information is proprietary or source selection information, or does not know if the person or entity may disclose or receive such information, shall make the inquiries prescribed at 3.104-8(d).

(b)(1) Proprietary and source selection information shall be protected from unauthorized disclosure in accordance with 14.401, 15.411, 15.413, applicable law, and agency regulations.

(2) Information contained in a bid or proposal that bears the legend required by 3.104-4(j)(2) shall be considered to be proprietary information for

purposes of the Act. However, information contained in a bid or proposal that does not bear that legend shall remain subject to the restrictions on disclosure contained in 15.413, 15.509, 24.202, or as otherwise required by law.

(c) In determining whether particular information is source selection information under 3.104-4(k)(2)(x), the originator shall assure that the information meets the criteria in 3.104-4(k)(1) and consult with agency officials as appropriate. Individuals responsible for preparing material that may include information designated as source selection information in accordance with 3.104-4 (k)(2)(x) shall mark the cover page and each page that contains source selection information with the legend "SOURCE SELECTION INFORMATION—SEE FAR 3.104." Although the material described in 3.104-4(k)(2) (i) through (ix) is considered to be source selection information whether or not marked, all reasonable efforts shall be made to mark such material with this legend.

(d)(1) The head of the agency, or his or her designee, or the contracting officer, has the authority, in accordance with applicable agency regulations or procedures, to authorize persons, or classes of persons, to receive proprietary or source selection information when necessary to the conduct of the procurement.

(2) For contracts and contract modifications in excess of $100,000, the head of the agency, or his or her designee, shall establish procedures to assure that the names of all persons, identification of the classes of persons and, to the maximum extent practicable, the names of all individuals within a class of persons, authorized access to proprietary or source selection information at the contracting activity are listed in the contract file.

(3) For contracts and contract modifications expected to exceed $100,000, if proprietary or source selection information is authorized to be released to Government activities outside the contracting activity responsible for the conduct of the procurement, the head of the office receiving the information, or his or her designee, shall maintain a list of persons, a list of classes of persons and, to the maximum extent practicable, the names of all individuals within classes of persons, who have been authorized access to the proprietary or source selection information. The list shall be forwarded to the contracting office responsible for the conduct of the procurement to be included in the contract file.

(4) For release to other than Government employees, see 15.413-2. The names of those individuals shall also be listed in the contract file when the contract or contract modification is expected to exceed $100,000.

(5) The lists prescribed by this subsection shall be forwarded to the contracting officer for inclusion in the contract file within the time specified by the contracting officer.

(e)(1) Except as provided in subparagraph (e)(4) of this subsection, if the contracting officer believes that information marked as proprietary (see 3.104-4(j)) is not proprietary, the competing contractor that has affixed the marking shall be notified in writing and given an opportunity to justify the proprietary marking. If the competing contractor agrees that the material is not proprietary information, or does not respond within the time specified in the notice, the contracting officer may remove the proprietary marking and the information may be released.

(2) After reviewing any justification submitted by the competing contractor, if the contracting officer determines that the proprietary marking is not justified, the contracting officer shall so notify the competing contractor in writing.

(3) Information marked by the competing contractor as proprietary shall not be released until—

(i) The review of the contractor's justification has been completed; or

(ii) The period specified for the contractor's response has elapsed, whichever is earlier.

Thereafter, the contracting officer may release the information.

(4) With respect to technical data that are marked proprietary by a competing contractor, the contracting offi-

cer shall generally follow the procedures in 27.404(h).

(f) Nothing in 3.104 prohibits competing contractors from disclosing or authorizing the Government to disclose their company-specific proprietary information to any other person or entity where not otherwise prohibited by law.

(g) Proprietary markings under 3.104 do not limit the Government's use of technical data to which the Government has rights.

(h) Source selection or proprietary information that is properly in the possession of a competing contractor as a result of a prior disclosure that was not prohibited by the Act shall not be considered to have been solicited or obtained, directly or indirectly, in violation of the Act.

(i) Nothing in 3.104 shall be construed to authorize the withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a Federal agency, any board of contract appeals of a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any such release which contains proprietary or source selection information shall clearly notify the recipient that the information or portions thereof are proprietary or source selection information related to the conduct of a Federal agency procurement whose disclosure is restricted by section 27 of the Act.

[55 FR 36787, Sept. 6, 1990]

3.104-6 Restrictions on employment or business opportunity discussions between competing contractors and procurement officials.

(a) *Applicability to procurement officials.* During the conduct of a Federal agency procurement, subsection 27(b)(1) of the Act prohibits an individual who has become a procurement official from knowingly, directly or indirectly, soliciting or accepting from or discussing with any officer, employee, representative, agent, or consultant of a competing contractor, future employment or business opportunity. Subsection 27(b)(1) of the Act also applies to individuals acting as procurement officials on behalf of the procuring agency who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors (other than employees of a competing contractor). The prohibition in subsection 27(b)(1) does not apply to a procurement official—

(1) After the contract has been awarded, the procurement canceled, or the contract modification has been executed;

(2) After the procurement official leaves Government service;

(3) Who is, or is employed by, a contractor, subcontractor, consultant, expert, or advisor, after such procurement official ceases to act on behalf of, or provide advice to, the procuring agency concerning the procurement;

(4) Described in paragraph (c) of this subsection who has received written authorization for recusal from further participation in a procurement, and who has in fact discontinued participation in the procurement.

(5) Whose only communication with a competing contractor is for the purpose of—

(i) Rejecting an unsolicited offer of employment or business opportunity; or

(ii) Advising the competing contractor that he or she must seek recusal in accordance with paragraph (d) of this subsection prior to any discussions regarding the unsolicited offer. A procurement official who wishes to conduct such discussions with the competing contractor shall promptly submit a recusal proposal.

(b) *Applicability to competing contractors.* During the conduct of a Federal agency procurement, subsection 27(a)(1) of the Act prohibits a competing contractor from knowingly, directly or indirectly, offering or promising to, or discussing with, a procurement official any future business or employment opportunity. The prohibition does not apply to—

(1) An initial contact for the sole purpose of determining whether an individual or other entity is able to engage in discussions concerning future employment or business opportunity either because the individual or entity has been recused or is not a procurement official.

(2) A contact or discussion with an individual or other entity who may engage in such contact or discussion under subparagraphs (a)(1) through (a)(4) of this subsection.

(c) *Eligibility for recusal.* An individual or other entity who is a procurement official may be eligible for recusal if the individual or entity has not participated personally and substantially in—

(1) The evaluation of bids or proposals, the selection of sources, or the conduct of negotiations in connection with such solicitation or contract during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract or cancellation of a procurement; or

(2) The evaluation of a proposed modification, or the conduct of negotiations during the period beginning with the negotiation of a modification of a contract and ending with an agreement to modify the contract or a decision not to modify the contract.

(d) *Recusal proposal.* An eligible procurement official who wishes to discuss future employment or business opportunities with a competing contractor during the conduct of a procurement shall submit to the Head of the Contracting Activity (HCA), or his or her designee, prior to initiating or engaging in such discussions, a written proposal of disqualification from further participation in the procurement which relates to that competing contractor. Concurrent copies of the written proposal shall be submitted to the contracting officer, the Source Selection Authority if the contracting officer is not the Source Selection Authority, and the procurement official's immediate supervisor. As a minimum, the proposal shall—

(1) Identify the procurement involved;

(2) Describe the nature of the procurement official's participation in the procurement and specify the approximate dates or time period of participation; and

(3) Identify the competing contractor and describe its interest in the procurement.

(e) *Suspension from participation in a procurement.* The contracting officer, or the Source Selection Authority if the contracting officer is not the Source Selection Authority, may suspend the individual's or entity's participation in the procurement pending evaluation of the recusal proposal. Notwithstanding submission of a recusal proposal or suspension from participation in a procurement, an individual or entity shall not solicit or engage in discussions of employment or business opportunity until authorized in writing by the HCA or his or her designee.

(f) *Evaluation of recusal proposal.* (1) If the HCA or his or her designee determines that the procurement official's further participation is not essential to the activity's conduct of the procurement and that recusal will not jeopardize the integrity of the procurement process, the HCA may, after consulting with the agency ethics official, grant written approval of the recusal proposal. In evaluating the recusal proposal, the HCA or his or her designee may consider any relevant factors, including—

(i) The importance of the procurement official's role to the completion of the procurement action;

(ii) The procurement official's prior participation in key procurement decisions and actions;

(iii) The timing of the proposal in relation to significant procurement milestones; and

(iv) Potential disruption to the procurement schedule as a result of the procurement official's recusal.

(2) The HCA or his or her designee may request that any person, including the procurement official, the Source Selection Authority, the contracting officer or the procurement official's immediate supervisor, provide any additional information necessary to evaluate the recusal proposal.

(3) Any rejection of the recusal proposal shall be in writing and shall state the basis for rejection. A determination by the HCA or his or her designee to reject a recusal proposal shall be final. Rejection of a Government officer's or employee's recusal proposal shall not be deemed to be an adverse personnel action or be subject to agency or negotiated grievance procedures.

(g) *Duration of recusal.* A procurement official whose recusal proposal has been approved shall be disqualified—

(1) As a minimum, for any period during which future employment or business opportunities with the competing contractor have not been rejected by either the procurement official or the competing contractor; or

(2) For the period the procurement official and competing contractor have an employment or business relationship or an arrangement concerning future employment or business relationships.

(h) *Reinstatement to participation in a procurement.* Subsequent to a period of disqualification, if an agency wishes to reinstate the procurement official to participation in the procurement, the HCA or his or her designee may authorize immediate reinstatement or, in his or her discretion, may authorize reinstatement following whatever additional period of disqualification he or she determines is necessary to ensure the integrity of the procurement process. It is within the discretion of the HCA, or his or her designee, to determine that the procurement official shall not be reinstated to participation in the procurement. In determining that any additional period of disqualification is necessary, the HCA or his or her designee shall consider any factors that might give rise to an appearance that the procurement official acted without complete impartiality with respect to issues involved in the procurement.

[55 FR 36788, Sept. 6, 1990]

3.104-7 Postemployment restrictions applicable to Government officers and employees serving as procurement officials and certifications required from procurement officials leaving Government service.

(a) Subsection 27(e)(4) of the Act provides that if a procurement official leaves the Government during the conduct of a procurement expected to result in a contract or modification in excess of $100,000, such official shall certify to the contracting officer that he or she understands the continuing obligation, during the conduct of the procurement, not to disclose propriety or source selection information related to such agency procurement. This certification requirement also applies to individuals acting as procurement officials on behalf of the procuring activity who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors other than employees of the competing contractor when such individuals, during the conduct of the procurement, cease to function as procurement officials for the procurement.

(b) Subsection 27(f)(1)(A) of the Act prohibits a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating in any manner in negotiations as an officer, employee, representative, agent, or consultant of a competing contractor leading to the award or modification of the contract for such procurement. This restriction not only includes representing the competing contractor in negotiations with the contracting activity, but also includes providing advice or information for the specific purpose of influencing negotiation strategies. For purposes of this restriction, "negotiation strategies" mean the contractor's approach to the preparation and presentation of its offer or the conduct of negotiations with the Government. This restriction does not apply to providing scientific, technical, or other advice that is unrelated to negotiation strategies. This restriction lasts for 2 years from the date of the individual's last personal and substantial participation in the Federal agency procurement.

(c) Subsection 27(f)(1)(B) of the Act prohibits a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating personally and substantially on behalf of the competing contractor in performance of the contract. To participate "personally and substantially" requires the presence of both direct and significant involvement in the performance of the specific contract. The performance of general engineering, scientific or technical work, or providing general budgetary or policy advice, shall not be considered personal and substantial participation on behalf of a competing contractor in the performance of the contract for which the Government officer or employee is or was a procurement official. Where participation is on behalf of a competing contractor who is a subcontractor, the significance of that participation will be determined in relation to the prime contract. This restriction lasts for 2 years from the date of the last personal and substantial participation in the Federal agency procurement.

(d) The restrictions in paragraphs (b) and (c) of this subsection do not apply to—

(1) Individuals acting as procurement officials on behalf of the procuring agency who are or were, or who are or were employed by, contractors, subcontractors, consultants, experts, or advisors and who are not Government officers or employees as defined in 3.104-4(d).

(2) Participation in the negotiation or performance of any other contract of the competing contractor.

(3) General scientific and technical work on an independent research and development project, unless such work involves the negotiation or performance of a specific contract that the individual worked on as a Government employee.

(4) Participation with respect to a subcontractor who is a competing contractor unless—

(i) The subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of $100,000; or

(ii) The subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award or modification of the prime contract personally directed or recommended the particular subcontractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award or modification of the subcontract. A contracting officer's consent, in accordance with part 44, to the placement of a subcontract or, with respect to architect-engineer contracts, the substitution of a subcontractor, associate, or consultant, does not constitute approval of the subcontract, subcontractor, associate, or consultant. Similarly, approval of a contractor's purchasing system does not constitute approval of a particular subcontract or subcontractor.

(5) An individual who has been granted a waiver by the President in accordance with subsection 27(f)(3) of the Act. Waivers under that subsection may be granted only to a civilian officer or employee of the Executive Office of the President who, after his or her Federal Government employment is terminated, is or will be engaged in activities at a Government-owned, contractor-operated entity at which he or she served as an officer or employee immediately before his or her Federal Government employment began.

(6) An individual whose only personal and substantial participation in the procurement occurred during the period December 1, 1989, through November 30, 1990.

[55 FR 36789, Sept. 6, 1990]

3.104-8 Knowing violations, duty to inquire, and ethics advisory opinions.

(a) *Knowing violations.* Neither a procurement official nor a competing contractor violates the restrictions set forth in 3.104-3 unless the prohibited conduct is engaged in knowingly. For these purposes, conduct is not *knowing* when—

(1) A competing contractor engages in specific conduct after having satisfied the duty to inquire under paragraphs (b), (c), and (d) of this subsection, or when the competing contractor engages in conduct based upon good faith reliance on an agency ethics advisory opinion issued to a current or former procurement official under paragraph (e) of this subsection.

(2) A procurement official engages in specific conduct after having satisfied the duty to inquire under paragraphs (b), (c), and (d) of this subsection or has acted in good faith reliance on an ethics advisory opinion obtained under paragraph (e) of this subsection.

(b) *Duty to inquire—general.* (1) For some procurements, neither competing contractors nor all procurement officials will have knowledge as to when the conduct of a particular procurement has begun. However, certain conduct and activities that are prohibited by the Act would be inappropriate at any time. There are prohibitions on the receipt of gratuities from agency contractors that apply without regard to whether an employee is involved in the conduct of a particular procurement. Similarly, potential contractors should not solicit, and agency personnel should not offer, proprietary or source selection information at any time. However, potential contractors may offer, and Government employees may solicit, employment except as prohibited by law.

(2) Agency personnel shall be presumed to know the procurements for which they are procurement officials. Contractor personnel are presumed to know the procurements for which the organization they represent is reasonably likely to be competing. Individuals who do not know whether they are procurement officials, or whether the organization they represent is or is reasonably likely to become a competing contractor, should defer any discussions regarding employment until these questions are resolved by consulting appropriate parties within their respective organizations. Agency personnel who cannot ascertain, after discussions with the contracting officer, or the Source Selection Authority if the contracting officer is not the Source Selection Authority, whether they are procurement officials, may request an ethics advisory opinion under paragraph (e) of this subsection for purposes of determining their status.

(b) *Duty to inquire—employment discussions.* (1) A contractor who wishes to discuss employment opportunities with an individual whose duties and functions may make that individual a procurement official (see 3.104-4(h)) should ask if that individual is a procurement official for a procurement for which the contractor is a competing contractor or is likely to become a competing contractor before conducting any discussion related to employment. A competing contractor shall not be considered to have knowingly violated the prohibitions set forth in subsection 27(a)(1) of the Act (see 3.104-3(a)(1)) if the contractor has made an inquiry in good faith of the possible procurement official and has been advised that the individual is not a procurement official for any procurement for which the contractor is or is reasonably likely to become a competing contractor, or is advised that the procurement official has been recused from participation in the procurement in accordance with 3.104-6.

(2) A procurement official may not solicit or engage in employment or business opportunity discussions with a competing contractor or a contractor who is reasonably likely to become a competing contractor unless the procurement official has been recused from participation in the procurement in accordance with the procurements at 3.104-6.

(3) A procurement official who wishes to solicit employment from, or discuss employment with, a contractor and does not know if the contractor is or is reasonably likely to become a competing contractor should ask whether the contractor is or is reasonably likely to become a competing contractor on any procurement for which the individual is serving as a procurement official. The procurement official—

(i) May rely on the contractor's representation that it is not or is not likely to become a competing contractor, and enter into employment or business opportunity dicussions with that contractor; or

(ii) Shall not, if the contractor represents that it is or is reasonably likely to become a competing contractor, enter into employment or business opportunity dicussions with that contractor. If the procurement official is an eligible procurement official as defined at 3.104-6(c), and desires to pursue dicussions with that contractor, the procurement official must first seek and obtain written authorization for recusal in accordance with the procedures at 3.104-6 before entering into further dicussions with that contractor.

(4) A procurement official shall not be considered to have knowingly violated the prohibitions set forth in sub-

section 27(b)(1) of the Act (see 3.104-3(b)(1)) if—

(i) The procurement official has made inquiry in good faith of the potential contractor, and has been advised that the contractor is not or will not be a competing contractor on a procurement under the responsibility of the procurement official; or

(ii) The procurement official has been recused from participation in the procurement.

(d) *Duty to inquire-proprietary and source selection information.* (1) A competing contractor shall not be considered to have knowingly violated the prohibitions in subsection 27(a)(3) of the Act (see 3.104-3(a)(3)) if, before proprietary or source selection information was solicited or obtained, the contractor—

(i) Had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) regarding whether information was proprietary or source selection information; and

(ii) Had been advised by such official that the information was not proprietary or source selection information.

(2) A procurement official shall not be considered to have knowingly violated the prohibitions in subsection 27(b)(3) of the Act (see 3.104-3(b)(3)) if, prior to disclosing information, the procurement official had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) and had been advised that—

(i) The information was not proprietary or source selection information; or

(ii) The information is proprietary or source selection information and the individual to whom the procurement official wishes to disclose the information has been authorized access to such information by the Head of the Agency or the contracting officer.

(3) No person who is given authorized or unauthorized access to proprietary or source selection information shall be considered to have knowingly violated the prohibition in subsection 27(d) or the Act (see 3.104-3(c)) if, before disclosing such information, the person:

(i) Had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) as to whether or not the individual to whom he seeks to diclose the proprietary or source selection information has been authorized access to such information by the Head of the Agency or the contracting officer; and

(ii) Had been adivsed by such official that such individual has been so authorized.

(e) *Ethics advisory opinions.* (1) An employee or former employee of an agency who is or was a procurement official may request an ethics advisory opinion from the agency ethics official as to whether specific conduct which has not yet occurred woudl violate section 27 of the Act. An individual who cannot determine, after dicussions with the contracting officer (see subparagraph (b)(2) of this subsection), if he or she is or was a procurement official may request an ethics advisory opionion for the purpose of determining his or her status. Ethics advisory opinions may not be obtained, however, for the purpose of establishing whether—

(i) Prior to bid opening or receipt of proposals, a particular contractor is a competing contractor;

(ii) Items of information constitute proprietary or source selection information as defined in 3.104-4; or

(iii) Proprietary or source selection information may be disclosed.

Questions regarding proprietary and source selection information shall be referred to the contracting officer or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee (se subparagraphs (d)(1) through (d)(3) of this subsection). Questions regarding a contractor's status as a competing contractor shall be resolved in accordance with subparagraph (c)(3) of this subsection.

(2) The request for an advisory opinion shall be submitted in writing, shall be dated and signed, and shall include all information reasonably available to the procurement official or former

procurement official that is relevant to the inquiry. As a minimum, the request shall include—

(i) Information about the procurement in which the individual was or is involved, including contract or solicitation numbers, dates of solictation or award, and a description of the goods or services procured or to be procured;

(ii) Information about the individual's participation in the procurement, including the dates or time periods of that participation, and the nature of the individual's duties or responsibilities;

(iii) Information about the competing contractor who would be a party to the proposed conduct, and the nature of the competing contractor's interest in the procurement.

(iv) A description of the possible gratuity or other thing of value if the request concerns conduct that might violate the prohibition of subsection 27(b)(2) of the Act. It shall be the responsibility of the individual requesting an advisory opinion to furnish an appraisal or good faith estimate of market value where the value of an item is in question.

(v) Specific information about the particular duties to be performed on behalf of the competing contractor if the request concerns conduct that might violate either or both of the prohibitions of subsection 27(f) of the Act. Where the issue concerns whether employment with a subcontractor is permissible under subsection 27(f)(2), the request shall include information about the subcontract level and dollar amount, the subcontractor's role in assisting the prime contractor in negotiating the prime contract, and the individual's role in directing or recommending the subcontractor to the prime contractor as a source for the subcontract or reviewing and approving the award or modification of the subcontract.

(3) Within 30 days after the date a request containing complete information is received, or as soon thereafter as practicable, the agency ethics official shall issue an opinion as to whether proposed conduct is proper or would violate section 27 of the Act.

(i) Where complete information is not included in the request, the agency ethics official may ask the requester to provide any information reasonably available to that person, and the 30-day period will run from the date that additional information is received. Additional information may also be requested from other persons, including the Source Selection Authority, the contracting officer, or the requester's immediate supervisor.

(ii) Where the opinion cannot be issued within 30 days, the reason for the delay will be documented in the file. Acceptable reasons for delay include, but are not limited to, the necessity for the agency ethics official to independently develop information not reasonable available to the requester, or to verify questionably information furnished by the requester.

(iii) In issuing an opinion, the agency ethics official may rely upon the accuracy of information furnished by the requester or other agency sources, unless he has reason to believe that the information is fraudulent, misleading, or otherwise incorrect.

(4) A copy of the request and ethics advisory opinion shall be retained for a period of 6 years. Agencies shall not provide copies of the advisory opinions to any person other than the requester, except with the express authorization of the requester or where release is otherwise permitted by law.

(5) Where the requester engages in conduct in good faith reliance upon an ethics advisory opinion, or a competing contractor engages in conduct based upon good faith reliance on the requester's ethics advisory opinion, neither the requester nor the competing contractor shall be found to have knowingly violated the restriction in issue. Where the requester or the competing contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information provided by the requester, their reliance upon the opinion will not be deemed to be in good faith.

[55 FR 36790, Sept. 6, 1990]

3.104-9 Certification requirements.

(a) *Applicability.* Subsection 27(e) of the Act requires certifications, prior to the award of a Federal agency contract or contract modification for property or services in excess of $100,000 awarded or executed on or after December 1, 1990, by the officer or employee of the contractor responsible for the offer or bid for that particular contract or contract modification for property or services, and by the contracting officer for that procurement.

(b) *Competing contractor certification.* (1) Except as provided in 3.104-9(f), contracting officers shall require the competing contractor to—

(i) Certify in writing to the contracting officer responsible for the procurement that, to the best of his or her knowledge and belief, such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3) as implemented in the FAR; or

(ii) Disclose to such contracting officer any and all such information, and certify in writing to such contracting officer that any and all such information has been disclosed; and

(iii) Certify in writing to such contracting officer that, to the best of his or her knowledge and belief, each officer, employee, agent, representative, and consultant of such competing contractor who, on or after December 1, 1990, has participated personally and substantially in the preparation or submission of such bid or offer, or in a modification of a contract, as the case may be, has certified in writing to such competing contractor that he or she—

(A) Is familiar with, and will comply with, the requirements of subsection 27(a) of the Act (see 3.104-3) as implemented in the FAR; and

(B) Will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification of a contract, as the case may be, any information concerning a violation or possible violation of subsections 27 (a), (b), or (f) of the Act (see 3.104-3), occuring on or after December 1, 1990, as implemented in the FAR.

(2) Subcontractors are not required to submit the certificate required by subsection 27(e)(1) of the Act. However, nothing in 3.104 precludes a competing contractor from requesting certifications from its subcontractors.

(3) The signed certifications prescribed in 3.104-10 shall be submitted as follows:

(i) *Procurements exceeding $100,000 using sealed bidding procedures:* (A) For procurements using sealed bidding procedures, the signed certifications shall be submitted by each bidder with the bid submission, except for procurements using two-step sealed bidding procedures (see subpart 14.5). For those procurements, the certifications shall be submitted with submission of the step two sealed bids. A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed $100,000.

(B) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options (see 3.104-4(e)) exceeds $100,000.

(C) Failure of a bidder to submit the signed certificate with its bid render the bid nonresponsive.

(ii) *Procurements exceeding $100,000 using other than sealed bidding procedures:* (A) For procurements, including contract modifications, made using procedures other than sealed bidding, the signed certifications shall be submitted by the successful offeror to the contracting officer within the time period specified by the contracting officer when requesting the certificates, except as provided in subdivisions (b)(3)(ii) (B) through (F) of this subsection. In no event shall the certificate be submitted subsequent to award of a contract or execution of a contract modification.

(B) For letter contracts, other unpriced contracts, or unpriced contract modifications, whether or not the unpriced contract or modification contains a maximum or not to exceed price, the signed certifications shall be submitted prior to the award of the letter contract, unpriced contract, or unpriced contract modification, and prior to the definitization of the letter contract or the establishment of the price of the unpriced contract or unpriced contract modification. The second certification shall apply only to the period between award of the letter contract and execution of the document definitizing the letter contract, or award of the unpriced contract or unpriced contract modification and execution of the document establishing the definitive price of such unpriced contract or unpriced contract modification.

(C) For basic ordering agreements—prior to the execution of a priced order; prior to the execution of an unpriced order, whether or not the unpriced order contains a maximum or not to exceed price; and prior to establishing the price of an unpriced order. The second certificate to be submitted for unpriced orders shall apply only to the period between award of the unpriced order and execution of the document establishing the definitive price for such order.

(D) A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed $100,000.

(E) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options exceeds $100,000.

(F) For purposes of contracts entered into under section 8(a) of the SBA, the business entity with whom the SBA contracts, and not the SBA, shall be required to comply with the certification requirements of subsection 27(e). The SBA shall obtain the signed certificate from the business entity, and forward the certificate to the contracting officer prior to the award of a contract to the SBA.

(G) Failure of an offeror to submit the signed certificate within the time prescribed by the contracting officer is a failure to comply with a material requirement of the solicitation and shall cause the offer to be rejected.

(c) *Contracting officer certifications.* (1) In accordance with subsection 27(e)(2) of the Act, a Federal agency may not award a contract for the procurement of property or services, or agree to a modification of any contract, if the contract or contract modification exceeds $100,000, unless the contracting officer responsible for such procurement—

(i) Certifies in writing to the head of such agency that, to the best of his or her knowledge and belief, the contracting officer has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3), as implemented in the FAR, pertaining to such procurement; or

(ii) Discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

(2) Immediately prior to contract award or execution of a contract modification, the contracting officer shall execute the following certificate and maintain the completed certificate in the contract file:

CONTRACTING OFFICER CERTIFICATE OF PROCUREMENT INTEGRITY

1. I, [*Name of contracting officer*], hereby certify that, to the best of my knowledge and belief, with the exception of any information described in this certificate, have no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of section 27 of the Office of Federal Procurement Policy Act* (41 U.S.C. 423), as implemented in the FAR, occurring during the conduct of this procurement (contract/modification number).

2. Violations or possible violations: (Continue on plain bond paper if necessary, and label Contracting Officer Certificate of Procurement Integrity (Continuation Sheet), ENTER "NONE" IF NONE EXISTS.)

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(Signature of contracting officer and date)

*Section 27, as amended, became effective on December 1, 1990. THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001.

(End of certification)

(d) *Additional certifications.* (1) Subsection 27(e)(3) of the Act provides that the head of a Federal agency may require any procurement official or any competing contractor, at any time during the conduct of any Federal agency procurement of property or services—

(i) To certify in writing that, to the best of his or her knowledge and belief, such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for a contract or the modification of a contract, has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), and (f) of the Act (see 3.104-3), as implemented in the FAR, occurring during the procurement; or

(ii) To disclose any and all such information and to certify in writing that any and all such information has been disclosed.

(2) In addition to the Head of the Agency, additional certifications may be required only by the HCA or his or her designee, provided that the designee is an individual of General Officer, Flag, SES or equivalent rank and is at least one organizational level above the contracting officer.

(3) Any additional certifications shall be submitted to the contracting officer unless another person is specified by the individual requiring the additional certifications.

(4) Each procurement official or competing contractor shall be afforded a reasonable time to comply with the additional certification requirements.

(5) A competing contractor's failure to submit any additional certifications that may be required shall cause the competing contractor's offer to be rejected.

(e) *Recordkeeping requirements.* (1) In accordance with subsections 27(e)(5) (A) and (B) and 27(e)(7)(A) of the Act, the contracting officer responsible for the award or modification of a contract in excess of $100,000 shall maintain, as part of the contract file—

(i) All competing contractor, contracting officer, and procurement official certifications required by subsections 27 (e)(1), (e)(2), and (e)(4) of the Act, and any additional certifications required by subsection 27(e)(3) of the Act for that particular procurement.

(ii) All certifications required by subsection 27(l) of the Act (see 3.104-12) from individuals acting as procurement officials on behalf of the procuring agency, who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors (other than competing contractors).

(iii) A record of all persons who have been authorized by the Head of the Agency or the contracting officer to have access to proprietary or source selection information regarding the procurement. When classes of persons have been authorized, this record shall identify the class of persons so authorized and, to the maximum extent practicable, the names of the individuals within the class.

(2) Certifications obtained from Government officers or employees (see 3.104-4(d)) who are required to submit a certification under subsection 27(l) of the Act shall be maintained in accordance with agency procedures.

(3) Ethics advisory opinions shall be retained, in accordance with agency procedures, for a period of 6 years.

(f) *Exceptions to certification requirements.* Pursuant to subsection 27(e)(7)(B) of the Act, certification requirements set forth in 3.104-9 do not apply—

(1) To contracts with a foreign government or an international organization that are not required to be awarded using competitive procedures pursuant to section 303(c)(4) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(4)), or section 2304(c)(4) of title 10 U.S.C.; or

(2) In an exceptional case, when the Head of the Agency concerned determines in writing that the certification requirement should be waived. This authority may not be delegated. The contracting officer shall submit the request for waiver in accordance with agency procedures. The request shall clearly identify the procurement or class of procurements and provide the rationale for the requested waiver. The decision of the agency head shall state the reasons for approving or disapproving the waiver. The agency

head shall promptly notify Congress in writing of each waiver approved. Procurements for which a waiver may be appropriate include—

(i) Where prices are set by law or regulation;

(ii) Where terms and conditions of a contract are specified by an agreement with a foreign government or governments;

(iii) Where supplies or services are provided by foreign nationals to United States facilities overseas for use outside the United States;

(iv) Where a foreign government specifies a particular U.S. contractor to satisfy its requirements (see 6.302-4(b)(1)).

[55 FR 36792, Sept. 6, 1990]

3.104-10 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the provision at 52.203-8, Requirement for Certificate of Procurement Integrity, in all solicitations where the resultant contract award is expected to exceed $100,000, unless, pursuant to 3.104-9(f), a certification is not required or a waiver has been granted. For procurements using other than sealed bidding procedures, the contracting officer shall substitute Alternate I for paragraph (c) of that provision.

(b) The contracting officer shall insert the clause at 52.203-9, Requirement for Certificate of Procurement Integrity-Modification, in all solicitations where the resultant contract award is expected to exceed $100,000, all contracts in excess of $100,000, and modifications to contracts which do not already contain the clause when the modification is expected to exceed $100,000, unless, pursuant to 3.104-9(f), a certificate is not required or a waiver has been granted.

(c) The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, in all solicitations where the resultant contract award is expected to exceed the small purchase limitation (see 13.000) and all contracts and modifications to contracts exceeding that limitation which do not already contain the clause when the modification is expected to exceed that limitation.

(d) The contracting officer shall insert the clause at 52.203-13, Procurement Integrity-Service Contracting, in all solicitations and contracts where the Government is procuring or may order the services of contractor employees to serve as procurement officials for another agency procurement. In addition, the contracting officer shall insert the provisions and clauses at 52.203-8, 52.203-9, and 52.203-10 in such solicitations and contracts as prescribed in this subsection.

[55 FR 36793, Sept. 6, 1990]

3.104-11 Processing violations or possible violations.

(a) If the contracting officer makes or receives a disclosure of information pursuant to subsection 27(e) of the Act or otherwise receives or obtains information of a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3), the contracting officer shall determine whether the reported violation or possible violation has any impact on the pending award or selection of the source therefor.

(1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer shall forward the information concerning the violation or possible violation, accompanied by appropriate documentation supporting that conclusion, to an individual designated in accordance with agency procedures. With the concurrence of that individual, the contracting officer shall, without further approval, proceed with the procurement. The individual concurring with that conclusion shall forward all information relating to the violation or possible violation to the HCA, or his or her designee, to satisfy the disclosure requirements of subsection 27(e)(2) of the Act.

(2) If the individual reviewing the contracting officer's conclusion does not agree with that conclusion, he or she shall advise the contracting officer to withhold award and shall promptly forward the information and documentation to the HCA or his or her designee.

(3) If the contracting officer determines that the violation or possible violation impacts the procurement, the contracting officer shall promptly forward the information to the HCA or his or her designee.

(b) The HCA or his or her designee receiving any information describing an actual or possible violation of subsection 27 (a), (b), (d), or (f) of the Act, shall review all information available and take appropriate action in accordance with agency procedures, such as—

(1) Advising the contracting officer to continue with the procurement;

(2) Causing an investigation to be conducted;

(3) Referring the information disclosed to appropriate criminal investigative agencies;

(4) Determining that a violation occurred.

(c) Prior to determining that a competing contractor (see 3.104-4(b)) has violated the Act, the HCA or his or her designee may request information from appropriate parties regarding the violation or possible violation when considered in the best interests of the Government.

(d) If the HCA or his or her designee determines that the prohibitions of section 27 of the Act have been violated, then the HCA or his or her designee may direct the contracting officer to—

(1) If a contract has not been awarded, or a contract modification has not been executed—

(i) Cancel the procurement;

(ii) Disqualify an offeror; or

(iii) Take any other appropriate actions in the interests of the Government.

(2) If a contract has been awarded or a contract modification has been executed—

(i) Effect appropriate contractual remedies, including profit recapture as provided for in the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity;

(ii) Void or rescind the contract, or contract modification; or

(iii) Take any other appropriate actions in the best interests of the Government.

(3) Refer the matter to the agency suspension and debarment official.

(e) The HCA or his or her designee shall, in his or her best judgment, recommend or direct an administrative or contractual remedy commensurate with the severity and effect of the violation.

(f) If the HCA or his or her designee receiving information concerning a violation or possible violation determines that award is justified by urgent and compelling circumstances, or is otherwise in the interests of the Government, he or she may authorize the contracting officer to award the contract or execute the contract modification after notification to the Head of the Agency in accordance with agency procedures.

(g) The designee of the HCA referenced in paragraphs (a), (b), (c), (d), and (e) of this subsection must be an individual at least one organizational level above the contracting officer and be of General Officer, Flag, SES or equivalent rank.

[55 FR 36794, Sept. 6, 1990]

3.104-12 Ethics program training requirements.

(a) Subsection 27(l) of the Act provides that the head of each Federal agency shall establish a procurement ethics training program for its procurement officials. The program shall, as a minimum—

(1) Provide for the distribution of a written explanation of subsections 27 (a) through (f) of the Act to such procurement officials; and

(2) Require each such procurement official, as a condition of serving as a procurement official, to certify in writing that he or she is familiar with the provisions of subsections 27 (b), (c), and (e) of the Act and will not engage in any conduct prohibited by such subsections, and will report immediately to the contracting officer any information concerning a violation or possible violation of subsection 27 (a), (b), (d), or (f) of the Act as implemented in the FAR.

(3) Certification made under section 27 as originally enacted and implemented in the FAR do not satisfy the certification requirements of subpara-

graph (a)(2) of this subsection. Agencies may use Optional Form 333 at 53.302-333 to obtain the certifications required by subparagraph (a)(2) of this subsection.

(b) Contractors, subcontractors, consultants, experts, or advisors (other than competing contractors) are responsible for establishing a procurement ethics training program for individuals in their employ who may serve as procurement officials on behalf of a Federal agency. The program shall, as a minimum, comply with subparagraphs (a)(1) and (a)(2) of this subsection.

[55 FR 36794, Sept. 6, 1990]

Subpart 3.2—Contractor Gratuities to Government Personnel

3.201 Applicability.

This subpart applies to all executive agencies, except that coverage concerning exemplary damages applies only to the Department of Defense (10 U.S.C. 2207).

3.202 Contract clause.

The contracting officer shall insert the clause at 52.203-3, Gratuities, in solicitations and contracts, except those for personal services and those between military departments or defense agencies and foreign governments that do not obligate any funds appropriated to the Department of Defense.

3.203 Reporting suspected violations of the Gratuities clause.

Agency personnel shall report suspected violations of the Gratuities clause to the contracting officer or other designated official in accordance with agency procedures. The agency reporting procedures shall be published as an implementation of this section 3.203 and shall clearly specify—

(a) What to report and how to report it; and

(b) The channels through which reports must pass, including the function and authority of each official designated to review them.

3.204 Treatment of violations.

(a) Before taking any action against a contractor, the agency head or a designee shall determine, after notice and hearing under agency procedures, whether the contractor, its agent, or another representative, under a contract containing the Gratuities clause—

(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended by the gratuity to obtain a contract or favorable treatment under a contract (intent generally must be inferred).

(b) Agency procedures shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The procedures should be as informal as practicable, consistent with principles of fundamental fairness.

(c) When the agency head or designee determines that a violation has occurred, the Government may—

(1) Terminate the contractor's right to proceed;

(2) Initiate debarment or suspension measures as set forth in subpart 9.4; and

(3) Assess exemplary damages, if the contract uses money appropriated to the Department of Defense.

Subpart 3.3—Reports of Suspected Antitrust Violations

3.301 General.

(a) Practices that eliminate competition or restrain trade usually lead to excessive prices and may warrant criminal, civil, or administrative action against the participants. Examples of anticompetitive practices are collusive bidding, follow-the-leader pricing, rotated low bids, collusive price estimating systems, and sharing of the business.

(b) Contracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful behavior by offerors and contractors. Agency personnel shall report, in accordance with agency regulations, evidence of suspected antitrust violations in acquisitions for possible referral to (1) the Attorney General under 3.303 and (2) the agency office responsible for contractor debarment and suspension under subpart 9.4.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

3.302 Definitions.

Identical bids means bids for the same line item that are determined to be identical as to unit price or total line item amount, with or without the application of evaluation factors (e.g., discount or transportation cost).

Line item means an item of supply or service, specified in an invitation for bids, for which the bidder must bid a separate price.

[49 FR 12974, Mar. 30, 1984]

3.303 Reporting suspected antitrust violations.

(a) Agencies are required by 41 U.S.C. 253(B)(e) and 10 U.S.C. 2305(b)(5) to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. These reports are in addition to those required by subpart 9.4.

(b) The antitrust laws are intended to ensure that markets operate competitively. Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect. Paragraph (c) below identifies behavior patterns that are often associated with antitrust violations. Activities meeting the descriptions in paragraph (c) are not necessarily improper, but they are sufficiently questionable to warrant notifying the appropriate authorities, in accordance with agency procedures.

(c) Practices or events that may evidence violations of the antitrust laws include—

(1) The existence of an *industry price list* or *price agreement* to which contractors refer in formulating their offers;

(2) A sudden change from competitive bidding to identical bidding;

(3) Simultaneous price increases or follow-the-leader pricing;

(4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes;

(5) Division of the market, so that certain competitors bid low only for contracts let by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;

(6) Establishment by competitors of a collusive price estimating system;

(7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;

(8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and

(9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists.

(d) Identical bids shall be reported under this section if the agency has some reason to believe that the bids resulted from collusion.

(e) For offers from foreign contractors for contracts to be performed outside the United States, contracting officers may refer suspected collusive offers to the authorities of the foreign government concerned for appropriate action.

(f) Agency reports shall be addressed to the Attorney General, U.S. Department of Justice, Washington, DC 20530, Attention: Assistant Attorney General, Antitrust Division, and shall include—

(1) A brief statement describing the suspected practice and the reason for the suspicion; and

(2) The name, address, and telephone number of an individual in the agency who can be contacted for further information.

(g) Questions concerning this reporting requirement may be communicated by telephone directly to the Office of the Assistant Attorney General, Antitrust Division.

[48 FR 42108, Sept. 19, 1983, as amended at 49 FR 12974, Mar. 30, 1984; 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 25526, June 21, 1990]

Subpart 3.4—Contingent Fees

3.400 Scope of subpart.

This subpart prescribes policies and procedures that restrict contingent fee arrangements for soliciting or obtaining Government contracts to those permitted by 10 U.S.C. 2306(b) and 41 U.S.C. 254(a).

3.401 Definitions.

Bona fide agency, as used in this subpart, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

Bona fide employee, as used in this subpart, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

Contingent fee, as used in this subpart, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

Improper influence, as used in this subpart, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

3.402 Statutory requirements.

Contractors' arrangements to pay contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence. In 10 U.S.C. 2306(b) and 41 U.S.C. 254(a), Congress affirmed this public policy but permitted certain exceptions. These statutes—

(a) Require in every negotiated contract a warranty by the contractor against contingent fees;

(b) Permit, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and

(c) Provide that, for breach or violation of the warranty by the contractor, the Government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

3.403 Applicability.

This subpart applies to all contracts. Statutory requirements for negotiated contracts are, as a matter of policy, extended to sealed bid contracts.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

3.404 Solicitation provision and contract clause.

(a) Prospective contractors are generally required to disclose contingent fee arrangements, other than those with full-time bona fide employees working solely for the prospective contractor, in order to permit the Government to evaluate the arrangements before award.

(b) The contracting officer shall insert the provision at 52.203-4, Contingent Fee Representation and Agreement, in solicitations, except when—

(1) Contracting by sealed bidding, and the contract amount is expected to be $25,000 or less;

(2) The contract amount is not expected to exceed the appropriate small purchase limitation in part 13;

(3) The solicitation is for perishable subsistence supplies, and the contract amount is expected to be $25,000 or less;

(4) The solicitation is for personal services to be paid for on a time basis;

(5) The solicitation is for utility services, at rates regulated by Federal,

State, or other regulatory bodies, from a public utility company that is the sole source;

(6) The award under the solicitation is to be made in a foreign country; or

(7) Any other Department of Defense contracts, individually or by class, have been designated by the Secretary for exception. Reports of such exceptions shall be filed promptly with the Administrator of General Services Administration.

(c) The contracting officer shall insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

3.405 Review of Contingent Fee Representation and Agreement.

(a) Prospective contractors may not use any claimed professional or special relationship (other than that of a full-time bona fide employee working solely for the prospective contractor) as a basis for nondisclosure of contingent fee arrangements. The fact that a fee is for information does not exclude it from the definition of contingent fee.

(b) Contracting officers shall review each prospective contractor's offer or quotation and take the following actions:

(1) Ensure that the prospective contractor has completed both subparagraph (a)(1) and (a)(2) of the solicitation provision at 52.203-4, Contingent Fee Representation and Agreement.

(2) Consider failure to complete the representation a minor informality and afford the prospective contractor another opportunity to comply.

(3) If the prospective contractor still does not furnish the representation, reject the offer or quotation.

(4) If the prospective contractor answered subparagraphs (a)(1) and (a)(2) of the representation negatively, accept the representation, unless there is a reason to question its accuracy, and proceed with the contractual action.

(5) If the prospective contractor has answered subparagraph (a)(1) or (a)(2) affirmatively, secure a completed Standard Form 119, Statement of Contingent or Other Fees (see 53.301-119), or the statement authorized by the representation and agreement.

3.406 Award before receipt of the SF 119.

Contracting officers may award sealed bid contracts before receipt of the SF 119 or the statement. Negotiated contracts may not be awarded before receipt and evaluation of the SF 119 or statement, unless specifically approved by the chief of the contracting office.

[48 FR 42108, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

3.407 Failure or refusal to furnish the SF 119.

If the prospective contractor fails or refuses to furnish the SF 119 or the statement in response to the contracting officer's request, the chief of the contracting office shall determine whether to make further efforts to secure the SF 119 or statement or to initiate appropriate actions under 3.409.

3.408 Evaluation of the SF 119.

3.408-1 Responsibilities.

(a) The contracting officer shall evaluate the SF 119 and all related information to determine—

(1) Whether a contingent fee arrangement exists between the prospective contractor and a person or company other than a full-time bona fide employee working solely for the prospective contractor; and

(2) When such a contingent fee arrangement does exist, whether it meets the statutory exception permitting contingent fee arrangements with bona fide employees or agencies.

(b) The contracting officer's documentation of the evaluation, conclusion, and any proposed actions shall be reviewed at a level above the contracting officer in accordance with agency procedures.

3.408-2 Evaluation criteria.

(a) *Improper influence.* By definition (see 3.401), a bona fide employee or bona fide agency neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts. If the contracting officer decides that there is a reasonable basis to conclude that improper influence has been or will be exerted or proposed, or that the employee or agency has held out as being able to obtain any Government contract or contracts through improper influence, the employee or agency shall not be considered bona fide.

(b) *Bona fide employee.* An employee may be bona fide but not work on a full-time basis solely for the contractor (e.g., small business concerns may need to employ persons who also represent other concerns). Prospective contractors must disclose such arrangements in the representation and agreement and submit the SF 119 or the statement. However, contingent compensation arrangements with bona fide employees, customary in the trade, are within the statutory exception and are not prohibited. In determining whether an employee is bona fide, the contracting officer shall—

(1) Compare the employment arrangement to the definition of bona fide employee in 3.401;

(2) Consider the criteria in subparagraphs (c)(1), (2), and (5) below, as appropriate; and

(3) Consider the continuity of employment. The employment must contemplate some continuity and not be solely for obtaining one or more specific Government contracts.

(c) *Bona fide agency.* The following guidelines are intended to help contracting officers determine whether an agency is a *bona fide agency,* as defined in 3.401. They describe circumstances ordinarily existing in acceptable arrangements in which the agency is bona fide. However, the guidelines are not individually or collectively inviolable rules. The contracting officer must evaluate each arrangement in its totality, including attendant facts and circumstances.

(1) The fee should not be inequitable or exorbitant when compared to the services performed or to customary fees for similar services related to commercial business.

(2) The agency should have adequate knowledge of the contractor's products and business, as well as other qualifications necessary to sell the products or services on their merits.

(3) The contractor and the agency should have a continuing relationship or, in newly established relationships, should contemplate future continuity.

(4) The agency should be an established concern that has existed for a considerable period, or be a newly established going concern likely to continue in the future. The business of the agency should be conducted in the agency name and characterized by the customary indicia of the conduct of regular business.

(5) While an agency that confines its selling activities to Government contracts is not disqualified, the fact that an agency represents the contractor in Government and commercial sales should receive favorable consideration.

3.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) Government personnel who suspect or have evidence of attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the Covenant Against Contingent Fees shall report the matter promptly to the contracting officer or appropriate higher authority in accordance with agency procedures.

(b) When there is specific evidence or other reasonable basis to suspect one or more of the violations in paragraph (a) above, the chief of the contracting office shall review the facts and, if appropriate, take or direct one or more of the following, or other, actions:

(1) If before award, reject the bid or proposal.

(2) If after award, enforce the Government's right to annul the contract or to recover the fee.

(3) Initiate suspension or debarment action under subpart 9.4.

(4) Refer suspected fraudulent or criminal matters to the Department of Justice, as prescribed in agency regulations.

3.410 Records.

For enforcement purposes, agencies shall preserve any representation and the original SF 119 or statement, together with all other pertinent data, including a record of actions taken. Contracting offices shall not retire or destroy these records until it is certain that they are no longer needed for enforcement purposes. If the original record is maintained in a central file, a copy must be retained in the contract file.

Subpart 3.5—Other Improper Business Practices

3.501 Buying-in.

3.501-1 Definition.

Buying-in means submitting an offer below anticipated costs, expecting to—

(a) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders); or

(b) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract.

3.501-2 General.

(a) Buying-in may decrease competition or result in poor contract performance. The contracting officer must take appropriate action to ensure buying-in losses are not recovered by the contractor through the pricing of (1) change orders or (2) follow-on contracts subject to cost analysis.

(b) The Government should minimize the opportunity for buying-in by seeking a price commitment covering as much of the entire program concerned as is practical by using—

(1) Multiyear contracting, with a requirement in the solicitation that a price be submitted only for the total multiyear quantity; or

(2) Priced options for additional quantities that, together with the firm contract quantity, equal the program requirements (see subpart 17.2).

(c) Other safeguards are available to the contracting officer to preclude recovery of buying-in losses (e.g., amortization of nonrecurring costs (see 15.804-6(f)) and treatment of unreasonable price quotations (see 15.803(d)).

3.502 Subcontractor kickbacks.

3.502-1 Definitions.

Kickback, as used in this section, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

Person, as used in this section, means a corporation, partnerhsip, business association of any kind, trust, joint-stock company, or individual.

Prime contract, as used in this section, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

Prime Contractor, as used in this section, means a person who has entered into a prime contract with the United States.

Prime Contractor employee, as used in this section, means any officer, partner, employee, or agent of a prime contractor.

Subcontract, as used in this section, means a contract or contractural action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or service of any kind under a prime contract.

Subcontractor, as used in this section, (a) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract, and (b) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

Subcontractor employee, as used in this section, means any officer, partner, employee, or agent of a subcontractor.

[52 FR 6121, Feb. 27, 1987, as amended at 53 FR 34226, Sept. 2, 1988]

3.502-2 General.

The Anti-Kickback Act of 1986 (41 U.S.C. 51-58) was passed to deter subcontractors from making payments and contractors from accepting payments for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or a subcontract relating to a prime contract. The Act—

(a) Prohibits any person from—

(1) Providing, attempting to provide, or offering to provide any kickback;

(2) Soliciting, accepting, or attempting to accept any kickbacks; or

(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

(b) Imposes criminal penalties on any person who knowingly and willfully engages in the prohibited conduct addressed in paragraph (a) of this subsection.

(c) Provides for the recovery of civil penalties by the United States from any person who knowingly engages in such prohibited conduct and from any person whose employee, subcontractor, or subcontractor employee provides, accepts, or charges a kickback.

(d) Provides that—

(1) The contracting officer may offset the amount of a kickback against monies owed by the United States to the prime contractor under the prime contract to which such kickback relates;

(2) The contracting officer may direct a prime contractor to withhold from any sums owed to a subcontract under a subcontractor of the prime contract the amount of any kickback which was or may be offset against the prime contractor under subparagraph (d)(1) of this subsection; and

(3) An offset under subparagraph (d)(1) or a direction under subparagraph (d)(2) of this subsection is a claim by the Government for the purposes of the Contract Disputes Act of 1978.

(e) Authorizes contracting officers to order that sums withheld under subparagraph (d)(2) of this subsection be paid to the contracting agency, or if the sum has already been offset against the prime contractor, that it be retained by the prime contractor.

(f) Requires the prime contractor to notify the contracting officer when the withholding under subparagraph (d)(2) of this subsection has been accomplished unless the amount withheld has been paid to the Government.

(g) Requires a prime contractor or subcontractor to report in writing to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice any possible violation of the Act when the prime contractor or subcontractor has reasonable grounds to believe such violation may have occurred.

(h) Provides that, for the purpose of ascertaining whether there has been a violation of the Act with respect to any prime contract, the General Accounting Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of such agency if the agency does not have an inspector general, shall have access to and may inspect the facilities and audit the books and records, including any electronic data or records, of any prime contractor or subcontractor under a prime contract awarded by such agency.

(i) Requires each contracting agency to include in each prime contract a requirement that the prime contractor shall—

(1) Have in place and follow reasonable procedures designed to prevent and detect violations of the Act in its own operations and direct business relationships (e.g., company ethics rules prohibiting kickbacks by employees, agents, or subcontractors; education programs for new employees and subcontractors, explaining policies against kickbacks, related company procedures and the consequences of detection; procedures requiring subcontractors to certify they have not paid kickbacks; procurement procedures to min-

imize the opportunity for kickbacks; audit procedures designed to detect kickbacks; periodic surveys of subcontractors to elicit information about kickbacks; procedures to report kickbacks to law enforcement officials; annual declarations by employees of gifts or gratuities received from subcontractors; annual employee declarations that they have violated no company ethics rules; personnel practices that document unethical or illegal behavior and make such information available to prospective employers); and

(2) Cooperate fully with any Federal agency investigating a possible violation of the Act.

[52 FR 6121, Feb. 27, 1987; 52 FR 9989, Mar. 27, 1987, as amended at 53 FR 34226, Sept. 2, 1988]

3.502-3 Contract clause.

The contracting officer shall insert the clause at 52.203-7, Anti-Kickback Procedures, in all solicitations and contracts.

[52 FR 6121, Feb. 27, 1987]

3.503 Unreasonable restrictions on subcontractor sales.

3.503-1 Policy.

10 U.S.C. 2402 and 41 U.S.C. 253(g) require that subcontractors not be unreasonably precluded from making direct sales to the Government of any supplies or services made or furnished under a contract. However, this does not preclude contractors from asserting rights that are otherwise authorized by law or regulation.

[50 FR 35475, Aug. 30, 1985, and 51 FR 27116, July 29, 1986]

3.503-2 Contract clause.

The clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, shall be inserted in solicitations and contracts for supplies or services.

[50 FR 35475, Aug. 30, 1985, and 51 FR 27116, July 29, 1986]

Subpart 3.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

3.601 Policy.

(a) Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

(b) For purposes of this subpart, special Government employees (as defined in 18 U.S.C. 202) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees unless—

(1) The contract arises directly out of the individual's activity as a special Government employee;

(2) In the individual's capacity as a special Government employee, the individual is in a position to influence the award of the contract; or

(3) Another conflict of interest is determined to exist.

[55 FR 34864, Aug. 24, 1990]

3.602 Exceptions.

The agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in 3.601 only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met.

3.603 Responsibilities of the contracting officer.

(a) Before awarding a contract, the contracting officer shall obtain an authorization under 3.602 if—

(1) The contracting officer knows, or has reason to believe, that a prospective contractor is one to which award

is otherwise prohibited under 3.601; and

(2) There is a most compelling reason to make an award to that prospective contractor.

(b) The contracting officer shall comply with the requirements and guidance in subpart 9.5 before awarding a contract to an organization owned or substantially owned or controlled by Government employees.

Subpart 3.7—Voiding and Rescinding Contracts

SOURCE: 51 FR 27116, July 29, 1986, unless otherwise noted.

3.700 Scope of subpart.

(a) This subpart prescribes Governmentwide policies and procedures for exercising discretionary authority to declare void and rescind contracts in relation to which there has been a final conviction for bribery, conflict of interest, or similar misconduct, and to recover the amounts expended and property transferred therefor.

(b) This subpart does not prescribe policies or procedures for, or govern the exercise of, any other remedy available to the Government with respect to such contracts, including but not limited to, the common law right of avoidance, rescission, or cancellation.

3.701 Purpose.

This subpart provides a means to—

(a) Provide the Government with an administrative remedy with respect to contracts in relation to which there has been a final conviction for bribery, conflict of interest, or similar misconduct; and

(b) Deter similar misconduct in the future by those who are involved in the award, performance, and administration of Government contracts.

3.702 Definition.

Final conviction means a conviction, whether entered on a verdict or plea, including a plea of *nolo contendere*, for which sentence has been imposed.

3.703 Authority.

Section 1(e) of Pub. L. 87-849, 18 U.S.C. 218 (*the Act*), empowers the President or the heads of executive agencies acting under regulations prescribed by the President, to declare void and rescind contracts and other transactions enumerated in the Act, in relation to which there has been a final conviction for bribery, conflict of interest, or any other violation of Chapter 11 of Title 18 of the United States Code (18 U.S.C. 201-224). Executive Order 12448, November 4, 1983, delegates the President's authority under the Act to the heads of the executive agencies and military departments.

3.704 Policy.

(a) In cases in which there is a final conviction for any violation of 18 U.S.C. 201-224 involving or relating to contracts awarded by an agency, the agency head or designee shall consider the facts available and, if appropriate, may declare void and rescind contracts, and recover the amounts expended and property transferred by the agency in accordance with the policies and procedures of this subpart.

(b) Since a final conviction under 18 U.S.C. 201-224 relating to a contract also may justify the conclusion that the party involved is not presently responsible, the agency should consider initiating debarment proceedings in accordance with FAR subpart 9.4, Debarment, Suspension, and Ineligibility, if debarment has not been initiated or is not in effect at the time the final conviction is entered.

3.705 Procedures.

(a) *Reporting.* The facts concerning any final conviction for any violation of 18 U.S.C. 201-224 involving or relating to agency contracts shall be reported promptly to the agency head or designee for that official's consideration. The agency head or designee shall promptly notify the Civil Division, Department of Justice, that an action is being considered under this subpart.

(b) *Decision.* Following an assessment of the facts, the agency head or designee may declare void and rescind contracts with respect to which a final conviction has been entered, and recover the amounts expended and the property transferred by the agency under the terms of the contracts involved.

(c) *Decision-making process.* Agency procedures governing the voiding and rescinding decision-making process shall be as informal as is practicable, consistent with the principles of fundamental fairness. As a minimum, however, agencies shall provide the following:

(1) A notice of the proposed action to declare void and rescind the contract shall be made in writing and sent by certified mail, return receipt requested.

(2) A thirty calendar day period after receipt of the notice, for the contractor to submit pertinent information before any final decision is made.

(3) Upon request made within the period for submission of pertinent information, an opportunity shall be afforded for a hearing at which witnesses may be presented, and any witness the agency presents may be confronted. However, no inquiry shall be made regarding the validity of the conviction.

(4) If the agency head or designee decides to declare void and rescind the contracts involved, that official shall issue a written decision which—

(i) States that determination;

(ii) Reflects consideration of the fair value of any tangible benefits received and retained by the agency; and

(iii) States the amount due, and the property to be returned, to the agency.

(d) *Notice of proposed action.* The notice of the proposed action, as a minimum shall—

(1) Advise that consideration is being given to declaring void and rescinding contracts awarded by the agency, and recovering the amounts expended and property transferred therefor, under the provisions of 18 U.S.C. 218;

(2) Specifically identify the contracts affected by the action;

(3) Specifically identify the final conviction upon which the action is based;

(4) State the amounts expended and property transferred under each of the contracts involved, and the money and the property demanded to be returned;

(5) Identify any tangible benefits received and retained by the agency under the contract, and the value of those benefits, as calculated by the agency;

(6) Advise that pertinent information may be submitted within 30 calendar days after receipt of the notice, and that, if requested within that time, a hearing shall be held at which witnesses may be presented and any witness the agency presents may be confronted; and

(7) Advise that action shall be taken only after the agency head or designee issues a final written decision on the proposed action.

(e) *Final agency decision.* The final agency decision shall be based on the information available to the agency head or designee, including any pertinent information submitted or, if a hearing was held, presented at the hearing. If the agency decision declares void and rescinds the contract, the final decision shall specify the amounts due and property to be returned to the agency, and reflect consideration of the fair value of any tangible benefits received and retained by the agency. Notice of the decision shall be sent promptly by certified mail, return receipt requested. Rescission of contracts under the authority of the Act and demand for recovery of the amounts expended and property transferred therefor, is not a claim within the meaning of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601-613, or part 33. Therefore, the procedures required by the CDA and the FAR for the issuance of a final contracting officer decision are not applicable to final agency decisions under this subpart, and shall not be followed.

Subpart 3.8—Limitations on the Payment of Funds to Influence Federal Transactions

SOURCE: 55 FR 3190, Jan. 30, 1990 (interim), unless otherwise noted.

3.800 Scope of subpart.

This subpart prescribes policies and procedures implementing section 319 of the Department of the Interior and Related Agencies Appropriations Act, Pub. L. 101-121, which added a new section 1352 to title 31 U.S.C., entitled "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions" (the Act).

3.801 Definitions.

Agency, as used in this section, means an executive agency as defined in 2.101.

Covered Federal action, as used in this section, means any of the following Federal actions:

(a) The awarding of any Federal contract.

(b) The making of any Federal grant.

(c) The making of any Federal loan.

(d) The entering into of any cooperative agreement.

(e) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Indian tribe and *tribal organization,* as used in this section, have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B) and include Alaskan Natives.

Influencing or attempting to influence, as used in this section, means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

Local government, as used in this section, means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

Officer or employee of an agency, as used in this section, includes the following individuals who are employed by an agency:

(a) An individual who is appointed to a position in the Government under title 5, United States Code, including a position under a temporary appointment;

(b) A member of the uniformed services, as defined in subsection 101(3), title 37, United States Code;

(c) A special Government employee, as defined in section 202, title 18, United States Code; and

(d) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, United States Code, appendix 2.

Person, as used in this section, means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

Reasonable compensation, as used in this section, means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

Reasonable payment, as used in this section, means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

Recipient, as used in this section, includes the contractor and all subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

Regularly employed, as used in this section, means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than 130 working days within 1 year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

State, as used in this section, means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

§ 3.802 Prohibitions.

(a) Section 1352 of title 31, United States Code, among other things, prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract; the making of any Federal grant; the making of any Federal loan; the entering into of any cooperative agreement; or, the modification of any Federal contract, grant, loan, or cooperative agreement.

(b) The Act also requires offerors to furnish a declaration consisting of both a certification and a disclosure. These requirements are contained in the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, and the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions.

(1) By signing its offer, an offeror certifies that no appropriated funds have been paid or will be paid in violation of the prohibitions in 31 U.S.C. 1352.

(2) The disclosure shall identify if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal action) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative agreement.

(c) The prohibitions of the Act do not apply under the following conditions:

(1) *Agency and legislative liaison by own employees.* (i) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(ii) For purposes of subdivision (c)(1)(i) of this section, providing any information specifically requested by an agency or Congress is permitted at any time.

(iii) The following agency and legislative liaison activities are permitted at any time where they are not related to a specific solicitation for any covered Federal action:

(A) Discussing with an agency the qualities and characteristics (including individual demonstrations) of the person's products or services, conditions or terms of sale, and service capabilities;

(B) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(iv) The following agency and legislative liaison activities are permitted where they are prior to formal solicitation of any covered Federal action:

(A) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(B) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and

(C) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507, and subsequent amendments.

(v) Only those activities expressly authorized by subparagraph (c)(1) of this section are permitted under this section.

(2) *Professional and technical services.* (i) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in the case of—

(A) Payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action;

(B) Any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(ii) For purposes of subdivision (c)(2)(i) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(iii) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents

(iv) Only those services expressly authorized by subdivisions (c)(2)(i) (A) and (B) of this section are permitted under this section.

(v) The reporting requirements of 3.803(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

3.803 Certification and disclosure.

(a) Any contractor who requests or receives a Federal contract exceeding $100,000 shall submit the certification and disclosures required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, with its offer. Disclosures under this section shall be submitted to the contracting officer using OMB standard form LLL, Disclosure of Lobbying Activities.

(b) The contractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraph (a) of this section. An event that materially affects the accuracy of the information reported includes—

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or

(3) A change in the officer(s), employee(s), or Member(s) of Congress contacted to influence or attempt to influence a covered Federal action.

(c) The contractor shall require the submittal of a certification, *and* if required, a disclosure form, by any person who requests or receives any subcontract exceeding $100,000 under the Federal contract.

(d) All subcontractor disclosure forms (but not certifications), shall be forwarded from tier to tier until received by the prime contractor. The prime contractor shall submit all disclosure forms to the contracting officer at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding contractor.

[55 FR 3190, Jan. 30, 1990, as amended at 55 FR 38516, Sept. 18, 1990]

3.804 Policy.

(a) The contracting officer shall obtain certifications and disclosures as required by the provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, prior to the award of any contract exceeding $100,000.

(b) The contracting officer shall forward a copy of all contractor disclosures furnished pursuant to the clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, to the official designated in accordance with agency procedures, for subsequent submission to Congress. The original of the disclosure shall be retained in the contract file.

3.805 Exemption.

The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibitions of this section whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of such exemption to Congress immediately after making such a determination.

3.806 Processing suspected violations.

Suspected violations of the requirements of the Act shall be referred to the official designated in agency procedures.

3.807 Civil penalties.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. 3803 (except subsection (c)), 3804-3408, and 3812, insofar as the provisions therein are not inconsistent with the requirements of this subpart.

3.808 Solicitation provision and contract clause.

(a) The provision at 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions, shall be included in solicitations expected to exceed $100,000.

(b) The clause at 52.203-12, Limitation on Payments to Influence Certain Federal Transactions, shall be included in solicitations and contracts expected to exceed $100,000.

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42113, Sept. 19, 1983, unless otherwise noted.

4.000 Scope of part.

This part prescribes policies and procedures relating to the administrative aspects of contract execution, distribution, reporting, retention, and files.

Subpart 4.1—Contract Execution

4.101 Contracting officer's signature.

(a) Only contracting officers shall sign contracts on behalf of the United States. The contracting officer's name and official title shall be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after it has been signed by the contractor. The contracting officer shall ensure that the signer(s) have authority to bind the contractor (see specific requirements in 4.102 below).

(b) Each signed or reproduced copy of the signed contract or modification that is intended to have the same force and effect as the signed original shall be marked "DUPLICATE ORIGINAL".

4.102 Contractor's signature.

(a) *Individuals.* A contract with an individual shall be signed by that individual. A contract with an individual doing business as a firm shall be signed by that individual, and the signature shall be followed by the individual's typed, stamped, or printed name and the words ", an individual doing business as ...." [*insert name of firm*].

(b) *Partnerships.* A contract with a partnership shall be signed in the partnership name. Before signing for the Government, the contracting officer shall obtain a list of all partners and ensure that the individual(s) signing for the partnership have authority to bind the partnership.

(c) *Corporations.* A contract with a corporation shall be signed in the corporate name, followed by the word "by" and the signature and title of the person authorized to sign. The contracting officer shall ensure that the person signing for the corporation has authority to bind the corporation.

(d) *Joint venturers.* A contract with joint venturers may involve any combination of individuals, partnerships, or corporations. The contract shall be signed by each participant in the joint venture in the manner prescribed in paragraphs (a) through (c) above for each type of participant. When a corporation is participating, the contracting officer shall obtain from the corporation secretary a certificate stating that the corporation is authorized to participate in the joint venture.

(e) *Agents.* When an agent is to sign the contract, other than as stated in paragraphs (a) through (d) above, the agent's authorization to bind the principal must be established by evidence satisfactory to the contracting officer.

4.103 Contract clause.

The contracting officer shall insert the clause at 52.204-1, Approval of Contract, in solicitations and contracts if required by agency procedures.

[49 FR 26741, June 29, 1984]

Subpart 4.2—Contract Distribution

4.201 Procedures.

Contracting officers shall distribute copies of contracts or modifications within 10 working days after execution by all parties. As a minimum, the contracting officer shall—

(a) Distribute simultaneously one signed copy or reproduction of the signed contract (see 4.101(b)), to the contractor and the paying office;

(b) When a contract is assigned to another office for contract administration (see subpart 42.2), provide to that office—

(1) One copy or reproduction of the signed contract and of each modification (stamped "DUPLICATE ORIGINAL"; see 4.101(b)); and

(2) A copy of the contract distribution list, showing those offices that should receive copies of modifications, and any changes to the list as they occur;

(c) Distribute one copy to each accounting and finance office (funding office) whose funds are cited in the contract;

(d) When the contract is not assigned for administration but contains a Cost Accounting Standards clause, provide one copy of the contract to the cognizant administrative contracting officer and mark the copy "FOR COST ACCOUNTING STANDARDS ADMINISTRATION ONLY" (see 30.401(b));

(e) Provide one copy of each contract or modification that requires audit service to the appropriate field audit office listed in the "Directory of Federal Contract Audit Offices" (copies of this directory can be ordered from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402, referencing stock numbers 008-007-03189-9 and 008-007-03190-2 for Volumes I and II, respectively); and

(f) Provide copies of contracts and modifications to those organizations required to perform contract administration support functions (e.g., when manufacturing is performed at multiple sites, the contract administration office cognizant of each location).

4.202 Agency distribution requirements.

Agencies shall limit additional distribution requirements to the minimum necessary for proper performance of essential functions. When contracts are assigned for administration to a contract administration office located in an agency different from that of the contracting office (see part 42), the two agencies shall agree on any necessary distribution in addition to that prescribed in 4.201 above.

4.203 Taxpayer identification number information.

If the contractor has furnished a taxpayer identification number when completing the solicitation provision at 52.204-3, Taxpayer Identification, the contracting officer shall, unless otherwise provided in agency procedures, attach a copy of the completed solicitation provision as the last page of the copy of the contract sent to the paying office.

[54 FR 34752, Aug. 21, 1989]

Subpart 4.3—[Reserved]

Subpart 4.4—Safeguarding Classified Information Within Industry

4.401 Definitions.

Classified acquisition means an acquisition that consists of one or more contracts in which offerors would be required to have access to classified information (Confidential, Secret, or Top Secret) to properly submit an offer or quotation, to understand the performance requirements of a classified contract under the acquisition, or to perform the contract.

Classified contract means any contract that requires, or will require, access to classified information (Confidential, Secret, or Top Secret) by the contractor or its employees in the performance of the contract. A contract may be a classified contract even though the contract document is not classified.

Classified information means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or under the control of the United States Government, and determined pursuant to Executive Order 12356, April 2, 1982 (47 FR 14874, April 6, 1982) or prior orders to require protection against unauthorized disclosure, and is so designated.

[48 FR 42113, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

4.402 General.

(a) Executive Order 10865, February 20, 1960 (25 FR 1583, February 25, 1960), entitled "Safeguarding Classified Information Within Industry," as amended by Executive Order 10909, January 17, 1961 (26 FR 508, January 20, 1961), forms the basis for agency regulations concerning safeguarding the release of classified information to U.S. industry.

(b) The Department of Defense (DOD) has incorporated the requirements of these Executive Orders into the Defense Industrial Security Program (DISP), administered by the Defense Investigative Service, 1900 Half Street, SW, Washington, DC 20324, (Director for Industrial Security). The following DOD publications implement the program:

(1) *Industrial Security Regulation* (ISR) (DOD 5220.22-R).

(2) *Industrial Security Manual for Safeguarding Classified Information* (ISM) (DOD 5220.22-M).

(c) Procedures for the protection of information relating to foreign classified contracts awarded to U.S. industry, and instructions for the protection of U.S. information relating to classified contracts awarded to foreign firms, are prescribed in Section VIII of the ISR.

(d) Part 27, Patents, Data, and Copyrights, contains policy and procedures for safeguarding classified information in patent applications and patents.

4.403 Responsibilities of contracting officers.

(a) *Presolicitation phase.* Contracting officers shall review all proposed solicitations to determine whether access to classified information may be required by offerors, or by a contractor during contract performance.

(1) If access to classified information of another agency may be required, the contracting officer shall—

(i) Determine if the agency is covered by the DISP; and

(ii) Follow that agency's procedures for determining the security clearances of firms to be solicited.

(2) If the classified information required is from the contracting officer's agency, the contracting officer shall follow agency procedures.

(b) *Solicitation phase.* Contracting officers shall—

(1) Ensure that the classified acquisition is conducted as required by the DISP or agency procedures, as appropriate; and

(2) Include (i) an appropriate Security Requirements clause in the solicitation (see 4.404), and (ii) as appropriate, in solicitations and contracts when the

contract may require access to classified information, a requirement for security safeguards in addition to those provided in the clause (52.204-2, Security Requirements).

(c) *Award phase.* Contracting officers shall inform contractors and subcontractors of the security classifications and requirements assigned to the various documents, materials, tasks, subcontracts, and components of the classified contract as follows:

(1) Agencies covered by the DISP shall use the Contract Security Classification Specification, DD Form 254. The contracting officer, or authorized representative, is the approving official for the form and shall ensure that it is prepared and distributed in accordance with Section VII of the ISR.

(2) Contracting officers in agencies not covered by the DISP shall follow agency procedures.

4.404 Contract clause.

(a) The contracting officer shall insert the clause at 52.204-2, Security Requirements, in solicitations and contracts when the contract may require access to classified information, unless the conditions specified in paragraph (d) below apply.

(b) If a cost contract (see 16.302) for research and development with an educational institution is contemplated, the contracting officer shall use the clause with its Alternate I.

(c) If a construction or architect-engineer contract where employee identification is required for security reasons is contemplated, the contracting officer shall use the clause with its Alternate II.

(d) If the contracting agency is not covered by the DISP and has prescribed a clause and alternates that are substantially the same as those at 52.204-2, the contracting officer shall use the agency-prescribed clause as required by agency procedures.

Subpart 4.5—[Reserved]

Subpart 4.6—Contract Reporting

4.600 Scope of subpart.

This subpart prescribes uniform reporting requirements for the Federal Procurement Data System (FPDS).

4.601 Record requirements.

(a) Each executive agency shall establish and maintain for a period of 5 years a computer file, by fiscal year, containing unclassified records of all procurements exceeding $25,000.

(b) With respect to each procurement carried out using competitive procedures, agencies shall be able to access from the computer file, as a minimum, the following information:

(1) The date of contract award.

(2) Information identifying the source to whom the contract was awarded.

(3) The property or services obtained by the Government under the procurement.

(4) The total cost of the procurement.

(5) Those procurements which result in the submission of a single bid or proposal so that they can be separately categorized and designated noncompetitive procurements using competitive procedures.

(c) In addition to paragraph (b) of this section with respect to each procurement carried out using procedures other than competitive procedures, agencies shall be able to access from the computer file—

(1) The reason under subpart 6.3 for the use of such procedures; and

(2) The identity of the organization or activity which conducted the procurement.

(d) This information shall be transmitted to the Federal Procurement Data System in accordance with agency procedures.

[50 FR 52429, Dec. 23, 1985, as amended at 52 FR 19802, May 27, 1987]

4.602 Federal Procurement Data System.

(a) The FPDS provides a comprehensive mechanism for assembling, organizing, and presenting contract placement data for the Federal Government. Federal agencies report data to the Federal Procurement Data Center (FPDC), which collects, processes, and disseminates official statistical data on Federal contracting. The data provide (1) a basis for recurring and special reports to the President, the Congress, the General Accounting Office, Federal executive agencies, and the general public; (2) a means of measuring and assessing the impact of Federal contracting on the Nation's economy and the extent to which small business concerns and small disadvantaged business concerns are sharing in Federal contracts; and (3) data for other policy and management control purposes.

(b) The *FPDS Reporting Manual* provides a complete list of reporting and nonreporting agencies and organizations. This manual (available at no charge from the Federal Procurement Data Center, General Services Administration, Suite 900, 4040 N. Fairfax Drive, Arlington, VA 22203, telephone (703) 235-2141) provides the necessary instruction to the data collection point in each agency as to what data are required and how often to provide the data.

(c) Data collection points in each agency report data on SF 279, Federal Procurement Data System (FPDS) Individual Contract Action Report, and SF 281, Federal Procurement Data System (FPDS) Summary Contract Action Report ($25,000 or Less), or computer-generated equivalent.

(d) The contracting officer shall obtain and report a Contractor Establishment Code for each awardee from information on file or available to the contracting office, or by using the procedures at 4.603. When appropriate, offerors shall be request to identify their Contractor Establishment Code, if available. If the apparent awardee does not identify its code, the contracting office or other designated agency office shall request a code using the procedures in the FPDS Reporting Manual or in accordance with agency procedures. Requests for codes shall be made by Government offices and only for the apparent awardees.

[48 FR 42113, Sept. 19, 1983. Redesignated at 50 FR 52429, Dec. 23, 1985, and amended at 54 FR 29280, July 11, 1989; 53 FR 43388, Oct. 26, 1988]

4.603 Solicitation provision.

The contracting officer shall insert the provision at 52.204-4, Contractor Establishment Code, in all solicitations exceeding the small purchase limitation in part 13 when there is a reasonable expectation that an award may be made to an offeror whose Contractor Establishment Code is not available to the contracting office but will be available to the offeror(s).

[54 FR 29280, July 11, 1989]

Subpart 4.7—Contractor Records Retention

4.700 Scope of subpart.

This subpart provides policies and procedures for retention of records by contractors to meet the records review requirements of the Government. In this subpart, the terms "contracts" and "contractors" include "subcontracts" and "subcontractors."

4.701 Purpose.

The purpose of this subpart is to generally describe records retention requirements and to allow reductions in the retention period for specific classes of records under prescribed circumstances.

4.702 Applicability.

(a) This subpart applies to records generated under contracts that contain one of the following clauses:

(1) Examination of Records by Comptroller General (52.215-1).

(2) Audit—Sealed Bidding (52.214-26).

(3) Audit—Negotiation (52.215-2).

(b) This subpart is not mandatory on Department of Energy contracts for which the Comptroller General allows alternative records retention periods. Apart from this exception, this subpart applies to record retention periods under contracts that are subject to Chapter 137, Title 10, U.S.C., and the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 471 et seq.

[48 FR 42113, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

4.703 Policy.

(a) Except as stated in 4.703(b), contractors shall make available books, records, documents, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General for (1) 3 years after final payment or, for certain records, (2) the period specified in 4.705 through 4.705-3, whichever of these periods expires first.

(b) Contractors shall make available the foregoing documents and supporting evidence for a longer period of time than is required in 4.703(a) if—

(1) A retention period longer than that cited in 4.703(a) is specified in any contract clause; or

(2) The contractor, for its own purposes, retains the foregoing documents and supporting evidence for a longer period. Under this circumstance, the retention period shall be the period of the contractor's retention or 3 years after final payment, whichever period expires first.

(3) The contractor does not meet the original 90-day due date for submission of final indirect cost rate proposals specified in subparagraph (d)(2) of the clause at 52.216-7, Allowable Cost and Payment, and subparagraph (c)(2) of the clause at 52.216-13, Allowable Cost and Payment—Facilities. Under these circumstances, the retention periods in 4.705 shall be automatically extended one day for each day the proposal is not submitted after the original 90-day due date.

(c) Contractors need not retain duplicate copies of records or supporting documents unless they contain significant information not shown on the record copy.

(d) If the information described in paragraph (a) of this section is maintained on a computer, contractors shall retain the computer data on a reliable medium for the time periods prescribed. Contractors may transfer computer data in machine readable form from one reliable computer medium to another. Contractors' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Contractors shall also retain an audit trail describing the data transfer. For the record retention time periods prescribed, contractors shall not destroy, discard, delete, or write over such computer data.

[48 FR 42113, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986; 53 FR 43388, Oct. 26, 1988; 54 FR 48982, Nov. 28, 1989]

4.704 Calculation of retention periods.

(a) The retention periods in 4.705 are calculated from the end of the contractor's fiscal year in which an entry is made charging or allocating a cost to a Government contract or subcontract. If a specific record contains a series of entries, the retention period is calculated from the end of the contractor's fiscal year in which the final entry is made. The contractor should cut off the records in annual blocks and retain them for block disposal under the prescribed retention periods.

(b) When records generated during a prior contract are relied upon by a contractor for cost or pricing data in negotiating a succeeding contract, the prescribed periods shall run from the date of the succeeding contract.

(c) If two or more of the record categories described in 4.705 are interfiled and screening for disposal is not practical, the contractor shall retain the entire record series for the longest period prescribed for any category of records.

4.705 Specific retention periods.

The contractor shall retain the records identified in 4.705-1 through 4.705-3 for the periods designated, provided retention is required under 4.702. Records are identified in this subpart in terms of their purpose or use and not by specific name or form number. Although the descriptive identifications may not conform to normal contractor usage or filing practices, these identifications apply to all contractor records that come within the description.

4.705-1 Financial and cost accounting records.

(a) Accounts receivable invoices, adjustments to the accounts, invoice registers, carrier freight bills, shipping orders, and other documents which detail the material or services billed on the related invoices: Retain 4 years.

(b) Material, work order, or service order files, consisting of purchase requisitions or purchase orders for material or services, or orders for transfer of material or supplies: Retain 4 years.

(c) Cash advance recapitulations, prepared as posting entries to accounts receivable ledgers for amounts of expense vouchers prepared for employees' travel and related expenses: Retain 4 years.

(d) Paid, canceled, and voided checks, other than those issued for the payment of salary and wages: Retain 4 years.

(e) Accounts payable records to support disbursements of funds for materials, equipment, supplies, and services, containing originals or copies of the following and related documents: remittance advices and statements, vendors' invoices, invoice audits and distribution slips, receiving and inspection reports or comparable certifications of receipt and inspection of material or services, and debit and credit memoranda: Retain 4 years.

(f) Labor cost distribution cards or equivalent documents: Retain 2 years.

(g) Petty cash records showing description of expenditures, to whom paid, name of person authorizing payment, and date, including copies of vouchers and other supporting documents: Retain 2 years.

4.705-2 Pay administration records.

(a) Payroll sheets, registers, or their equivalent, of salaries and wages paid to individual employees for each payroll period; change slips; and tax withholding statements: Retain 4 years.

(b) Clock cards or other time and attendance cards: Retain 2 years.

(c) Paid checks, receipts for wages paid in cash, or other evidence of payments for services rendered by employees: Retain 2 years.

4.705-3 Acquisition and supply records.

(a) Store requisitions for materials, supplies, equipment, and services: Retain 2 years.

(b) Work orders for maintenance and other services: Retain 4 years.

(c) Equipment records, consisting of equipment usage and status reports and equipment repair orders: Retain 4 years.

(d) Expendable property records, reflecting accountability for the receipt and use of material in the performance of a contract: Retain 4 years.

(e) Receiving and inspection report records, consisting of reports reflecting receipt and inspection of supplies, equipment, and materials: Retain 4 years.

(f) Purchase order files for supplies, equipment, material, or services used in the performance of a contract; supporting documentation and backup files including, but not limited to, invoices, and memoranda; e.g., memoranda of negotiations showing the principal elements of subcontract price negotiations (see 52.244-1 and 52.244-2): Retain 4 years.

(g) Production records of quality control, reliability, and inspection: Retain 4 years.

4.706 Microfilming records.

4.706-1 General.

(a) Contractors may use microfilm (e.g., film chips, jackets, aperture cards, microprints, roll film, and microfiche) for recordkeeping, subject to the limitations in this subpart.

(b) In the process of microfilming documents, the contractor shall also microfilm all relevant notes, worksheets, and other papers necessary for reconstructing or understanding the records.

(c) The contractor shall review all microfilm before destroying the hard-copy documents to ensure legibility and reproducibility of the microfilm.

(d) Unless earlier retirement of records is permitted by 4.705, or the administrative contracting officer agrees to a lesser retention period when the contractor has established adequate internal controls including continuing surveillance over the microfilm system, the contractor shall not destroy original records that have been microfilmed, until—

(1) All claims under the contract are settled;

(2) Eighteen months have passed since final payment; or

(3) The time original records are required to be kept by other laws or regulations has elapsed.

4.706-2 Filing and retrieval.

The contractor shall—

(a) Maintain an effective indexing system to permit timely and convenient access to the microfilmed records by the Government;

(b) Provide strict security measures to prevent the loss of microfilm and to safeguard classified information;

(c) Store microfilm in a fireproof cabinet in an environment ensuring the safety of these records for the specified retention periods; and

(d) Have adequate viewing equipment and provide printouts the approximate size of the original material.

4.706-3 Quality control.

(a) Microfilm, when displayed on a microfilm reader (viewer) or reproduced on paper, must exhibit a high degree of legibility and readability.

(b) The quality of the contractor's record microfilming process is subject to periodic review by the administrative contracting officer.

Subpart 4.8—Contract Files

4.800 Scope of subpart.

This subpart prescribes requirements for establishing, maintaining, and disposing of contract files for all contractual actions. The application of this subpart to small purchases and other simplified procedures covered by part 13 is optional. See also documentation requirements in 13.106(c).

4.801 General.

(a) The head of each office performing contracting, contract administration, or paying functions shall establish files containing the records of all contractual actions.

(b) The documentation in the files (see 4.803) shall be sufficient to constitute a complete history of the transaction for the purpose of—

(1) Providing a complete background as a basis for informed decisions at each step in the acquisition process;

(2) Supporting actions taken;

(3) Providing information for reviews and investigations; and

(4) Furnishing essential facts in the event of litigation or congressional inquiries.

(c) The files to be established include—

(1) A file for cancelled solicitations;

(2) A file for each contract; and

(3) A file such as a contractor general file, containing documents relating—for example—to (i) no specific contract, (ii) more than one contract, or (iii) the contractor in a general way (e.g., contractor's management systems, past performance, or capabilities).

4.802 Contract files.

(a) A contract file should generally consist of—

(1) The contracting office contract file, which shall document the basis for the acquisition and the award, the assignment of contract administration (including payment responsibilities), and any subsequent actions taken by the contracting office;

(2) The contract administration office contract file, which shall document actions reflecting the basis for and the performance of contract administration responsibilities; and

(3) The paying office contract file, which shall document actions prerequisite to, substantiating, and reflecting contract payments.

(b) Normally, each file should be kept separately; however, if appropriate, any or all of the files may be combined; e.g., if all functions or any combination of the functions are performed by the same office.

(c) Files shall be maintained at organizational levels that shall ensure—

(1) Effective documentation of contract actions;

(2) Ready accessibility to principal users;

(3) Minimal establishment of duplicate and working files;

(4) The safeguarding of classified documents; and

(5) Conformance with agency regulations for file location and maintenance.

(d) If the contract files or file segments are decentralized (e.g., by type or function) to various organizational elements or to other outside offices, responsibility for their maintenance shall be assigned. A central control and, if needed, a locator system should be established to ensure the ability to locate promptly any contract files.

(e) Contents of contract files that are proprietary or source selection information as defined in 3.104-4 shall be protected from disclosure to unauthorized persons (see 3.104-5).

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 20496, May 11, 1989; 55 FR 36794, Sept. 6, 1990]

4.803 Contents of contract files.

The following are examples of the records normally contained, if applicable, in contract files:

(a) *Contracting office contract file.* (1) Purchase request, acquisition planning information, and other presolicitation documents.

(2) Justifications and approvals, determinations and findings, and associated documents.

(3) Evidence of availability of funds.

(4) Synopsis of proposed acquisition as published in the Commerce Business Daily or reference thereto.

(5) The list of sources solicited, and a list of any firms or persons whose requests for copies of the solicitation were denied, together with the reasons for denial.

(6) Set-aside decision.

(7) Government estimate of contract price.

(8) A copy of the solicitation and all amendments thereto.

(9) Security requirements and evidence of required clearances.

(10) A copy of each offer or quotation, the related abstract, and records of determinations concerning late offers or quotations. Unsuccessful offers or quotations may be maintained separately, if cross-referenced to the contract file. The only portions of the unsuccessful offer or quotation that need be retained are—

(i) Completed solicitation sections A, B, and K;

(ii) Technical and management proposals;

(iii) Cost/price proposals;

(iv) Any other pages of the solicitation that the offeror or quoter has altered or annotated.

(11) Contractor's contingent fee representation and other certifications and representations.

(12) Preaward survey reports or reference to previous preaward survey reports relied upon.

(13) Source selection documentation.

(14) Contracting officer's determination of the contractor's responsibility.

(15) Small Business Administration Certificate of Competency.

(16) Records of contractor's compliance with labor policies including equal employment opportunity policies.

(17) Cost or pricing data and Certificates of Current Cost or Pricing Data or a required justification for waiver.

(18) Packaging and transportation data.

(19) Cost or price analysis.

(20) Audit reports or reasons for waiver.

(21) Record of negotiation.

(22) Justification for type of contract.

(23) Authority for deviations from this regulation, statutory requirements, or other restrictions.

(24) Required approvals of award and evidence of legal review.

(25) Notice of award.

(26) The original of (i) the signed contract or award, (ii) all contract modifications, and (iii) documents supporting modifications executed by the contracting office.

(27) Synopsis of award or reference thereto.

(28) Notice to unsuccessful quoters or offerors and record of any debriefing.

(29) Acquisition management reports (see subpart 4.6).

(30) Bid, performance, payment, or other bond documents, or a reference thereto, and notices to sureties.

(31) Report of postaward conference.

(32) Notice to proceed, stop orders, and any overtime premium approvals granted at the time of award.

(33) Documents requesting and authorizing modification in the normal assignment of contract administration functions and responsibility.

(34) Approvals or disapprovals of requests for waivers or deviations from contract requirements.

(35) Rejected engineering change proposals. These proposals may be filed separately for early disposal (see 4.805(h)).

(36) Royalty, invention, and copyright reports (including invention disclosures) or reference thereto.

(37) Contract completion documents.

(38) Documentation regarding termination actions for which the contracting office is responsible.

(39) Cross-references to pertinent documents that are filed elsewhere.

(40) Any additional documents on which action was taken or that reflect actions by the contracting office pertinent to the contract.

(41) A current chronological list identifying the awarding and successor contracting officers, with inclusive dates of responsibility.

(42) All certifications required by 3.104-9(e)(1).

(43) For contracts and contract modifications in excess of $100,000, a record of all persons or classes of persons authorized to have access to proprietary or source selection information and, to the maximum extent practicable, the names of all individuals within the class.

(b) *Contract administration office contract file.* (1) Copy of the contract and all modifications, together with official record copies of supporting documents executed by the contract administration office.

(2) Any document modifying the normal assignment of contract administration functions and responsibility.

(3) Security requirements.

(4) Cost and pricing data, Certificates of Current Cost or Pricing Data, cost or price analysis, and other documentation supporting contractual actions executed by the contract administration office.

(5) Preaward survey information.

(6) Purchasing system information.

(7) Consent to subcontract or purchase.

(8) Performance and payment bonds and surety information.

(9) Postaward conference records.

(10) Orders issued under the contract.

(11) Notice to proceed and stop orders.

(12) Insurance policies or certificates of insurance or references to them.

(13) Documents supporting advance or progress payments.

(14) Progressing, expediting, and production surveillance records.

(15) Quality assurance records.

(16) Property administration records.

(17) Documentation regarding termination actions for which the contract administration office is responsible.

(18) Cross reference to other pertinent documents that are filed elsewhere.

(19) Any additional documents on which action was taken or that reflect actions by the contract administration office pertinent to the contract.

(20) Contract completion documents.

(c) *Paying office contract file.* (1) Copy of the contract and any modifications.

(2) Bills, invoices, vouchers, and supporting documents.

(3) Record of payments or receipts.

(4) Other pertinent documents.

[48 FR 42113, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 55 FR 36794, Sept. 6, 1990]

4.804 Closeout of contract files.

4.804-1 Closeout by the office administering the contract.

(a) Except as provided in paragraph (c) below, time standards for closing out contract files are as follows:

(1) Small purchase files should be considered closed when the contracting officer receives evidence of receipt of property and final payment, unless otherwise specified by agency regulation.

(2) Files for all firm-fixed-price contracts other than small purchases should be closed within 6 months of the month in which the contracting officer receives evidence of physical completion.

(3) Files for contracts requiring settlement of indirect cost rates should be closed within 36 months of the month in which the contracting officer receives evidence of physical completion.

(4) Files for all other contracts should be closed within 20 months of the month in which the contracting officer receives evidence of physical completion.

(b) When closing out the contract files at 4.804-1(a)(2), (3), and (4), the contracting officer shall use the closeout procedures at 4.804-5. However, these closeout actions may be modified to reflect the extent of administration that has been performed. Quick closeout procedures (see 42.708) should be used, when appropriate, to reduce administrative costs and to enable deobligation of excess funds.

(c) A contract file shall not be closed if (1) the contract is in litigation or under appeal, or (2) in the case of a termination, all termination actions have not been completed.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 34752, Aug. 21, 1989]

4.804-2 Closeout of the contracting office files if another office administers the contract.

(a) Small purchase files should be considered closed when the contracting officer receives evidence of receipt of property and final payment, unless otherwise specified by agency regulation.

(b) All other contract files shall be closed as soon as practicable after the contracting officer receives a contract completion statement from the contract administration office. The contracting officer shall ensure that all contractual actions required have been completed and shall prepare a statement to that effect. This statement is authority to close the contract file and shall be made a part of the official contract file.

4.804-3 Closeout of paying office contract files.

The paying office shall close the contract file upon issuance of the final payment voucher.

4.804-4 Physically completed contracts.

(a) Except as provided in paragraph (b) below, a contract is considered to be physically completed when—

(1) (i) The contractor has completed the required deliveries and the Government has inspected and accepted the supplies;

(ii) The contractor has performed all services and the Government has accepted these services; and

(iii) All option provisions, if any, have expired; or

(2) The Government has given the contractor a notice of complete contract termination.

(b) Facilities contracts and rental, use, and storage agreements are considered to be physically completed when—

(1) The Government has given the contractor a notice of complete contract termination; or

(2) The contract period has expired.

4.804-5 Detailed procedures for closing out contract files.

(a) The office administering the contract is responsible for initiating (automated or manual) administrative closeout of the contract after receiving evidence of its physical completion. At the outset of this process, an initial contract funds status review shall be accomplished and, where appropriate, excess funds identified to the contracting office. When complete, the administrative closeout procedures shall ensure that—

(1) Disposition of classified material is completed;

(2) Final patent report is cleared;

(3) Final royalty report is cleared;

(4) There is no outstanding value engineering change proposal;

(5) Plant clearance report is received;

(6) Property clearance is received;

(7) All interim or disallowed costs are settled;

(8) Price revision is completed;

(9) Subcontracts are settled by the prime contractor;

(10) Prior year indirect cost rates are settled;

(11) Termination docket is completed;

(12) Contract audit is completed;

(13) Contractor's closing statement is completed;

(14) Contractor's final invoice has been submitted; and

(15) Contract funds review is completed and deobligation of any excess funds is recommended.

(b) When the actions in paragraph (a) above have been verified, the contracting officer administering the contract shall ensure that a contract completion statement, containing the following information, is prepared:

(1) Contract administration office name and address (if different from the contracting office).

(2) Contracting office name and address.

(3) Contract number.

(4) Last modification number.

(5) Last call or order number.

(6) Contractor name and address.

(7) Dollar amount of excess funds, if any.

(8) Voucher number and date, if final payment has been made.

(9) Invoice number and date, if the final approved invoice has been forwarded to a disbursing office of another agency or activity and the status of the payment is unknown.

(10) A statement that all required contract administration actions have been fully and satisfactorily accomplished.

(11) Name and signature of the contracting officer.

(12) Date.

(c) When the statement is completed, the contracting officer shall ensure that—

(1) The signed original is placed in the contracting office contract file (or forwarded to the contracting office for placement in the files if the contract administration office is different from the contracting office); and

(2) A signed copy is placed in the appropriate contract administration file if administration is performed by a contract administration office.

[48 FR 42113, Sept. 19, 1983, as amended at 54 FR 34752, Aug. 21, 1989]

4.805 Disposal of contract files.

Agencies shall prescribe procedures for the handling, storing, and disposing of contract files. However, such procedures shall include provisions that the documents specified below shall not be destroyed before the times indicated:

Document	Retention Period
(a) Records pertaining to exceptions or protests, claims for or against the United States, investigations, cases pending or in litigation, or similar matters.	Until final clearance or settlement, or until the retention period otherwise specified for the document in paragraphs (b) through (n) below is completed, whichever is later.
(b) Signed originals of (1) contracts and (2) modifications thereto.	6 years and 3 months after final payment.
(c) [Reserved]	
(d) Signed originals of justifications and approvals and determinations and findings required by part 6, and copies of supporting documents and data.	6 years and 3 months after final payment.
(e) Signed originals of small purchases and modifications thereto and construction contracts under $2,000.	3 years after final payment.
(f) All unsuccessful offers or quotations that pertain to contracts below the appropriate small purchase limitation in part 13.	Retain 1 year after date of award or until final payment, whichever is later; but if the contracting officer determines that the files have future value to the Government, retain as long as advisable.
(g) Contract status (progressing), expediting, and production surveillance records.	6 months after final payment.
(h) Rejected engineering change proposals.	6 months after final payment.
(i) Labor compliance records, including equal employment opportunity records.	3 years after final payment.
(j) Documents pertaining generally to the contractor as described at 4.801(c)(3).	Until superseded or obsolete.
(k) Records or documents other than those in paragraphs 4.805(a)–(j) above pertaining to contracts below the appropriate small purchase limitation in part 13.	1 year after final payment.
(l) Records or documents other than those in paragraphs 4.805(a)–(k) above pertaining to contracts above the appropriate small purchase limitation in part 13.	6 years and 3 months after final payment.
(m) Files for cancelled solicitations (see 4.801(c)(1)).	5 years after cancellation.
(n) Solicited and unsolicited unsuccessful offers and quotations above the appropriate small purchase limitation in part 13.	
(1) When filed separately from contract case files.	Until contract completion date.
(2) When filed with contract case files.	6 years and 3 months after final payment.

[48 FR 42113, Sept. 19, 1983, as amended at 50 FR 1727, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989]

Subpart 4.9—Information Reporting To The Internal Revenue Service

SOURCE: 53 FR 43388, Oct. 26, 1988, unless otherwise noted.

4.900 Scope of subpart.

This subpart provides policies and procedures applicable to contract and payment information reporting to the Internal Revenue Service (IRS).

4.901 Definitions.

Common parent, as used in this subpart, means that corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member.

Corporate status, as used in this subpart, means a designation as to whether the offeror is a corporate entity, an unincorporated entity, (e.g., sole proprietorship or partnership), or a corporation providing medical and health care services.

Taxpayer Identification Number (TIN), as used in this subpart, means the number required by the IRS to be used by the offeror in reporting income tax and other returns.

[53 FR 43388, Oct. 26, 1988, as amended at 54 FR 34752, Aug. 21, 1989]

4.902 General.

(a) 26 U.S.C. 6041 and 6041A, as implemented in 26 CFR, in part, require payors, including Federal Government agencies, to report to the IRS payments made to certain contractors.

(1) The following payments are exempt from this reporting requirement:

(i) Payments to corporations. However, payments to corporations providing medical and health care services or engaged in the billing and collecting of payments for such services are not exempted.

(ii) Payments for bills for merchandise, telegrams, telephone, freight, storage, and similar charges.

(iii) Payments of income required to be reported on an IRS Form W-2 (e.g., contracts for personal services).

(iv) Payments to a hospital or extended care facility described in 26 CFR 501(c)(3) that is exempt from taxation under 26 CFR 501(a).

(v) Payments to a hospital or extended care facility owned and operated by the United States, a state, the District of Columbia, a possession of the United States, or a political subdivision, agency, or instrumentality of any of the foregoing.

(vi) Payments for any contract with a state, the District of Columbia, a possession of the United States, or a political subdivision, agency, or instrumentality of any of the foregoing.

(2) The following information is required to provide report to IRS:

(i) Name, address, and TIN of contractor.

(ii) Corporate status (see 4.901).

(b) 26 U.S.C. 605M, as implemented in 26 CFR, requires heads of Federal Executive agencies to report to the IRS the following information for certain contracts in excess of $25,000:

(1) Name, address, and TIN of contractor.

(2) Name and TIN of common parent (if any).

(3) Date of the contract action.

(4) Amount obligated on the contract action.

(5) Estimated contract completion date.

4.903 Procedures.

The information reported to the IRS under 4.902(b) will be transmitted using the Federal Procurement Data System (see subpart 4.6 and implementing instructions). Requirements concerning information to be transmitted to paying offices are specified in 4.203.

[53 FR 43388, Oct. 26, 1988, as amended at 54 FR 34753, Aug. 21, 1989]

4.904 Solicitation provision.

The contracting officer shall insert the provision at 52.204-3, Taxpayer Identification, in all solicitations, unless the TIN of each offeror has previously been obtained and is known.

SUBCHAPTER B—ACQUISITION PLANNING

PART 5—PUBLICIZING CONTRACT ACTIONS

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Subpart 5.5—Paid Advertisements

5.501 Definitions.
5.502 Authority.
5.503 Procedures.
5.504 Use of advertising agencies.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42119, Sept. 19, 1983, unless otherwise noted.

5.000 Scope of part.

This part prescribes policies and procedures for publicizing contract opportunities and award information.

5.001 Definition.

Contract action, as used in this part, means an action resulting in a contract, as defined in subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Change clause, or funding and other administrative changes.

[50 FR 1728, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985]

5.002 Policy.

Contracting officers shall publicize contract actions in order to—

(a) Increase competition;

(b) Broaden industry participation in meeting Government requirements; and

(c) Assist small business concerns, small disadvantaged business concerns, and labor surplus area concerns in obtaining contracts and subcontracts.

[50 FR 52429, Dec. 23, 1985]

Subpart 5.1—Dissemination of Information

5.101 Methods of disseminating information.

The Commerce Business Daily (CBD) is the public notification media by which U.S. Government agencies identify proposed contract actions and contract awards. The CBD is published in five or six daily editions weekly, as necessary.

(a) As required by the Small Business Act (15 U.S.C. 637(e)) and the Office of Federal Procurement Policy Act (41 U.S.C. 416), contracting officers shall disseminate information on proposed contract actions as follows:

(1) For contract actions expected to exceed $25,000, or $10,000 if there is not a reasonable expectation that at least two offers will be received from responsive and responsible offerors, by synopsizing in the Commerce Business Daily (CBD) (See subpart 5.201); and

(2) For proposed contract actions expected to exceed $10,000 ($5,000 for Defense activities), but not expected to exceed $25,000, by displaying in a public place at the contracting office issuing the solicitation, an unclassified notice of the solicitation or a copy of the solicitation satisfying the requirements of 5.207 (c) and (f). Such information shall be posted not later than the date the solicitation is issued and remain posted for at least 10 days regardless of the date of award. Such information shall remain posted until after offers have been opened.

(i) If solicitations are posted in lieu of a notice, various methods of satisfying the requirements of 5.207 (c) and (f) may be employed. For example, the requirements for 5.207 (c) and (f) may be met by stamping the solicitation, by a cover sheet to the solicitation, or by placing a general statement in the display room.

(ii) The contracting officer need not comply with the display requirements set forth above when the exemptions at 5.202(a) (1), (5) through (9), or (11) apply, or when oral solicitations are used.

(iii) Contracting officers shall post solicitations expected to exceed $25,000 if required by agency regulations.

(b) In addition, one or more of the following methods may be used:

(1) Preparing periodic handouts listing proposed contracts, and displaying them as in 5.101(a)(2).

(2) Assisting local trade associations in disseminating information to their members.

(3) Making brief announcements of proposed contracts to newspapers, trade journals, magazines, or other mass communication media for publication without cost to the Government.

(4) Placing paid advertisements in newspapers or other communications media, subject to the following limitations:

(i) Contracting officers shall place paid advertisements of proposed contracts only when it is anticipated that effective competition cannot be obtained otherwise (see 5.205(d)).

(ii) Contracting officers shall not place advertisements of proposed contracts in a newspaper published and printed in the District of Columbia unless the supplies or services will be furnished, or the labor performed, in the District of Columbia or adjoining counties in Maryland or Virginia (44 U.S.C. 3701).

(iii) Advertisements published in newspapers must be under proper written authority in accordance with 44 U.S.C. 3702 (see 5.502(a)).

[48 FR 42119, Sept. 19, 1983, as amended at 50 FR 1728, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 27117, July 29, 1986; 52 FR 21885, June 9, 1987]

5.102 Availability of solicitations.

(a) The contracting officer shall—

(1) Maintain a reasonable number of copies of solicitations publicized in the CBD, including specifications and other pertinent information (upon request, potential sources not initially solicited shall be mailed or provided copies of solicitations, if available);

(2) Provide copies of a limited solicitation to firms requesting copies that were not initially solicited, but only after advising the requester of the determination to limit the solicitation to a specified firm or firms as authorized under part 6;

(3) Provide copies on a *first-come-first-served* basis, for pickup at the contracting office, to publishers, trade associations, information services, and other members of the public having a legitimate interest (for construction, see 36.211); and

(4) In addition to the methods of disseminating proposed contract information in 5.101(a) and (b), provide upon request to small business concerns, as required by 15 U.S.C. 637(b)—

(i) A copy of the solicitation and specifications;

(ii) The name and telephone number of an employee of the contracting office to answer questions on the solicitation; and

(iii) Adequate citations to each applicable major Federal law or agency rule with which small business concerns must comply in performing the contract.

(5) Retain a copy of the solicitation and other documents for review by and duplication for those requesting

copies after the initial number of copies is exhausted.

(6) Agencies may require payment of a fee, not exceeding the actual cost of duplication, for a copy of the solicitation documents.

(b) This section 5.102 applies to classified contracts to the extent consistent with agency security requirements (see 5.202(a)(1)).

[48 FR 42119, Sept. 19, 1983, as amended at 50 FR 1728, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

Subpart 5.2—Synopses of Proposed Contract Actions

5.201 General.

(a) As required by the Small Business Act (15 U.S.C. 637(c)) and the Office of Federal Procurement Policy Act (41 U.S.C. 416), agencies shall furnish for publication in the Commerce Business Daily (CBD) notices of proposed contract actions as specified below.

(b) For acquisitions of supplies and services other than those covered by the exceptions in 5.202, and special situations in 5.205, the contracting officer shall transmit a notice to the CBD (synopsis) (see 5.207) for each proposed—

(1) Contract actions meeting the thresholds in 5.101(a)(1);

(2) Effort to locate private commercial sources for cost comparison purposes under OMB Circular A-76 (see 5.205(d));

(3) Modification to an existing contract for additional supplies or services that meets the thresholds in 5.101(a)(1); or

(4) Contract action in any amount when advantageous to industry or the Government.

(c) The primary purposes of the CBD notice are to improve small business access to acquisition information and enhance competition by identifying contracting and subcontracting opportunities.

(d) Subcriptions to the CBD must be placed with the Superintendent of Documents, Government Printing Office, Washington, DC 20402 (Tel. 202-783-3238).

[48 FR 42119, Sept. 19, 1983, as amended at 50 FR 1728, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 27117, July 29, 1986; 52 FR 21886, June 9, 1987]

5.202 Exceptions.

The contracting officer need not submit the notice required by 5.201 when—

(a) The contracting officer determines that—

(1) The synopsis cannot be worded to preclude disclosure of an agency's needs and such disclosure would compromise the national security (e.g., would result in disclosure of classified information). The fact that a proposed solicitation or contract action contains classified information, or that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception to synopsis;

(2) The contract action is made under the conditions described in 6.302-2 and the Government would be seriously injured if the agency complies with the time periods specified in 5.203;

(3) The contract action is one for which either the written direction of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government, or the terms of an international agreement or treaty between the United States and a foreign government or international organizations, has the effect of requiring that the acquisition shall be from specified sources;

(4) The contract action is expressly authorized or required by a statute to be made through another Government agency, including acquisitions from the Small Business Administration (SBA) using the authority of section 8(a) of the Small Business Act (but see 5.205(e)), or from a specific source such as a workshop for the blind under the rules of the Committee for the Purchase from the Blind and Other Severely Handicapped;

(5) The contract action is for utility services other than telecommunications services and only one source is available;

(6) The contract action is an order placed under a requirements contract;

(7) The contract action results from acceptance of a proposal under the Small Business Innovation Development Act of 1982 (Pub. L. 97-219);

(8) The contract action results from the acceptance of an unsolicited research proposal that demonstrates a unique and innovative concept (see 6.003) and publication of any notice complying with 5.207 would improperly disclose the originality of thought or innovativeness of the proposed research, or would disclose proprietary information associated with the proposal. This exception does not apply if the contract action results from an unsolicited research proposal and acceptance is based solely upon the unique capability of the source to perform the particular research services proposed (see 6.302-1(a)(2)(i);

(9) The contract action is made for perishable subsistence supplies, and advance notice is not appropriate or reasonable;

(10) The contract action is made under conditions described in 6.302-3, or 6.302-5 with regard to brand name commercial items for authorized resale, or 6.302-7, and advance notice is not appropriate or reasonable;

(11) The contract action is made under the terms of an existing contract that was previously synopsized in sufficient detail to comply with the requirements of 5.207 with respect to the current contract action; or

(12) The contract action is by a Defense agency and the contract action will be made and performed outside the United States, its possessions, or Puerto Rico, and only local sources will be solicited.

(b) The head of the agency determines in writing after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that advance notice is not appropriate or reasonable.

[50 FR 1728, Jan. 11, 1985, as amended at 50 FR 52430, Dec. 23, 1985; 51 FR 27117, July 29, 1986; 53 FR 27463, July 20, 1988; 54 FR 46004, Oct. 31, 1989]

5.203 Publicizing and response time.

Whenever agencies are required to publish notice of contract actions under 5.201, they shall proceed as follows:

(a) A notice of the contract action shall be published in the CBD at least 15 days before issuance of a solicitation.

(b) Agencies shall allow at least 30 days response time for receipt of bids or proposals from the date of issuance of a solicitation.

(c) Agencies shall allow at least 30 days response time from the date of publication of a proper notice of intent to contract for architect-engineer services or before issuance of an order under a basic ordering agreement or similar arrangement.

(d) Agencies shall allow at least 45 days response time for receipt of bids or proposals from the date of publication of the notice required in 5.201 for contract actions categorized as research and development.

(e) Nothing in this subpart prohibits officers or employees of agencies from responding to requests for information.

(f) Contracting officers may, unless they have evidence to the contrary, presume that notice has been published 10 days (6 days if electronically transmitted) following transmittal of the synopsis to the CBD. This presumption is based on the CBD's confirmation that publication does occur within these timeframes. This presumption does not negate the mandatory waiting or response times specified in paragraphs (a) through (d) of this section. Upon learning that a particular notice has not in fact been published within the presumed timeframes, contracting officers should consider whether the date for receipt of offers can be extended or whether circumstances have become sufficiently compelling to justify proceeding with the contract action under the authority of 5.202(a)(2).

[50 FR 52430, Dec. 23, 1985, as amended at 51 FR 31425, Sept. 3, 1986]

5.204 Presolicitation notices.

Contracting officers shall publicize presolicitation notices in the CBD (see 15.404 and 36.302). Synopsizing is still required prior to issuance of any resulting solicitation (see 5.201 and 5.203).

[50 FR 1729, Jan. 11, 1985 and 50 FR 52429, Dec. 23, 1985]

5.205 Special situations.

(a) *Research and development (R&D) advance notice.* Contracting officers may publish in the CBD, advance notices of their interest in potential R&D programs whenever existing solicitation mailing lists do not include a sufficient number of concerns to obtain adequate competition. Advance notices shall not be used where security considerations prohibit such publication. Advance notices will enable potential sources to learn of R&D programs and provide their sources with an opportunity to submit information which will permit evaluation of their R&D capabilities. Potential sources which respond to advance notices shall be added to the appropriate solicitation mailing list for subsequent solicitation. Advance notices shall be titled "Research and Development Sources Sought," cite the appropriate Numbered Note, and include the name and telephone number of the contracting officer or other contracting activity official from whom technical details of the project can be obtained. This will enable sources to submit information for evaluation of their R&D capabilities. Contracting officers shall synopsize all subsequent solicitations for R&D contracts, including those resulting from a previously synopsized advance notice, unless one of the exceptions in 5.202 applies.

(b) *Federally Funded Research and Development Centers.* Before establishing a Federally Funded Research and Development Center (FFRDC) (see part 35) or before changing its basic purpose and mission, the sponsor shall place at least three notices over a 90-day period in the Commerce Business Daily and the FEDERAL REGISTER, indicating the agency's intention to sponsor an FFRDC or change the basic purpose and mission of an FFRDC. The notice shall indicate the scope and nature of the effort to be performed and request comments. Notice is not required where action is required by law.

(c) *General notices and announcements.* General notices and announcements of such matters as business fairs, pre-bid/pre-proposal conferences, meetings, availability of draft solicitations or draft specifications for review, etc., which are to be published in the CBD shall be transmitted in accordance with 5.207(a). Contracting officers shall prepare general announcement in the following format:

(1) *General.* Use conventional typing, with upper and lower case letters, standard punctuation, and commonly used abbreviations.

(2) *Spacing.* Begin lines in the text, except paragraph beginnings, flush with the left margin. Use double-spaced lines. Begin paragraphs five spaces from the left margin.

(3) *Contracting office and address.* Begin the name, address, and telephone number of the contracting office on the first line of the text. Do not abbreviate except for names of states. The address shall include an attention phrase that identifies the person(s) to contact for further information.

(4) *Description of the matter being announced.* Include a clear, complete description of the matter to be published.

(d) *Architect-engineering services.* Contracting officers shall publish notices of intent to contract for architect-engineering services as follows:

(1) Except when exempted by 5.202, synopsize each proposed contract action for which the total fee (including phases and options) is expected to exceed $25,000, or $10,000 if there is not reasonable expectation that at least two offers will be received from responsive and responsible offerors. Reference shall be made to the appropriate CBD Numbered Note.

(2) When the total fee is expected to exceed $10,000 ($5,000 for Defense activities), but not exceed $25,000, the contracting officer shall comply with 5.101(a)(2). When the contract action is not required to be synopsized under subparagraph (d)(1) of this section, the contracting officer shall display a notice of the solicitation or a copy of the solicitation in a public place at the contracting office. Other optional pub-

licizing methods are authorized in accordance with 5.101(b).

(e) *Effort to locate commercial sources under OMB Circular A-76.* When determining the availability of commercial sources under the procedures prescribed in subpart 7.3 and OMB Circular A-76, the contracting officer shall not arrive at a conclusion that there are no commercial sources capable of providing the required supplies or services until publicizing the requirement in the CBD at least three times in a 90 calendar-day period, with a minimum of 30 calendar days between each. When necessary to meet an urgent requirement, this may be limited to a total of two publications in the CBD in a 30 calendar-day period, with a minimum of 15 calendar days between each.

(f) *Section 8(a) competitive acquisition.* When a national buy requirement is being considered for competitive acquisition limited to eligible 8(a) concerns under Supart 19.8, the contracting officer shall transmit a synopsis of the proposed contract action to the CBD in accordance with 5.207. The synopsis may be transmitted to the CDB concurrent with submission of the agency offering (see 19.804-2) to the Small Business Administration (SBA). The synopsis should also include information—

(1) Advising that the acquisition is being offered for competition limited to eligible 8(a) concerns;

(2) Specifying the Standard Industrial Classification (SIC) code;

(3) Advising that eligibility to participate may be restricted to firms in either the developmental or transitional stage; and

(4) Encouraging interested 8(a) firms o request a copy of the solicitation as xpeditiously as possible since the solicitation will be issued without further notice upon SBA acceptance of he requirement for the section 8(a) rogram.

8 FR 42119, Sept. 19, 1983, as amended at
FR 1729, Jan. 11, 1985; 50 FR 4221, Jan.
, 1985; 50 FR 52430, Dec. 23, 1985; 51 FR
117, July 29, 1986; 52 FR 21886, June 9,
87; 53 FR 43389, Oct. 26, 1988; 54 FR
061, June 12, 1989; 54 FR 46004, Oct. 31,
89; 55 FR 3881, Feb. 5, 1990; 55 FR 25526,
ne 21, 1990]

5.206 Publicizing subcontract opportunities.

Contracting officers shall encourage prime contractors and subcontractors to use the CBD to publicize subcontracting opportunities stemming from their Government business. Subcontract information should be mailed directly to the CBD under the heading *Subcontracting Assistance Wanted,* using the format in 5.207.

[48 FR 42119, Sept. 19, 1983, as amended at 50 FR 1729, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 52 FR 19802, May 27, 1987; 54 FR 25061, June 12, 1989]

5.207 Preparation and transmittal of synopses.

(a) *Transmittal.* Contracting officers shall transmit synopses of actions identified under § 5.101 to the Commerce Business Daily by the most expeditious and reliable means available.

(1) *Electronic transmission.* All synopses transmitted by electronic means shall be in ASCII Code. Contact your agency's communications center for the appropriate transmission instructions or services.

(2) *Hard copy transmission.* When electronic transmission is not feasible, synopses should be sent to the CBD via mail or other physical delivery of hard copy and should be addressed to: U.S. Department of Commerce, Commerce Business Daily, P.O. Box 5999, Chicago, IL 60680.

(b) *Format.* The contracting officer shall prepare the synopsis in the following style and format to ensure timely processing of the synopsis by the Commerce Business Daily.

(1) *General.* Format for all synopses shall employ conventional typing with abbreviations, capitalization, and punctuation all grammatically correct. Each synopsis shall include all 17 format items. Do not include the title for the format item.

(2) *Spacing.* Begin each line flush left and use double spaced lines between each format line. If more than one synopsis is sent at one time, separate each synopsis with four line spaces and begin each new synopsis with format item number 1.

(3) *Abbreviations.* Minimize abbreviations or acronyms to commonly recognized abbreviations.

(4) *Standard format.* Prepare each synopsis in the following manner. Begin each format item with the number of the item followed by a period (e.g., 1.). Then make two spaces after the period. Next type the appropriate information for each format item. Then conclude each format item with two exclamation points (i.e., !!). Conclude each complete synopsis, following format item 17, with five asterisks (i.e., * * * * *).

FORMAT ITEM and Explanation/ Description of Entry

1. ACTION CODE

(A single alphabetic letter denoting the specific action related in the synopsis. Choices are limited to the following: P=Presolicitation Notice/Procurement; A=Award announcement; M=Modification of a previously announced procurement action (a correction to a previous CBD announcement); R=Sources Sought (includes A-76 services and architect-engineer contracts); F=Foreign procurement announcement or tender.)

2. DATE

(Date on which the synopsis is transmitted to the CBD for publication. Use a four digit number indicating month in two digits and date in two digits (MMDD). All four spaces must be used with preceding 0 for months January thru September. Format: 0225 for February 25.)

3. YEAR

(Two numeric digits denoting the calendar year of the synopsis. Format 85 for 1985.)

4. FEDERAL INFORMATION PROCESSING STANDARD (FIPS) NUMBER

(Agency code number identifying the sending agency. Normally a four or five character field. Usually numeric, but may contain one or more alphabetic characters. Reference is FIPS 95 publication by the National Bureau of Standards which identifies Federal Agencies and related organizations.)

5. CONTRACTING OFFICE ZIP CODE

(The geographic zip code for the contracting office. Up to nine characters may be entered. When using a nine digit zip code, separate the first five digits and last four digits with a dash. Format: 00000-0000.)

6. CLASSIFICATION CODE. (Service or supply code number; see 5.207(g). Each synopsis shall classify the contemplated contract action under the one classification code which most closely describes the acquisition. If the action is for a multiplicity of goods and/or services, the preparer should select the one category best describing the overall acquisition based upon value. Inclusion of more than one classification code, or failure to include a classification code, will result in rejection of the synopsis by the Commerce Business Daily).

7. CONTRACTING OFFICE ADDRESS

(The complete name and address of the contracting office. Field length is open, but generally not expected to exceed 90 alpha-numeric characters.)

8. SUBJECT

(Insert classification code for ITEM 6, and a brief title description of services, supplies, or project required by the agency. This will appear in the CBD as the bold faced title in the first line of the description.)

9. PROPOSED SOLICITATION NUMBER

(Agency number for control, tracking, identification. For solicitations; if not a solicitation, enter N/A.)

10. OPENING/CLOSING RESPONSE DATE

(For solicitations; if not a solicitation, enter N/A. Issuing agency deadline for receipt of bids, proposals or responses. Use a six digit date. Format: MMDDYY. Explanation may appear in text of synopsis in Item 17.)

11. CONTACT POINT/CONTRACTING OFFICER

(Include name and telephone number of contact. Also include name and telephone number of contracting officer if different. This will appear as the first item of information in the published entry. This entry may be alpha-numeric and up to 320 character blocks in length.)

12. CONTRACT AWARD AND SOLICITATION NUMBER

(For awards; if not an award, enter N/A. The award, solicitation or project reference number assigned by the agency to provide a reference for bidders/subcontractors. Seventy-two blocks available for alpha-numeric entries plus slashes and dashes.)

13. CONTRACT AWARD DOLLAR AMOUNT

(For awards; if not an award, enter N/A. A ten digit numeric field. Enter whole dollars only. Output will be preceded by a dollar sign ($).)

14. CONTRACT LINE ITEM NUMBER

(For awards—as desired; if not an award, enter N/A. The alpha-numeric field with dashes and slashes may not exceed 32 spaces. If sufficient space is not available, enter N/A and insert the contract line item number(s) in format item 17.)

15. CONTRACT AWARD DATE

(For awards; if not an award, enter N/A. A six digit entry showing the date the award is made or the contract let. Format: MMDDYY.)

16. CONTRACTOR

(For awards; if not an award, enter N/A. Name and address of successful offeror. Ninety character spaces allowed for full identification.)

17. DESCRIPTION

(This block of space is open ended for entry of the substantive description of the contract action. Suggested sequence of content and items for inclusion in a solicitation synopsis are contained in 5.207(c) below. (See 5.302(b) for award entries, and 5.207(c) for solicitation entries.) The last entry(ies) should include reference(s) to any numbered notes or conditions which are applicable and which should appear in the printed text.)

(5) *Nonapplicable format items.* When a format item is not applicable, type the item number, a period, two blank spaces, and "N/A" (e.g., 10. N/A!!).

(6) The following is an illustrative solicitation synopsis format:

1. P!!
2. 0925!!
3. 85!!
4. 57936!!
5. 19111-5096!!
6. 95!!
7. Defense Industrial Supply Center, 700 Robbins Ave., Philadelphia, PA 19111-5096!!
8. 95—metal plate steel!!
9. DLA500-86-B-0090!!
10. BOD, 111585!!
11. Contact, Mary Drake, 215/697-XXXX/Contracting Officer, Larry Bird, 215/697-XXXX!!
12. N/A!!
13. N/A!!
14. N/A!!
15. N/A!!
16. N/A!!
17. NSN9515-00-237-5342,—Spec MIL-S-226988,—0.1875 in thk, 96 in w. 240 in lg.—Carbon steel,—45,000 lbs.—Del to NSY Philadelphia, PA, NSC Norfolk, VA.—Del by 1 Oct 86.—When calling, be prepared to state name, address and solicitation number.—See note 9.—All responsible sources may submit an offer which will be considered.* * * * *

(c) *General format for Item 17, "Description."* (1) Prepare the synopsis to ensure that it includes a clear description of the supplies or services to be contracted for, and is not unnecessarily restrictive of competition and will allow a prospective offeror to make an informed business judgment as to whether a copy of the solicitation should be requested.

(2) Include the following elements to the extent applicable, in sequence, with each element separated by two hyphens. Do not include the Roman numeral designator preceding each element, and do not include the supply/service classification code.

(i) National Stock Number (NSN) if assigned.

(ii) Specification and whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and identification of the office from which additional information about the qualification requirement may be obtained (see subpart 9.2).

(iii) Manufacturer, including part number, drawing number, etc.

(iv) Size, dimensions, or other form, fit or functional description.

(v) Predominant material of manufacture.

(vi) Quantity, including any options for additional quantities.

(vii) Unit of issue.

(viii) Destination information.

(ix) Delivery schedule.

(x) Duration of the contract period.

(xi) For Architect-Engineer projects and other projects for which the supply or service codes are insufficient, provide brief details with respect to: location, scope of services required, cost range and limitations, type of contract, estimated starting and completion dates, and any significant evaluation factors.

(xii) Numbered notes (see 5.207(e)), including instructions for set-asides for small businesses and labor surplus area concerns.

(xiii) In the case of contract actions under subpart 6.3, insert a statement of the reason justifying other than full and open competition, and identify the intended source(s) (see 5.207(e)(3)).

(xiv) Insert a statement that all responsible sources may submit a bid, proposal, or quotation which shall be considered by the agency.

(xv) If the contracting office will accept requests for solicitations through alternate means (e.g., facsimile machine, Telex), provide the machine number and routing instructions.

(d) *Set-asides.* When the proposed acquisition provides for a total or partial small business or labor surplus area (LSA) set aside, the appropriate CBD Numbered Note will be cited.

(e) *CBD Numbered Notes.* (1) Numbered Notes are footnotes. The purpose of the Numbered Notes is to conserve space and simplify the identification of repetitive notices. An explanation of the Numbered Notes appears each week in the Monday edition of the CBD. If the Monday edition of the CBD is not printed because of a holiday, an explanation of the Numbered Notes will appear in the next day's issue. When one or more of the Notes applies to a synopsis, contracting officers should reference the note at the end of Item 17 of the synopsis; e.g., "See Note(s). . . ." Requests to add or change Notes will be submitted through channels for approval by the DAR Council and the CAA Council. The Councils will review the Numbered Notes periodically and, as appropriate, after consultation with the initiating agency, advise the Department of Commerce to delete or modify outdated or unused notes from the CBD. Contracting officers shall also include the substance of Numbered Notes whenever a proposed contract is publicized by means other than the CBD (see 5.101).

(2) If the acquisition is subject to the requirements of the Trade Agreements Act of 1979 (see part 25), Numbered Note 12 shall be referenced in the synopsis.

(3) If the synopsis is for a proposed contract action intended to be awarded on a sole source basis, the synopsis shall refer to Numbered Note 22. If it is anticipated that award will be made via a delivery order to an existing basic ordering agreement, the synopsis shall so state.

(f) *Information not covered by Numbered Notes.* To alert prospective contractors to information not covered by Numbered Notes, contracting officers should identify the following unusual circumstances in the synopsis:

(1) *Availability of specification, plans, drawing, or other technical data.* It is impracticable to distribute the applicable ———— [*insert 'specifications,' 'plans,' 'drawings,' or other appropriate words*] with the solicitation. These contract documents may be examined or obtained at ————

(2) *Availability of background research report.* This contract for basic research is a continuation of an effort conducted for the past ——— [*insert period*]. A research report containing findings to date is not available to the Government.

(3) *Production requirements.* The production of the supplies listed requires a substantial initial investment or an extended period of preparation for manufacture.

(4) *Place of performance unknown.* This contract is subject to the Service Contract Act and the place of performance is unknown. Wage determinations have been requested for (insert localities). The contracting officer will request wage determinations for additional localities if asked to do so in writing by (insert time and date).

(g) *Codes to be used in synopses to identify services or supplies.* (1) Contracting officers shall use one of the following classification codes when the contemplated contract action is for services or when the overall acquisition can best be described as services based upon value:

Code	Description
A	Experimental, developmental, test, and basic and applied research work.
H	Expert and consultant services.
J	Maintenance and repair of equipment.
K	Modification, alteration, and rebuilding of equipment.
L	Technical representative services (e.g., services of technical specialists required to assist with the installation, checking, operation, and maintenance of complex equipment).
M	Operation and maintenance of Government-owned facility.
N	Installation of equipment (use code K if the contract also involves modification, alteration, or rebuilding of the equipment).
O	Funeral and Chaplain services.
P	Salvage services (services required to salvage property of any kind).
Q	Medical services.
R	Architect-engineer services.
S	Housekeeping services; e.g.— Utilities (gas, electric, telephone, etc.); Laundry and dry cleaning; Custodial-janitorial; Insect and rodent control; Packing and crating;

Code	Description
	Storage;
	Garbage and trash collection;
	Food;
	Fueling;
	Fire protection;
	Building and grounds maintenance;
	Care of remains-funerals; and
	Guards.
T	Photographic, mapping, printing, and publication services; e.g.—
	Film processing;
	Cataloging;
	Charting;
	Reproduction;
	Technical writing;
	Art; and
	Printing.
U	Training.
V	Transportation services; e.g.—
	Passenger and cargo transportation;
	Vessel charter;
	Vessel operation;
	Tug service;
	Stevedoring;
	Vehicle hire; and
	Railway equipment charter.
W	Lease or rental, except transportation equipment; e.g.—
	Lease of ADP or EAM equipment; and
	Lease of earth-moving equipment.
X	Miscellaneous (includes all services not covered by any other code).
Y	Construction; i.e., new construction and major additions to existing buildings or facilities.
Z	Maintenance, repair, and alteration of real property; i.e. painting, building maintenance, alteration and repair, grounds maintenance and repair, roads maintenance and repair.

(2) Contracting officers shall use one of the following classification codes when the contemplated contract action is for supplies or when the overall acquisition can best be described as supplies based upon value:

Code	Description
10	Weapons.
11	Nuclear ordnance.
12	Fire control equipment.
13	Ammunition and explosives.
14	Guided missiles.
15	Aircraft and airframe structural components.
16	Aircraft components and accessories.
17	Aircraft launching, landing, and ground handling equipment.
18	Space vehicles.
19	Ships, small craft, pontoons, and floating docks.
20	Ship and marine equipment.
22	Railway equipment.
23	Motor vehicles, trailers, and cycles.
24	Tractors.
25	Vehicular equipment components.
26	Tires and tubes.
28	Engines, turbines, and components.
29	Engine accessories.
30	Mechanical power transmission equipment.
31	Bearings.
32	Woodworking machinery and equipment.
34	Metalworking machinery.
35	Service and trade equipment.
36	Special industry machinery.
37	Agricultural machinery and equipment.
38	Construction, mining, excavating, and highway maintenance equipment.
39	Materials handling equipment.
40	Rope, cable, chain, and fittings.
41	Refrigeration and air-conditioning equipment.
42	Fire fighting, rescue, and safety equipment.
43	Pumps and compressors.
44	Furnace, steam plant, and drying equipment and nuclear reactors.
45	Plumbing, heating, and sanitation equipment.
46	Water purification and sewage treatment equipment.
47	Pipe, tubing, hose, and fittings.
48	Valves.
49	Maintenance and repair shop equipment.
51	Hand tools.
52	Measuring tools.
53	Hardware and abrasives.
54	Prefabricated structures and scaffolding.
55	Lumber, millwork, plywood, and veneer.
56	Construction and building materials.
58	Communication equipment.
59	Electrical and electronic equipment components.
60	Fiber optics materials.
61	Electric wire, and power and distribution equipment.
62	Lighting fixtures and lamps.
63	Alarm and signal systems.
65	Medical, dental, and veterinary equipment and supplies.
66	Instruments and laboratory equipment.
67	Photographic equipment.
68	Chemicals and chemical products.
69	Training aids and devices.
70	General-purpose ADP equipment, software, supplies, and support equipment.
71	Furniture.
72	Household and commercial furnishings and appliances.
73	Food preparation and serving equipment.
74	Office machines.
75	Office supplies and devices.
76	Books, maps, and other publications.
77	Musical instruments, phonographs, and home-type radios.
78	Recreational and athletic equipment.
79	Cleaning equipment and supplies.
80	Brushes, paints, sealers, and adhesives.
81	Containers, packaging, and packing supplies.
83	Textiles, leather, furs, apparel and shoe findings, tents, and flags.
84	Clothing, individual equipment, and insignia.
85	Toiletries.
87	Agricultural supplies.
88	Live animals.
89	Subsistence.
91	Fuels, lubricants, oils, and waxes.
93	Nonmetallic fabricated materials.
94	Nonmetallic crude materials.
95	Metal bars, sheets, and shapes.
96	Ores, minerals, and their primary products.
99	Miscellaneous.

[48 FR 42119, Sept. 19, 1983, as amended at 50 FR 1729, Jan. 11, 1985; 50 FR 4221, Jan. 30, 1985; 50 FR 52430, Dec. 23, 1985; 51 FR

27117, July 29, 1986; 53 FR 17856, May 18, 1988; 54 FR 19813, May 8, 1989; 54 FR 25061, June 12, 1989]

Subpart 5.3—Synopses of Contract Awards

5.301 General.

(a) Except for contract actions described in paragraph (b) of this section, contracting officers shall synopsize in the Commerce Business Daily (CBD) awards exceeding $25,000 that (1) are subject to the Trade Agreements Act (see 25.402 and 25.403), or (2) are likely to result in the award of any subcontracts. However, the dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the Government.

(b) A notice is not required under paragraph (a) of this section if—

(1) The notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(2) The award results from acceptance of an unsolicited research proposal that demonstrates a unique and innovative research concept and publication of any notice would disclose the originality of thought or innovativeness of the proposed research or would disclose proprietary information associated with the proposal;

(3) The award results from a proposal submitted under the Small Business Innovation Development Act of 1982 (Pub. L. 97-219);

(4) The contract action is an order placed under a requirements contract;

(5) The award is made for perishable subsistence supplies; or

(6) The award is for utility services, other than telecommunications services, and only one source is available.

(c) With respect to acquisitions subject to the Trade Agreements Act, contracting officers shall submit synopses in sufficient time to permit their publication in the CBD not later than 60 days after award.

[52 FR 19802, May 27, 1987, as amended at 53 FR 27463, July 20, 1988]

5.302 Preparation and transmittal of synopses of awards.

Contracting officers shall—

(a) Transmit synopses of contract awards in the same manner as prescribed in 5.207; and

(b) Complete synopsis format items defined in section 5.207, as appropriate. Under format item 17, include as relevant the following:

(1) The following details of f.o.b. destination contracts, when total shipments from origin to destination will exceed 200,000 pounds, and destinations are firm:

(i) Origin point of shipment when different from the address of the contractor.

(ii) Continental United States destination of shipment.

(iii) Scheduled delivery period (beginning and ending dates).

(2) A statement of the industries, crafts, processes, or component items for which subcontractors are desired in a geographic area indicated by the contractor. This information shall be included when requested by the prime contractor.

[48 FR 42119, Sept. 19, 1983, as amended at 51 FR 27119, July 29, 1986]

5.303 Announcement of contract awards.

(a) *Public Announcement.* Contracting officers shall make information available on awards over $3 million (unless another dollar amount is specified in agency acquisition regulations) in sufficient time for the agency concerned to announce it by Washington, DC time on the day of award.Contracts excluded from this reporting requirement include those placed with (1) the Small Business Administration under section 8(a) of the Small Business Act, and (2) with foreign firms when the place of delivery or performance is outside the United States or its possessions. Agencies shall not release information on awards before the public release time of 4:00 p.m. Washington, DC time.

(b) *Local Announcement.* Agencies may also release information on contract awards to the local press or other media. When local announcements are made for contract awards in excess of the small purchase limitation in 13.000, they shall include—

(1) For awards after sealed bidding, a statement that the contract was awarded after competition by sealed bidding, the number of offers solicited and received, and the basis for selection (e.g., the lowest responsible bidder); or

(2) For awards after negotiation, the information prescribed by 15.1001(c), and after competitive negotiation (either price or design competition), a statement to this effect, and in general terms the basis for selection.

[48 FR 42119, Sept. 19, 1983, as amended at 50 FR 1729, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 52 FR 30076, Aug. 12, 1987; 55 FR 3881, Feb. 5, 1990]

Subpart 5.4—Release of Information

5.401 General.

(a) A high level of business security must be maintained in order to preserve the integrity of the acquisition process. When it is necessary to obtain information from potential contractors and others outside the Government for use in preparing Government estimates, contracting officers shall ensure that the information is not publicized or discussed with potential contractors.

(b) Contracting officers may make available maximum information to the public, except information—

(1) On plans that would provide undue or discriminatory advantage to private or personal interests;

(2) Received in confidence from an offeror;

(3) Otherwise requiring protection under Freedom of Information Act (see subpart 24.2) or Privacy Act (see subpart 24.1); or

(4) Pertaining to internal agency communications (e.g., technical reviews, contracting authority or other reasons, or recommendations referring thereto).

(c) This policy applies to all Government personnel who participate directly or indirectly in any stage of the acquisition cycle.

5.402 General public.

Contracting officers shall process requests for specific information from the general public, including suppliers, in accordance with subpart 24.1 or 24.2, as appropriate.

5.403 Requests from Members of Congress.

(a) *Individual requests.* Contracting officers shall give Members of Congress, upon their request, detailed information regarding any particular contract. When responsiveness would result in disclosure of classified matter, business confidential information, or information prejudicial to competitive acquisition, the contracting officer shall refer the proposed reply, with full documentation, to the agency head and inform the legislative liaison office of the action.

(b) *Inclusion on solicitation mailing lists.* Upon request of a Congressional Committee or Subcommittee Chairperson, contracting officers shall place any member of a Committee or Subcommittee on the applicable solicitation mailing lists to receive automatic distribution of solicitations in the specific area of interest.

[48 FR 42119, Sept. 19, 1983, as amended at 50 FR 1729, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

5.404 Release of long-range acquisition estimates.

To assist industry planning and to locate additional sources of supply, it may be desirable to publicize estimates of unclassified long-range acquisition requirements. Estimates may be publicized as far in advance as possible.

5.404-1 Release procedures.

(a) *Application.* The agency head, or a designee, may release long-range acquisition estimates if the information will—

(1) Assist industry in its planning and facilitate meeting the acquisition requirements;

(2) Not encourage undesirable practices (e.g., attempts to corner the market or hoard industrial materials); and

(3) Not indicate the existing or potential mobilization of the industry as a whole.

(b) *Conditions.* The agency head shall ensure that—

(1) Classified information is released through existing security channels in accordance with agency security regulations;

(2) The information is publicized as widely as practicable to all parties simultaneously by any of the means described in this part;

(3) Each release states that (i) the estimate is based on the best information available, (ii) the information is subject to modification and is in no way binding on the Government, and (iii) more specific information relating to any individual item or class of items will not be furnished until the proposed acquisition is synopsized in the CBD, or the solicitation is issued;

(4) Each release contains the name and address of the contracting officer that will process the acquisition;

(5) Modifications to the original release are publicized as soon as possible, in the same manner as the original; and

(6) Each release—

(i) Is coordinated in advance with small business, public information, and public relations personnel, as appropriate;

(ii) Contains, if applicable, a statement that small business or LSA set-asides may be involved, but that a determination can be made only when acquisition action is initiated; and

(iii) Contains the name or description of the item, and the estimated quantity to be acquired by calendar quarter, fiscal year, or other period. It may also contain such additional information as the number of units last acquired, the unit price, and the name of the last supplier.

5.404-2 Announcements of long-range acquisition estimates.

Further publication, consistent with the needs of the individual case, may be accomplished by announcing in the CBD that long-range acquisition estimates have been published and are obtainable, upon request, from the contracting officer.

5.405 Exchange of acquisition information.

(a) When the same item or class of items is being acquired by more than one agency, or by more than one contracting activity within an agency, the exchange and coordination of pertinent information, particularly cost and pricing data, between these agencies or contracting activities is necessary to promote uniformity of treatment of major issues and the resolution of particularly difficult or controversial issues. The exchange and coordination of information is particularly beneficial during the period of acquisition planning, presolicitation, evaluation, and pre-award survey.

(b) When substantial acquisitions of major items are involved or when the contracting activity deems it desirable, the contracting activity shall request appropriate information (on both the end item and on major subcontracted components) from other agencies or contracting activities responsible for acquiring similar items. Each agency or contracting activity receiving such a request shall furnish the information requested. The contracting officer, early in a negotiation of a contract, or in connection with the review of a subcontract, shall request the contractor to furnish information as to the contractor's or subcontractor's previous Government contracts and subcontracts for the same or similar end items and major subcontractor components.

Subpart 5.5—Paid Advertisements

5.501 Definitions.

Advertisement, as used in this subpart, means any single message prepared for placement in communication media, regardless of the number of placements.

Publication, as used in this subpart, means (a) the placement of an advertisement in a newspaper, magazine, trade or professional journal, or any other printed medium, or (b) the broadcasting of an advertisement over radio or television.

5.502 Authority.

(a) *Newspapers*. Authority to approve the publication of paid advertisements in newspapers is vested in the head of each agency (44 U.S.C. 3702). This approval authority may be delegated (5 U.S.C. 302 (b)). Contracting officers shall obtain written authorization in accordance with agency procedures before advertising in newspapers.

(b) *Other media.* Unless the agency head determines otherwise, advance written authorization is not required to place advertisements in media other than newspapers.

5.503 Procedures.

(a) *General.* Orders for paid advertisements may be placed directly with the media or through an advertising agency. Contracting officers shall give small and disadvantaged business concerns maximum opportunity to participate in these acquisitions.

(b) *Rates.* Advertisements may be paid for at rates not over the commercial rates charged private individuals, with the usual discounts (44 U.S.C. 3703).

(c) *Forms.* (1) When contracting directly with the media for advertising, contrating officers shall—

(i) Use Standard Form 26, Award/Contract, or Standard Form 1447, Solicitation/Contract, when the dollar amount of the acquisition exceeds the small purchase dollar limitations (see 13.000); or

(ii) Use Optional Form 347, Order for Supplies or Services, or an approved agency form, when the dollar amount of the acquisition does not exceed the small purchase dollar limitations (see 13.000).

(2) When issuing a delivery order under a basic ordering agreement with an advertising agency for advertising, contracting officers should use Optional Form 347, or an approved agency form.

(d) *Proof of advertising.* Every invoice for advertising shall be accompanied by a copy of the advertisement or n affidavit of publication furnished y the publisher, radio or television tation, or advertising agency conerned (44 U.S.C. 3703). Paying offices hall retain the proof of advertising ntil the General Accounting Office ettles the paying office's account.

(e) *Payment.* Upon receipt of an invoice supported by proof of advertisg, the contracting officer shall tach a copy of the written authority (see 5.502(a)) and submit the invoice for payment under agency procedures.

[48 FR 42119, Sept. 19, 1983, as amended at 54 FR 48982, Nov. 28, 1989]

5.504 Use of advertising agencies.

(a) *General.* Basic ordering agreements may be placed with advertising agencies for assistance in producing and placing advertisements when a significant number will be placed in several publications and in national media. Services of advertising agencies include, but are not limited to, counseling as to selection of the media for placement of the advertisement, contacting the media in the interest of the Government, placing orders, selecting and ordering typography, copywriting, and preparing rough layouts.

(b) *Use of commission-paying media.* The services of advertising agencies in placing advertising with media often can be obtained at no cost to the Government, over and above the space cost, as many media give advertising agencies a commission or discount on the space cost that is not given to the Government.

(c) *Use of noncommission-paying media.* Some media do not grant advertising agencies a commission or discount, meaning the Government can obtain the same rate as the advertising agency. If the advertising agency agrees to place advertisements in noncommission-paying media as a no-cost service, the basic ordering agreement shall so provide. If the advertising agency will not agree to place advertisements at no cost, the agreement shall (1) provide that the Government may place orders directly with the media, or (2) specify an amount that the Government will pay if the agency places the orders.

(d) *Art work, supplies, and incidentals.* The basic ordering agreement also may provide for the furnishing by the advertising agency of art work, supplies, and incidentals, including brochures and pamphlets, but not their printing. *Incidentals* may include telephone calls, telegrams, and postage incurred by the advertising agency on behalf of the Government.

PART 6—COMPETITION REQUIREMENTS

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Subpart 6.5—Competition Advocates

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6.502 Duties and responsibilities.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 50 FR 1729, Jan. 11, 1985 (interim rule), and 50 FR 52429, Dec. 23, 1985 (final rule), unless otherwise noted.

6.000 Scope of part.

This part prescribes policies and procedures to promote full and open competition in the acquisition process and to provide for full and open competition, full and open competition after exclusion of sources, other than full and open competition, and competition advocates. As used in this part, full and open competition is the process by which all responsible offerors are allowed to compete. This part does not deal with the results of competition (e.g., adequate price competition), which are addressed in other parts (e.g., part 15).

6.001 Applicability.

This part applies to all acquisitions except—

(a) Contracts awarded using the small purchase procedures of part 13;

(b) Contracts awarded using contracting procedures (other than those addressed in this part) that are expressly authorized by statute;

(c) Contract modifications that are within the scope and under the terms of an existing contract;

(d) Orders placed under requirements contracts or definite-quantity contracts; or

(e) Orders placed under indefinite-quantity contracts that were entered into pursuant to this part when—

(1) The contract was awarded under subpart 6.1 or 6.2 and all responsible sources were realistically permitted to compete for the requirements contained in the order; or

(2) The contract was awarded under subpart 6.3 and the required justification and approval adequately covers the requirements contained in the order.

[50 FR 52431, Dec. 23, 1985]

6.002 Limitations.

No agency shall contract for supplies or services from another agency for the purpose of avoiding the requirements of this part.

6.003 Definitions.

Full and open competition, when used with respect to a contract action, means that all responsible sources are permitted to compete.

Procuring activity, as used in this part, means a component of an executive agency having a significant acquisition function and designated as such by the head of the agency. Unless agency regulations specify otherwise, the term *procuring activity* shall be synonymous with *contracting activity* as defined in subpart 2.1.

Sole source acquisition means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and negotiating with only one source.

Unique and innovative concept, when used relative to an unsolicited research proposal, means that, in the opinion and to the knowledge of the Government evaluator, the meritorious proposal is the product of original thinking submitted in confidence by one source; contains new novel or changed concepts, approaches, or methods; was not submitted previously by another; and, is not otherwise available within the Federal Government. In this context, the term does not mean that the source has the sole capability of performing the research.

[50 FR 1729, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985, as amended at 53 FR 27463, July 20, 1988]

Subpart 6.1—Full and Open Competition

6.100 Scope of subpart.

This subpart prescribes the policy and procedures that are to be used to promote and provide for full and open competition.

6.101 Policy.

(a) 10 U.S.C. 2304 and 41 U.S.C. 253 require, with certain limited exceptions (see subparts 6.2 and 6.3), that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.

(b) Contracting officers shall provide for full and open competition through use of the competitive procedure or combination of competitive procedures contained in this subpart that is best suited to the circumstances of the contract action. Contracting officers must use good judgment in selecting the procedure that best meets the needs of the Government.

6.102 Use of competitive procedures.

The competitive procedures available for use in fulfilling the requirement for full and open competition are as follows:

(a) *Sealed bids*. (See 6.401(a).)

(b) *Competitive proposals*. (See 6.401(b).) If sealed bids are not appropriated under (a) above, contracting officers shall request competitive proposals or use the other competitive procedures under (c) or (d) below.

(c) *Combination of competitive procedures*. If sealed bids are not appropriate, contracting officers may use any combination of competitive procedures (e.g., two-step sealed bidding).

(d) *Other competitive procedures*. (1) Selection of sources for architect-engineer contracts in accordance with the provisions of Pub. L. 92-582 (40 U.S.C. 541 *et seq.*) is a competitive procedure (see subpart 36.6 for procedures).

(2) Competitive selection of basic and applied research and that part of development not related to the development of a specific system or hardware procurement is a competitive procedure if award results from—

(i) A broad agency announcement that is general in nature identifying areas of research interest, including criteria for selecting proposals, and soliciting the participation of all offerors capable of satisfying the Government's needs; and

(ii) A peer of scientific review.

(3) Use of multiple award schedules issued under the procedures established by the Administrator of General Services consistent with the requirement of 41 U.S.C. 259 (b)(3)(A) for the multiple award schedule program of the General Services Administration is a competitive procedure if ordering offices follow the procedures in 8.405-1 in placing orders under this program.

[50 FR 1729, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985, as amended at 53 FR 27463, July 20, 1988]

Subpart 6.2—Full and Open Competition After Exclusion of Sources

6.200 Scope of subpart.

This subpart prescribes policies and procedures for providing for full and open competition after excluding one or more sources.

6.201 Policy.

Acquisitions made under this subpart require use of the competitive procedures prescribed in 6.102 after agencies have excluded a source or sources from participation in a contract action under the circumstances described in 6.202 or 6.203 below.

6.202 Establishing or maintaining alternative sources.

(a) Agencies may exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would—

(1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition, of such supplies or services;

(2) Be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the supplies or services in case of a national emergency or industrial mobilization; or

(3) Be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

(b)(1) Every proposed contract action under the authority of paragraph (a) above shall be supported by a determination and findings (D&F) (see subpart 1.7) signed by the head of the agency or designee. This D&F shall not be made on a class basis.

(2) Technical and requirements personnel are responsible for providing all necessary data to support their recommendation to exclude a particular source.

(3) When the authority in (a)(1) above is cited, the findings shall include a description of the estimated reduction in overall costs and how the estimate was derived.

6.203 Set-asides for small business and labor surplus area concerns.

(a) To fulfill the statutory requirements relating to small business concerns and labor surplus area concerns, contracting officers may set aside solicitations to allow only such business concerns to compete. This includes contract actions conducted under the Small Business Innovation Research Program established under Pub. L. 97-219.

(b) No separate justification or determination and findings is required under this part to set aside a contract action for small business or labor surplus area concerns.

(c) Subpart 19.5 prescribes policies and procedures that shall be followed with respect to small business set-asides.

(d) Subpart 20.2 prescribes policies and procedures that shall be followed with respect to labor surplus area set-asides.

6.204 Section 8(a) competition.

(a) To fulfill statutory requirements relating to section 8(a) of the Small Business Act, as amended by Pub. L. 100-656, contracting officers may limit competition to eligible 8(a) contractors (see subpart 19.8).

(b) No separate justification or determination and findings is required under this part to limit competition to eligible 8(a) contractors.

[54 FR 46005, Oct. 31, 1989]

Subpart 6.3—Other Than Full and Open Competition

6.300 Scope of subpart.

This subpart prescribes policies and procedures, and identifies the statutory authorities, for contracting without providing for full and open competition.

6.301 Policy.

(a) 41 U.S.C. 253(c) and 10 U.S.C. 2304(c) each authorize, under certain conditions, contracting without providing for full and open competition. The Department of Defense, Coast Guard, and National Aeronautics and Space Administration are subject to 10 U.S.C. 2304(c). Other executive agencies are subject to 41 U.S.C. 253(c). Contracting without providing for full and open competition or full and open competition after exclusion of sources is a violation of statute, unless permitted by one of the exceptions in 6.302.

(b) Each contract awarded without providing for full and open competition shall contain a reference to the specific authority under which it was so awarded. Contracting officers shall use the U.S. Code citation applicable to their agency. (See 6.302.)

(c) Contracting without providing for full and open competition shall not be justified on the basis of (1) a lack of advance planning by the requiring activity or (2) concerns related to the amount of funds available (e.g., funds will expire) to the agency or activity for the acquisition of supplies or services.

(d) When not providing for full and open competition, the contracting officer shall solicit offers from as many potential sources as is practicable under the circumstances.

(e) For contracts under this subpart, the contracting officer shall use the contracting procedures prescribed in 6.102 (a) or (b), if appropriate, or any other procedures authorized by this regulation.

6.302 Circumstances permitting other than full and open competition.

The following statutory authorities (including applications and limitations) permit contracting without providing for full and open competition. Requirements for justifications to support the use of these authorities are in 6.303.

[50 FR 52431, Dec. 23, 1985]

6.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a) *Authority.* (1) Citations: 10 U.S.C. 2304(c)(1) or 41 U.S.C. 253(c)(1).

(2) When the supplies or services required by the agency are available from only one responsible source, or, for DoD, NASA, and the Coast Guard, from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements, full and open competiton need not be provided for.

(i) Supplies or services may be considered to be available from only one source if the source has submitted an unsolicited research proposal that:

(A) Demonstrates a unique and innovative concept, or, demonstrates a unique capability of the source to provide the particular research services proposed;

(B) Offers a concept or services not otherwise available to the Government; and

(C) Does not resemble the substance of a pending competitive acquisition. (See 10 U.S.C. 2304(d)(1)(A) and 41 U.S.C. 253(d)(1)(A).)

(ii) Supplies may be deemed to be available only from the original source in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in (A) substantial duplication of cost to the Government that is not expected to be recovered through competition, or (B) unacceptable delays in fulfilling the agency's requirements. (See 10 U.S.C. 2304(d)(1)(B) or 41 U.S.C. 253(d)(1)(B).)

(iii) For DoD, NASA, and the Coast Guard, services may be deemed to be available only from the original source in the case of follow-on contracts for the continued provision of highly specialized services when it is likely that award to any other source would result in (A) substantial duplication of cost to the Government that is not expected to be recovered through competition, or (B) unacceptable delays in fulfilling the agency's requirements. (See 10 U.S.C. 2304(d)(1)(B)).

(b) *Application.* This authority shall be used, if appropriate, in preference to the authority in 6.302-7; it shall not be used when any of the other circumstances is applicable. Use of this authority may be appropriate in situations such as the following (these examples are not intended to be all-inclusive and do not consitute authority in and of themselves):

(1) When there is a reasonable basis to conclude that the agency's minimum needs can only be satisfied by (i) unique supplies or services available from only one source or only one supplier with unique capabilities; or, (ii) for DoD, NASA, and the Coast Guard, unique supplies or services available from only one or a limited number of sources or from only one or a limited number of suppliers with unique capabilities.

(2) The existence of limited rights in data, patent rights, copyrights, or secret processes; the control of basic raw material; or similar circumstances, make the supplies and services available from only one source (however, the mere existence of such rights or circumstances does not in and of itself justify the use of these authorities) (see part 27).

(3) When acquiring electric power or energy, gas (natural or manufactured), water, or other utility services, circumstances may dictate that only one supplier can furnish the service (see 8.304-5(d)); or when the contemplated contract is for construction of a part of a utility system and the utility company itself is the only source available to work on the system.

(4) When the agency head has determined in accordance with the agency's standardization program that only specified makes and models of technical equipment and parts will satisfy the agency's needs for additional units or replacement items, and only one source is available.

(c) *Limitations.* (1) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304.

(2) For contracts awarded using this authority, the notices required by 5.201 shall have been published and any bids and proposals must have been considered. (See 15.402(g).)

[50 FR 52431, Dec. 23, 1985, as amended at 52 FR 21886, June 9, 1987; 53 FR 27463, July 20, 1988]

6.302-2 Unusual and compelling urgency.

(a) *Authority.* (1) Citations: 10 U.S.C. 2304(c)(2) or 41 U.S.C. 253(c)(2).

(2) When the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for.

(b) *Application.* This authority applies in those situations where (1) an unusual and compelling urgency precludes full and open competition, and (2) delay in award of a contract would result in serious injury, financial or other, to the Government.

(c) *Limitations.* (1) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304. These justifications may be made and approved after contract award when preparation and approval prior to award would unreasonably delay the acquisition.

(2) This statutory authority requires that agencies shall request offers from as many potential sources as is practicable under the circumstances.

[50 FR 52431, Dec. 23, 1985]

6.302-3 Industrial mobilization; or engineering, developmental, or research capability.

(a) *Authority.* (1) Citations: 10 U.S.C. 2304(c)(3) or 41 U.S.C. 253(c)(3).

(2) Full and open competition need not be provided for when it is necessary to award the contract to a particular source or sources in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization, or (ii) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

(b) *Application.* (1) Use of the authority in paragraph (a)(2)(i) above may be appropriate when it is necessary to—

(i) Keep vital facilities or suppliers in business or make them available in the event of a national emergency;

(ii) Train a selected supplier in the furnishing of critical supplies or serv-

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ices, prevent the loss of a supplier's ability and employees' skills, or maintain active engineering, research, or development work;

(iii) Maintain properly balanced sources of supply for meeting the requirements of acquisition programs in the interest of industrial mobilization (when the quantity required is substantially larger than the quantity that must be awarded in order to meet the objectives of this authority, that portion not required to meet such objectives will be acquired by providing for full and open competition as appropriate under this part);

(iv) Limit competition for current acquisition of selected supplies or servces approved for production planning under the Department of Defense Industrial Preparedness Program to planned producers with whom indusrial preparedness agreements for hose items exist, or limit award to oferors who agree to enter into indusrial preparedness agreements;

(v) Create or maintain the required domestic capability for production of ritical supplies by limiting competiion to items manufactured in the United States or the United States and Canada;

(vi) Continue in production, contracors that are manufacturing critical tems, where there would otherwise be break in production;

(vii) Divide current production reuirements among two or more conractors to provide for an adequate inustrial mobilization base; or

(viii) Acquire items covered by subart 8.2, Jewel Bearings and Related tems.

(2) Use of the authority in paraaph (a)(2)(ii) above may be approriate when it is necessary to—

(i) Establish or maintain an essential apability for theoretical analyses, exloratory studies, or experiments in ny field of science or technology;

(ii) Establish or maintain an essenal capability for engineering or develomental work calling for the practil application of investigative findgs and theories of a scientific or chnical nature; or

(iii) Contract for supplies or services are necessary incident to paraaphs (b)(2)(i) or (ii) above.

(c) *Limitations.* Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304.

[50 FR 52431, Dec. 23, 1985]

6.302-4 International agreement.

(a) *Authority.* (1) Citations: 10 U.S.C. 2304(c)(4) or 41 U.S.C. 253(c)(4).

(2) Full and open competition need not be provided for when precluded by the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government.

(b) *Application.* This authority may be used in circumstances such as—

(1) When a contemplated acquisition is to be reimbursed by a foreign country that requires that the product be obtained from a particular firm as specified in official written direction such as a Letter of Offer and Acceptance; or

(2) When a contemplated acquisition is for services to be performed, or supplies to be used, in the sovereign territory of another country and the terms of a treaty or agreement specify or limit the sources to be solicited.

(c) *Limitations.* Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304.

[50 FR 52432, Dec. 23, 1985]

6.302-5 Authorized or required by statute.

(a) *Authority.* (1) Citations: 10 U.S.C. 2304(c)(5) or 41 U.S.C. 253(c)(5).

(2) Full and open competition need not be provided for when (i) a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source, or (ii) the agency's need is for a brand name commercial item for authorized resale.

(b) *Application.* This authority may be used when statutes, such as the following, expressly authorize or require that acquisition be made from a specified source or through another agency:

(1) Federal Prison Industries (UNICOR)—18 U.S.C. 4124 (see subpart 8.6);

(2) Qualified Nonprofit Agencies for the Blind or other Severely Handicapped—41 U.S.C. 46-48c (see subpart 8.7);

(3) Government Printing and Binding—44 U.S.C. 501-504, 1121 (see subpart 8.8); or

(4) Sole source awards under the 8(a) Program—15 U.S.C. 637 (see subpart 19.8).

(c) *Limitations.* (1) The authority in paragraph (a)(2)(ii) above may be used only for purchases of brand-name commercial items for resale through commissaries or other similar facilities. Ordinarily, these purchases will involve articles desired or preferred by customers of the selling activities (but see 6.301(d)).

(2) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304, except for—

(i) Contracts awarded under (a)(2)(ii), (b)(2), or (b)(4) of this subsection; or

(ii) Contracts awarded under (a)(2)(i) of this subsection when the statute expressly requires that the procurement be made from a specified source. (Justification and approval requirements apply when the statute authorizes, but does not require, that the procurement be made from a specified source.)

[50 FR 52432, Dec. 23, 1985, as amended at 51 FR 36971, Oct. 16, 1986; 54 FR 46005, Oct. 31, 1989]

6.302-6 National security.

(a) *Authority.* (1) Citations: 10 U.S.C. 2304(c)(6) or 41 U.S.C. 253(c)(6).

(2) Full and open competition need not be provided for when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

(b) *Application.* This authority may be used for any acquisition when disclosure of the Government's needs would compromise the national security (e.g., would violate security requirements); it shall not be used merely because the acquisition is classified, or merely because access to classified matter will be necessary to submit a proposal or to perform the contract.

(c) *Limitations.* (1) Contracts awarded using this authority shall be supported by the written justifications and approvals described in 6.303 and 6.304.

(2) See 5.202(a)(1) for synopsis requirements.

(3) This statutory authority requires that agencies shall request offers from as many potential sources as is practicable under the circumstances.

[50 FR 52432, Dec. 23, 1985]

6.302-7 Public interest.

(a) *Authority.* (1) Citations: 10 U.S.C. 2304(c)(7) or 41 U.S.C. 253(c)(7).

(2) Full and open competition need not be provided for when the agency head determines that it is not in the public interest in the particular acquisition concerned.

(b) *Application.* This authority may be used when none of the other authorities in 6.302 apply.

(c) *Limitations.* (1) A written determination to use this authority shall be made in accordance with subpart 1.7, by (i) the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Transportation for the Coast Guard, or the Administrator of the National Aeronautics and Space Administration; or (ii) the head of any other executive agency. This authority may not be delegated.

(2) The Congress shall be notified in writing of such determination not less than 30 days before award of the contract.

(3) If required by the head of the agency, the contracting officer shall perpare a justification to support the determination under paragraph (c)(1) above.

(4) This Determination and Finding (D & F) shall not be made on a class basis.

[50 FR 52432, Dec. 23, 1985]

6.303 Justifications.

6.303-1 Requirements.

(a) A contracting officer shall not commence negotiations for a sole source contract, commence negotiations for a contract resulting from an unsolicited proposal, or award any other contract without providing for full and open competition unless the contracting officer—

(1) Justifies, if required in 6.302, the use of such actions in writing;

(2) Certifies the accuracy and completeness of the justification; and

(3) Obtains the approval required by 6.304.

(b) Technical and requirements personnel are responsible for providing and certifying as accurate and complete necessary data to support their recommendation for other than full and open competition.

(c) Justifications required by paragraph (a) above may be made on an individual or class basis. Any justification for contracts awarded under the authority of 6.302-7 shall only be made on an individual basis. Whenever a justification is made and approved on a class basis, the contracting officer must ensure that each contract action taken pursuant to the authority of the class justification and approval is within the scope of the class justification and approval and shall document the contract file for each contract action accordingly.

(d) Contract actions subject to the Agreement on Government Procurement (see subpart 25.4, Foreign Acquisition) may be made without providing for full and open competition only when permitted and justified pursuant to this subpart. If, in such a contract action, the authority of 6.302-3(a)(2)(i) or 6.302-7 is being cited as a basis for not providing for full and open competition, a copy of the justification shall also be forwarded, in accordance with agency procedures, to the agency's point of contact with the Office of the Unied States Trade Representative.

(e) The justifications for contracts awarded under the authority cited in 6.302-2 may be prepared and approved within a reasonable time after contract award when preparation and approval prior to award would unreasonably delay the acquisitions.

[50 FR 1729, Jan. 11, 1985, as amended at 50 FR 52433, Dec. 23, 1985; 55 FR 25526, June 21, 1990]

6.303-2 Content.

(a) Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification shall include the following information:

(1) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for other than full and open competition."

(2) Nature and/or description of the action being approved.

(3) A description of the supplies or services required to meet the agency's needs (including the estimated value).

(4) An identification of the statutory authority permitting other than full and open competition.

(5) A demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited.

(6) A description of efforts made to ensure that offers are solicited from as many potential sources as is practicable, including whether a CBD notice was or will be publicized as required by subpart 5.2 and, if not, which exception under 5.202 applies.

(7) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(8) A description of the market survey conducted (see 7.101) and the results or a statement of the reasons a market survey was not conducted.

(9) Any other facts supporting the use of other than full and open competition, such as:

(i) Explanation of why technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition have not been developed or are not available.

(ii) When 6.302-1 is cited for follow-on acquisitions as described in 6.302-1(a)(2)(ii), an estimate of the cost to the Government that would be duplicated and how the estimate was derived.

(iii) When 6.302-2 is cited, data, estimated cost, or other rationale as to the extent and nature of the harm to the Government.

(10) A listing of the sources, if any, that expressed, in writing, an interest in the acquisition.

(11) A statement of the actions, if any, the agency may take to remove or overcome any barriers to competition before any subsequent acquisition for the supplies or services required.

(12) Contracting officer certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(b) Each justification shall include evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government's minimum needs or schedule requirements or other rationale for other than full and open competition) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

[50 FR 1729, Jan. 11, 1985, as amended at 50 FR 52433, Dec. 23, 1985]

6.304 Approval of the justification.

(a) Except for paragraph (b) of this section, the justification for other than full and open competition shall be approved in writing—

(1) For a proposed contract not exceeding $100,000, the contracting officer's certification required by 6.303-2(a)(12) will serve as approval unless a higher approving level is established in agency procedures.

(i) Contracts under the authority cited in 6.302-4 or 6.302-5;

(ii) Contracts for electric power or energy, gas (natural or manufactured), water, or other utility services when such services are available from only one source;

(iii) Contracts for educational services from nonprofit institutions; or

(iv) Contracts not exceeding $25,000.

(2) For a proposed contract over $100,000 but not exceeding $1,000,000, by the competition advocate for the procuring activity designated pursuant to 6.501. This authority is not delegable.

(3) For a proposed contract over $1,000,000 but not exceeding $10,000,000, by the head of the procuring activity, or a designee who—

(i) If a member of the armed forces, is a general or flag officer; or

(ii) If a civilian, is serving in a position in grade GS 16 or above under the General Schedule (or in a comparable or higher position under another schedule).

(4) For a proposed contract over $10,000,000, by the senior procurement executive of the agency designated pursuant to the OFPP Act (41 U.S.C. 414(3)) in accordance with agency procedures. Except as provided in 10 U.S.C. 2304(f)(1)(B)(iii), which applies to the Department of Defense, this authority is not delegable.

(b) Any justification for a contract awarded under the authority of 6.302-7, regardless of dollar amount, shall be considered approved when the determination required by 6.302-7(c)(1) is made.

(c) A class justification for other than full and open competition shall be approved in writing in accordance with agency procedures. The approval level shall be determined by the estimated total value of the class.

(d) The estimated dollar value of all options shall be included in determining the approval level of a justification.

[50 FR 1729, Jan. 11, 1985, as amended at 50 FR 52433, Dec. 23, 1985; 54 FR 13023, Mar. 29, 1989; 55 FR 3881, Feb. 5, 1990]

6.305 Availability of the justification.

(1) The justification required by 6.303-1 and any related information shall be made available for public inspection as required by 10 U.S.C. 2304(f)(4) and 41 U.S.C. 303(f)(4). Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552)

in determining whether other data should be removed.

(2) If a Freedom of Information request is received, contracting officers shall comply with subpart 24.2.

Subpart 6.4—Sealed Bidding and Competitive Proposals

6.401 Sealed bidding and competitive proposals.

Sealed bidding and competitive proposals, as described in parts 14 and 15, are both acceptable procedures for use under subparts 6.1, 6.2, and when appropriate, under subpart 6.3. Contracting officers shall exercise good judgment in selecting the method of contracting that best meets the needs of the Government. If the choice is to use competitive proposals rather than sealed bidding, the contracting officer shall briefly explain, in writing, which of the four conditions in paragraph (a) of this section has not been met. No additional documentation or justification is required.

(a) *Sealed bids.* (See part 14 for procedures.) Contracting officers shall solicit sealed bids if—

(1) Time permits the solicitation, submission, and evaluation of sealed bids;

(2) The award will be made on the basis of price and other price-related factors;

(3) It is not necessary to conduct discussions with the responding offerors about their bids; and

(4) There is reasonable expectation of receiving more than one sealed bid.

(b) *Competitive proposals.* (See part 15 for procedures.)

(1) Contracting officers may request competitive proposals if sealed bids are not appropriate under paragraph (a) above.

(2) Because of differences in areas such as law, regulations, and business practices, it is generally necessary to conduct discussions with offerors relative to proposed contracts to be made and performed outside the United States, it possessions, or Puerto Rico. Competitive proposals will therefore be used for these contracts unless discussions are not required and the use of sealed bids is otherwise appropriate.

[50 FR 1729, Jan. 11, 1985; 50 FR 4221, Jan. 30, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989]

Subpart 6.5—Competition Advocates

6.501 Requirement.

As required by section 20 of the Office of Federal Procurement Policy Act, the head of each executive agency shall designate a competition advocate for the agency and for each procuring activity of the agency. The competition advocates shall—

(a) Be in positions other than that of the agency senior procurement executive;

(b) Not be assigned any duties or responsibilities that are inconsistent with 6.502 below; and

(c) Be provided with staff or assistance (e.g., specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns), as may be necessary to carry out the advocate's duties and responsibilities.

6.502 Duties and responsibilities.

(a) Agency competition advocates shall—

(1) Be responsible for challenging barriers to and promoting full and open competition in the acquisition of supplies and services by the agency;

(2) Review the contracting operations of the agency and identify and report to the agency senior procurement executive—

(i) Opportunities and actions taken to achieve full and open competition in the contracting operations of the agency; and

(ii) Any condition or action that has the effect of unnecessarily restricting competition in the contract actions of the agency.

(3) Prepare and submit an annual report to the agency senior procurement executive, in accordance with agency procedures, describing—

(i) Such advocate's activities under this subpart;

(ii) New initiatives required to increase competition;

(iii) Any barriers to full and open competition that remain; and

(iv) Other ways in which the agency has emphasized competition in areas such as acquisition training and research.

(4) Recommend to the senior procurement executive of the agency goals and plans for increasing competition on a fiscal year basis; and

(5) Recommend to the senior procurement executive of the agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in acquisition.

(b) Procuring activity competition advocates designated pursuant to 6.501 shall be responsible for—

(1) Promoting full and open competition in the procuring activity; and

(2) Challenging barriers to such competition, including unnecessarily detailed specifications and unnecessarily restrictive statements of need.

PART 7—ACQUISITION PLANNING

Sec.

7.000 Scope of part.

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42124, Sept. 19, 1983, unless otherwise noted.

7.000 Scope of part.

This part prescribes policies and procedures for—

(a) Developing acquisition plans;

(b) Determining whether to use commercial or Government resources for acquisition of supplies or services; and

(c) Deciding whether it is more economical to lease equipment rather than purchase it.

Subpart 7.1—Acquisition Plans

7.101 Definitions.

Acquisition planning means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.

Acquisition streamlining, as used in this subpart means any effort that results in more efficient and effective use of resources to design and develop, or produce quality systems. This includes ensuring that only necessary and cost-effective requirements are included, at the most appropriate time in the acquisition cycle, in solicitations and resulting contracts for the design, development, and production of new systems, or for modifications to existing systems that involve redesign of systems or subsystems.

Design-to-cost is a concept that establishes cost elements as management goals to achieve the best balance between life-cycle cost, acceptable performance, and schedule. Under this concept, cost is a design constraint during the design and development phases and a management discipline throughout the acquisition and operation of the system or equipment.

Life-cycle cost means the total cost to the Government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired.

Market survey means attempts to ascertain whether other qualified sources capable of satisfying the Government's requirement exist. This testing of the marketplace may range from written or telephone contacts with knowledgeable federal and nonfederal experts regarding similar or duplicate requirements, and the results of any market test recently undertaken, to the more formal sources-sought announcements in pertinent publications (e.g., technical/scientific journals, or the Commerce Business Daily), or solicitations for information or planning purposes. (See 15.405)

Planner, as used in this subpart, means the designated person or office responsible for developing and maintaining a written plan, or for the planning function in those acquisitions not requiring a written plan.

[48 FR 42124, Sept. 19, 1983, as amended at 50 FR 1735, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 34226, Sept. 2, 1988]

7.102 Policy.

Agencies shall perform acquisition planning and conduct market surveys for all acquisitions in order to promote and provide for full and open competition (see part 6), or, when full and open competition is not required in accordance with part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies and services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253A(a)(1)). This planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. The purpose of this planning is to ensure that the Government meets its needs in the most effective, economical, and timely manner. Agencies that have a detailed acquisition planning system in place that generally meets the requirements of 7.104 and 7.105 need not revise their system to specifically meet all of these requirements.

[50 FR 52433, Dec. 23, 1985]

7.103 Agency-head responsibilities.

The agency head or a designee shall prescribe procedures for—

(a) Ensuring that in no case is a contract entered into without full and open competition on the basis of a lack of acquisition planning or concerns related to the amount of funds available to the agency for acquisitions (10 U.S.C. 2304(f)(5) and 41 U.S.C. 253(f)(5)(A)).

(b) Ensuring that acquisition planners address the requirement to specify needs, develop specifications, and to solicit offers in such a manner to promote and provide for full and open competition with due regard to the nature of the supplies and services to be acquired (10 U.S.C. 2305(a)(1)(A) and 41 U.S.C. 253A(a)(1)). (See part 6 and 10.002.)

(c) Establishing criteria and thresholds at which increasingly greater detail and formality in the planning process is required as the acquisition becomes more complex and costly, specifying those cases in which a written plan shall be prepared;

(d) Writing plans either on a system basis or on an individual contract basis, depending upon the acquisition;

(e) Ensuring that the principles of this subpart are used, as appropriate, for those acquisitions that do not require a written plan as well as for those that do;

(f) Designating planners for acquisitions;

(g) Reviewing and approving acquisition plans and revisions to these plans;

(h) Establishing criteria and thresholds at which design-to-cost and life-cycle-cost techniques will be used;

(i) Establishing standard acquisition plan formats, if desired, suitable to agency needs; and

(j) Waiving requirements of detail and formality, as necessary, in planning for acquisitions having compressed delivery or performance schedules because of the urgency of the need.

(k) Assuring that the contracting officer, prior to contracting, reviews:

(1) The acquisition history of the supplies and services; and

(2) A description of the supplies, including, when necessary for adequate description, a picture, drawing, diagram, or other graphic representation.

[48 FR 42124, Sept. 19, 1983, as amended at 50 FR 1735, Jan. 11, 1985; 50 FR 27561, July 3, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 27116, July 29, 1986]

7.104 General procedures.

(a) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of the fiscal year in which contract award is necessary. In developing the plan, the planner shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel. The planner should review previous plans for similar acquisitions and discuss them with the key personnel involved in those acquisitions. At key dates specified in the plan or whenever significant changes occur, and no less often than annually, the planner shall review the plan and, if appropriate, revise it.

(b) Requirements and logistics personnel should avoid issuing requirements on an urgent basis or with unrealistic delivery or performance schedules, since it generally restricts competition and increases prices. Early in the planning process, the planner should consult requirements and logistics personnel who determine type, quality, quantity, and delivery requirements.

(c) The planner shall coordinate with and secure the concurrence of the contracting officer in all acquisition planning. If the plan proposes using other than full and open competition, the plan shall also be coordinated with the cognizant competition advocate.

[48 FR 42124, Sept. 19, 1983, as amended at 50 FR 1735, Jan. 11, 1985; 50 FR 52433, Dec. 23, 1985]

7.105 Contents of written acquisition plans.

In order to facilitate attainment of the acquisition objectives, the plan must identify those milestones at which decisions should be made (see subparagraph (b)(19) below). The plan shall address all the technical, business, management, and other significant considerations that will control the acquisition. The specific content of plans will vary, depending on the nature, circumstances, and stage of the acquisition. In preparing the plan, the planner shall follow the applicable instructions in paragraphs (a) and (b) below, together with the agency's implementing procedures.

(a) *Acquisition background and objectives*—(1) *Statement of need.* Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives and any related in-house effort.

(2) *Applicable conditions.* State all significant conditions affecting the acquisition, such as (i) requirements for compatibility with existing or future systems or programs and (ii) any known cost, schedule, and capability or performance constraints.

(3) *Cost.* Set forth the established cost goals for the acquisition and the rationale supporting them, and discuss related cost concepts to be employed, including, as appropriate, the following items:

(i) *Life-cycle cost.* Discuss how life-cycle cost will be considered. If it is not used, explain why. If appropriate, discuss the cost model used to develop life-cycle-cost estimates.

(ii) *Design-to-cost.* Describe the design-to-cost objective(s) and underlying assumptions, including the rationale for quantity, learning-curve, and economic adjustment factors. Describe how objectives are to be applied, tracked, and enforced. Indicate specific related solicitation and contractual requirements to be imposed.

(iii) *Application of should-cost.* Describe the application of should-cost analysis to the acquisition (see 15.810).

(4) *Capability or performance.* Specify the required capabilities or performance characteristics of the supplies or services being acquired and state how they are related to the need.

(5) *Delivery or performance-period requirements.* Describe the basis for establishing delivery or performance-period requirements (see subpart 12.1).

Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing for full and open competition.

(6) *Trade-offs.* Discuss the expected consequences of trade-offs among the various cost, capability or performance, and schedule goals.

(7) *Risks.* Discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals. If concurrency of development and production is planned, discuss its effects on cost and schedule risks.

(8) *Acquisition streamlining.* If specifically designated by the requiring agency as a program subject to acquisition streamlining, discuss plans and procedures to:

(i) Encourage industry participation by using draft solicitations, presolicitation conferences, and other means of stimulating industry involvement during design and development in recommending the most appropriate application and tailoring of contract requirements;

(ii) Select and tailor only the necessary and cost-effective requirements; and

(iii) State the timeframe for identifying which of those specifications and standards, originally provided for guidance only, shall become mandatory (see 10.002(c)).

(b) *Plan of action.* (1) *Sources.* Indicate the prospective sources of supplies and/or services that can meet the need. Consider required sources of supplies and services (see part 8). Include consideration of small business, small disadvantaged business, and labor surplus area concerns (see parts 19 and 20). If the acquisition or a part of it is for commercial or commercial-type products (see part 11), address the results of market research and analysis and indicate their impact on the various elements of the plan. If the acquisition or part of it is for other than commercial or commercial-type products, address the extent and results of the market survey conducted or the reasons one was not or will not be conducted.

(2) *Competition.* (i) Describe how competition will be sought, promoted, and sustained throughout the course of the acquisition. If full and open competition is not contemplated cite the authority in 6.302, discuss the basis for the application of that authority, identify the source(s), and discuss why full and open competition cannot be obtained.

(ii) Identify the major components or subsystems. Discuss component breakout plans relative to these major components or subsystems. Describe how competition will be sought, promoted, and sustained for these components or subsystems.

(iii) Describe how competition will be sought, promoted, and sustained for spares and repair parts. Identify the key logistic milestones, such as technical data delivery schedules and acquisition method coding conferences, that affect competition.

(iv) When effective subcontract competition is both feasible and desirable, describe how such subcontract competition will be sought, promoted, and sustained throughout the course of the acquisition. Identify any known barriers to increasing subcontract competition and address how to overcome them.

(3) *Source-selection procedures.* Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives (see subpart 15.6).

(4) *Contracting considerations.* For each contract contemplated, discuss contract type selection (see part 16); use of multiyear contracting, options, or other special contracting methods (see part 17); any special clauses, special solicitation provisions, or FAR deviations required (see subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (see subpart 7.4) and why; and any other contracting considerations.

(5) *Budgeting and funding.* Describe how budget estimates were derived and discuss the schedule for obtaining adequate funds at the time when they are required (see subpart 32.7).

(6) *Product descriptions.* In accordance with part 10, explain the choice of product description types to be used in the acquisition.

(7) *Priorities, allocations, and allotments.* When urgency of the requirement dictates a particularly short delivery or performance schedule, certain priorities may apply. If so, specify the method for obtaining and using priorities, allocations, and allotments, and the reasons for them (see subpart 12.3).

(8) *Contractor versus Government performance.* Address the consideration given to OMB Circular No. A-76 (see subpart 7.3).

(9) *Management information requirements.* Discuss, as appropriate, what management system will be used by the Government to monitor the contractor's effort.

(10) *Make or buy.* Discuss any consideration given to make-or-buy programs (see subpart 15.7).

(11) *Test and evaluation.* To the extent applicable, describe the test program of the contractor and the Government. Describe the test program for each major phase of a major system acquisition. If concurrency is planned, discuss the extent of testing to be accomplished before production release.

(12) *Logistics considerations.* Describe—

(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing (see subpart 7.3) and distribution of commercial products (see part 11);

(ii) The reliability, maintainability, and quality assurance requirements, including any planned use of warranties (see part 46); and

(iii) The requirements for contractor data (including repurchase data) and data rights, their estimated cost, and the use to be made of the data (see part 27).

(iv) Standardization concepts, including the necessity to designate, in accordance with agency procedures, technical equipment as *standard* so that future purchases of the equipment can be made from the same manufacturing source.

(13) *Government-furnished property.* Indicate any property to be furnished to contractors, including material and facilities, and discuss any associated considerations, such as its availability or the schedule for its acquisition (see part 45).

(14) *Government-furnished information.* Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors.

(15) *Environmental considerations.* Discuss environmental issues associated with the acquisition, the applicability of an environmental assessment or environmental impact statement (see 40 CFR part 1502), the proposed resolution of environmental issues, and any environment-related requirements to be included in solicitations and contracts.

(16) *Security considerations.* For acquisitions dealing with classified matters, discuss how adequate security will be established, maintained, and monitored (see subpart 4.4).

(17) *Other considerations.* Discuss, as applicable, energy conservation measures, standardization concepts, the industrial readiness program, the Defense Production Act, the Occupational Safety and Health Act, foreign sales implications, and any other matters germane to the plan not covered elsewhere.

(18) *Milestones for the acquisition cycle.* Address the following steps and any others appropriate:

Acquisition plan approval.

Statement of work.

Specifications.

Data requirements.

Completion of acquisition-package preparation.

Purchase request.

Justification and approval for other than full and open competition where applicable and/or any required D&F approval.

Issuance of synopsis.

Issuance of solicitation.

Evaluations of proposals, audits, and field reports.

Beginning and completion of negotiations.

Contract preparation, review, and clearance.

Contract award.

i9) *Identification of participants in*
uisition plan preparation. List the
ividuals who participated in prepar-
the acquisition plan, giving contact
ormation for each.

FR 42124, Sept. 19, 1983, as amended at
R 1735, Jan. 11, 1985; 50 FR 52429, Dec.
1985, and 51 FR 27116, July 29, 1986; 53
17856, May 18, 1988; 53 FR 34226, Sept.
988]

4 Additional requirements for major
systems.

) In planning for the solicitation of
ajor system (see part 34) develop-
nt contract, planners shall consider
uiring offerors to include, in their
ers, proposals to incorporate in the
ign of a major system—
) Items which are currently avail-
within the supply system of the
ncy responsible for the major
tem, available elsewhere in the na-
al supply system, or commercially
ilable from more than one source;

) Items which the Government will
ble to acquire competitively in the
ure if they are likely to be needed
substantial quantities during the
tem's service life.
) In planning for the solicitation of
ajor system (see part 34) produc-
contract, planners shall consider
uiring offerors to include, in their
ers, proposals identifying opportu-
es to assure that the Government
be able to obtain, on a competitive
s, items acquired in connection
the system that are likely to be
uired in substantial quantities
ing the service life of the system.
posals submitted in response to
requirements may include the
owing:
) Proposals to provide the Govern-
t the right to use technical data to
provided under the contract for
petitive future acquisitions, to-
er with the cost to the Govern-
t, if any, of acquiring such techni-
data and the right to use such

) Proposals for the qualification or
lopment of multiple sources of
ly for competitive future acquisi-

) In determining whether to apply
graphs (a) and (b) above, planners

shall consider the purposes for which the system is being acquired and the technology necessary to meet the system's required capabilities. If such proposals are required, the contracting officer shall consider them in evaluating competing offers. In noncompetitive awards, the factors in paragraphs (a) and (b) above, may be considered by the contracting officer as objectives in negotiating the contract.

[50 FR 27561, July 3, 1985 and 51 FR 27116, July 29, 1986]

Subpart 7.2—Planning for the Purchase of Supplies in Economic Quantities

SOURCE: 50 FR 35475, Aug. 30, 1985, unless otherwise noted.

7.200 Scope of subpart.

This subpart prescribes policies and procedures for gathering information from offerors to assist the Government in planning the most advantageous quantities in which supplies should be purchased.

7.201 [Reserved]

7.202 Policy.

(a) Agencies are required by 10 U.S.C. 2384(a) and 41 U.S.C. 253(f) to procure supplies in such quantity as (1) will result in the total cost and unit cost most advantageous to the Government, where practicable, and (2) does not exceed the quantity reasonably expected to be required by the agency.

(b) Each solicitation for a contract for supplies is required, if practicable, to include a provision inviting each offeror responding to the solicitation (1) to state an opinion on whether the quantity of the supplies proposed to be acquired is economically advantageous to the Government, and (2) if applicable, to recommend a quantity or quantities which would be more economically advantageous to the Government. Each such recommendation is required to include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

7.203 Solicitation provision.

Contracting officers shall insert the provision at 52.207-4, Economic Purchase Quantity—Supplies, in solicitations for supplies. The provision need not be inserted if the solicitation is for a contract under the General Services Administration's multiple award schedule contract program, or if the contracting officer determines that (a) the Government already has the data, (b) the data is otherwise readily available, or (c) it is impracticable for the Government to vary its future requirements.

[52 FR 30076, Aug. 12, 1987]

7.204 Responsibilities of contracting officers.

(a) Contracting officers are responsible for transmitting offeror responses to the solicitation provision at 52.207-4 to appropriate inventory management/requirements development activities in accordance with agency procedures. The economic purchase quantity data so obtained are intended to assist inventory managers in establishing and evaluating economic order quantities for supplies under their cognizance.

(b) In recognition of the fact that economic purchase quantity data furnished by offerors are only one of many data inputs required for determining the most economical order quantities, contracting officers should generally take no action to revise quantities to be acquired in connection with the instant procurement. However, if a significant price variation is evident from offeror responses, and the potential for significant savings is apparent, the contracting officer shall consult with the cognizant inventory manager or requirements development activity before proceeding with an award or negotiations. If this consultation discloses that the Government should be ordering an item of supply in different quantities and the inventory manager/requirements development activity concurs, the solicitation for the item should be amended or canceled and a new requisition should be obtained.

Subpart 7.3—Contractor Versus Government Performance

7.300 Scope of subpart.

This subpart prescribes policies and procedures for use in acquisitions of commercial or industrial products and services subject to (a) OMB Circular No. A-76 (the Circular), Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government, and (b) the Supplement to OMB Circular No. A-76.

[48 FR 42124, Sept. 19, 1983, as amended at 55 FR 25526, June 21, 1990]

7.301 Policy.

The Circular provides that it is the policy of the Government to (a) rely generally on private commercial sources for supplies and services, if certain criteria are met, while recognizing that some functions are inherently Governmental and must be performed by Government personnel, and (b) give appropriate consideration to relative cost in deciding between Government performance and performance under contract. In comparing the costs of Government and contractor performance, the Circular provides that agencies shall base the contractor's cost of performance on firm offers.

7.302 General.

The Circular and the Supplement—

(a) Prescribe the overall policies and detailed procedures required of all agencies in making cost comparisons between contractor and Government performance. In making cost comparisons, agencies shall—

(1) Prepare an estimate of the cost of Government performance based on the same work statement and level of performance as apply to offerors; and

(2) Compare the total cost of Government performance to the total cost of contracting with the potentially successful offeror.

(b) Provide that solicitations and synopses of the solicitations issued to obtain offers for comparison purposes shall state that they will not result in a contract if Government performance is determined to be more advanta-

s (see the solicitation provisions
.207-1 and 52.207-2);
Provide that each cost compari-
hall be reviewed by an activity in-
ndent of the activity which pre-
l the cost analysis to ensure con-
ance with the instructions in the
lement; and
Provide that, ordinarily, agencies
ld not incur the delay and ex-
e of conducting cost comparison
es to justify a Government com-
ial or industrial activity involving
fewer full-time equivalents as de-
in OMB Circular No. A-76. Ac-
es below this threshold should be
rmed by contract unless in-house
rmance is justified. However, if
is reason to believe that inad-
te competition or other factors
causing commercial prices to be
asonable, a cost comparison study
be conducted.

R 35475, Aug. 30, 1985, as amended at
17856, May 18, 1988; 55 FR 25526,
21, 1990]

**Determining availability of private
ommercial sources.**

During acquisition planning re-
, contracting officers shall assist
dentifying private commercial
es.
In making all reasonable efforts
entify such sources, the contract-
fficer shall assist in—
Synopsizing the requirement in
Commercial Business Daily until a
nable number of potential
es are identified. If necessary,
osis shall be submitted at least
times in a 90-day period with a
num of 30 days between notices,
when necessary to meet an
t requirement, this notification
be limited to a total of two no-
in a 30-day period with a mini-
of 15 days between them). If suf-
t sources are not identified
gh synopses or from subpara-
(b)(2) of this section, a finding
no commercial source is available
e made and the cost comparison
led; and
Requesting assistance from the
Business Administration, the
tment of Commerce, and the
al Services Administration.

[48 FR 42124, Sept. 19, 1983, as amended at 55 FR 25526, June 21, 1990]

7.304 Procedures.

(a) *Work statement.* When private commercial sources are available and a cost comparison is required, the Government's functional managers responsible for the comparison or another group shall prepare a comprehensive, performance work statement. The work statement must—

(1) Accurately reflect the actual Government requirement, stating adequately *what* is to be done without prescribing *how* it is to be done;

(2) Include performance standards that can be used to ensure a comparable level of performance for both Government and contractor and a common basis for evaluation; and

(3) Be reviewed by the contracting officer to ensure that it is adequate and appropriate to serve as a basis for solicitation and award.

(b) *Cost estimate.* The agency personnel who develop the cost estimate for Government performance—

(1) Enter on a cost-comparison form (see Part IV of the Supplement) the cost estimate and the other elements required to accomplish a cost comparison;

(2) Review the estimate for completeness and accuracy and have the estimate audited; and

(3) Submit to the contracting officer the completed form and all necessary detailed supporting data in a sealed, dated envelope not later than the time established for receipt of initial proposals or bid opening. If more time is needed to develop the Government's cost estimate, the contracting officer shall amend the opening date of the solicitation.

(c) *Solicitation.* (1) The contracting officer shall issue a solicitation based on the work statement prepared in accordance with paragraph (a) above. Prepriced option prices in existing contracts will not be used instead of issuing a new solicitation when conducting a cost comparison under a new start.

(2) Firm offers shall be required for the period covered by the cost comparison, by using (i) a base contract period and any applicable priced op-

tions to total the amount of time represented by the cost estimate for Government performance (see subpart 17.2), or (ii) a multiyear contract when appropriate (see subpart 17.1).

(3) Solicitations shall not, unless a proper determination to the contrary is made, limit award to U.S. offerors.

(d) *Integrity of cost comparison.* (1) The confidentiality of (i) the cost estimate for Government performance and (ii) the bids in sealed bid cost comparisons shall be maintained until the time of bid opening, to ensure that they are completely independent.

(2) For cost comparisons conducted using the results of negotiation procedures, confidentiality and independence shall be maintained until after negotiations are completed and the most advantageous offer has been selected.

(3) Personnel who have knowledge of the cost figures in the cost estimate for Government performance shall not participate in the offer-evaluation process unless the contract file is adequately documented to show that no other qualified personnel were available.

[48 FR 42124, Sept. 19, 1983, as amended at 50 FR 1735, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 25526, June 21, 1990]

7.305 Solicitation provisions and contract clause.

(a) The contracting officer shall, when contracting by sealed bidding, insert in solicitations issued for the purpose of comparing the costs of contractor and Government performance the provision at 52.207-1, Notice of Cost Comparison (Sealed-Bid).

(b) The contracting officer shall, when contracting by negotiation, insert in requests for proposals issued for the purpose of comparing the costs of contractor and Government performance the provision at 52.207-2, Notice of Cost Comparison (Negotiated).

(c) The contracting officer shall insert the clause at 52.207-3, Right of First Refusal of Employment, in all solicitations which may result in a conversion from in-house performance to contract performance of work currently being performed by the Government and in contracts that result from the solicitations, whether or not a cost comparison is conducted.

[48 FR 42124, Sept. 19, 1983, as amended at 50 FR 1735, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 52 FR 9037, Mar. 20, 1987]

7.306 Evaluation.

The evaluation procedure to be followed after the contracting officer receives the cost estimate for Government performance (see 7.304(b)) and the responses to the solicitation differs from conventional contracting procedures as follows:

(a) *Sealed bidding.* (1) At the public bid opening, after recording of bids, the contracting officer shall—

(i) Open the sealed envelope containing the cost-comparison form on which the cost estimate for Government performance has been entered;

(ii) Enter on the cost-comparison form the price of the apparent low bidder;

(iii) Announce the result, based on the initial cost-comparison form, stating that this result is subject to required agency processing, including evaluation for responsiveness and responsibility, completion and audit of the cost-comparison form (see Supplement, Part IV, Illustration 1), and resolution of any requests for review under the appeals procedure (see 7.307);

(iv) State that no final determination for performance by the Government or under contract will be made during the public review period specified in the solicitation (at least 15 working days, up to a maximum of 30 working days if the contracting officer considers the action to be complex; the public review period begins when the documents identified in (v) below are available to interested parties), plus any additional time required for the appeals procedure; and

(v) Make available for this public review by interested parties the abstract of bids, completed cost-comparison form, and detailed data supporting the cost estimate for Government performance.

(2) After evaluation of bids (see subpart 14.4) and determinations of responsibility, the contracting officer shall provide the price of the low re-

sponsive, responsible bidder to the preparer of the cost estimate for Government performance, for final Government review of the cost-comparison form.

(3) Upon completion of the review process, including resolution of any request under 7.307, the responsible agency official shall make the final determination for performance by the Government or under contract and provide written notification to the contracting officer, who shall either award a contract or cancel the solicitation as required.

(4) The contracting officer shall make the completed and approved cost-comparison analysis available to interested parties upon request.

(b) *Negotiation.* The contracting officer shall receive proposals, evaluate them (see subpart 15.6), conduct negotiations, and select the most advantageous proposal in accordance with normal contracting procedures (see part 15). The contracting officer shall, before public announcement, open the sealed estimate in the presence of the preparer, enter the amount of the most advantageous proposal on the cost-comparison form, and return the form to the preparer of the cost estimate for Government performance for completion. The preparer shall give due consideration to all types of costs which could add or subtract from the cost of either mode of performance.

(1) If the result of the cost comparison favors performance under contract and the responsible agency official approves the result, the contracting officer shall award a contract in accordance with agency procedures. Concurrently with the award, the contracting officer shall publicly—

(i) Notify interested parties of the result of the cost comparison;

(ii) Inform interested parties that the completed cost-comparison form and detailed supporting data are available for review;

(iii) Announce the contractor's name; and

(iv) Advise interested parties that contractor preparations for performance are conditioned upon completion of the public review period specified in the solicitation plus any additional period required by the appeals procedure.

(2) If the result of the cost comparison favors Government performance, the contracting officer shall—

(i) Notify interested parties of the result of the cost comparison;

(ii) Inform interested parties that the completed cost-comparison form and detailed supporting data relative to the Government cost estimate are available for public review (see subparagraph (3) below); and

(iii) Announce the price of the offer most advantageous to the Government.

(3) The public review period shall begin with the contracting officer's announcement of the cost-comparison result and availability of the cost comparison forms and detailed supporting data to interested parties. The review period shall last for the period specified in the solicitation (at least 15 working days, up to a maximum of 30 working days if the contracting officer considers the action to be complex). Upon completion of the public review period and resolution of any questions raised under 7.307, the responsible agency official shall provide the contracting officer written notification of the final cost comparison decision. The contracting officer shall then, in the case of subparagraph (1) above, give the contractor notice to commence or cancel the contract as appropriate or, in the case of subparagraph (2) above, cancel the solicitation or award the contract, as appropriate.

[48 FR 42124, Sept. 19, 1983, as amended at 50 FR 1735, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 34125, Sept. 3, 1986; 53 FR 661, Jan. 11, 1988; 55 FR 25526, June 21, 1990]

7.307 Appeals.

(a) The Circular provides that each agency shall establish an appeals procedure for informal administrative review of the initial cost-comparison result. The appeals procedure shall provide for an independent, objective review of the initial result by an official at the same level as, or at a higher level than, the official who approved that result. This review must be completed within 30 days after the deciding official receives a request under paragraph (b) of this section. The purpose is to protect the rights of affected parties and to ensure that final agency determinations are fair, equitable, and in accordance with established policy.

(b) The Circular provides that the appeals procedure shall be used only to resolve questions concerning the calculation of the cost comparison and shall not apply to questions concerning selection of one contractor in preference to another, which shall be treated as prescribed in 14.407-8, Protests against award. Directly affected parties may request review of any discrepancy in the cost comparison. Any such requests shall be made in writing to the contracting officer, who shall forward them in accordance with agency procedures. Such requests shall be considered only if based on specific objections and received within the public review period stated in the solicitation.

[48 FR 42124, Sept. 19, 1983, as amended at 55 FR 25527, June 21, 1990]

Subpart 7.4—Equipment Lease or Purchase

7.400 Scope of subpart.

This subpart provides guidance pertaining to the decision to acquire equipment by lease or purchase. It applies to both the initial acquisition of equipment and the renewal or extension of existing equipment leases.

7.401 Acquisition considerations.

(a) Agencies should consider whether to lease or purchase equipment based on a case-by-case evaluation of comparative costs and other factors. The following factors are the minimum that should be considered:

(1) Estimated length of the period the equipment is to be used and the extent of use within that period.

(2) Financial and operating advantages of alternative types and makes of equipment.

(3) Cumulative rental payments for the estimated period of use.

(4) Net purchase price.

(5) Transportation and installation costs.

(6) Maintenance and other service costs.

(7) Potential obsolescence of the equipment because of imminent technological improvements.

(b) The following additional factors should be considered, as appropriate depending on the type, cost, complexity, and estimated period of use of the equipment:

(1) Availability of purchase options.

(2) Potential for use of the equipment by other agencies after its use by the acquiring agency is ended.

(3) Trade-in or salvage value.

(4) Imputed interest.

(5) Availability of a servicing capability, especially for highly complex equipment; e.g., can the equipment be serviced by the Government or other sources if it is purchased?

7.402 Acquisition methods.

(a) *Purchase method.* (1) Generally, the purchase method is appropriate if the equipment will be used beyond the point in time when cumulative leasing costs exceed the purchase costs.

(2) Agencies should not rule out the purchase method of equipment acquisition in favor of leasing merely because of the possibility that future technological advances might make the selected equipment less desirable.

(b) *Lease method.* (1) The lease method is appropriate if it is to the Government's advantage under the circumstances. The lease method may also serve as an interim measure when the circumstances—

(i) Require immediate use of equipment to meet program or system goals; but

(ii) Do not currently support acquisition by purchase.

(2) If a lease is justified, a lease with option to purchase is preferable.

(3) Generally, a long term lease should be avoided, but may be appropriate if an option to purchase or other favorable terms are included.

7.403 General Services Administration assistance.

(a) When requested by an agency, the General Services Administration (GSA) will assist in lease or purchase decisions by providing information such as—

(1) Pending price adjustments to Federal Supply Schedule contracts;

(2) Recent or imminent technological developments;

(3) New techniques; and

(4) Industry or market trends.

(b) Agencies may request information from the following GSA offices:

(1) Office of Information Resources Management Policy (KMA), Washington, DC 20405, for information on automatic data processing and telecommunications equipment acquisitions.

(2) Office of Commodity Management (FC), Washington, DC 20406, for information on other types of equipment.

[48 FR 42124, Sept. 19, 1983, as amended at 54 FR 29280, July 11, 1989]

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

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Sec.
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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42129, Sept. 19, 1983, unless otherwise noted.

8.000 Scope of part.

This part deals with the acquisition of supplies and services from or through Government supply sources.

8.001 Priorities for use of Government supply sources.

(a) Except as required by 8.002, or as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority as prescribed in 41 CFR 101-26.107:

(1) *Supplies*. (i) Agency inventories;

(ii) Excess from other agencies (see subpart 8.1);

(iii) Federal Prison Industries, Inc. (see subpart 8.6);

(iv) Procurement lists of products available from the Committee for Purchase from the Blind and Other Severely Handicapped (see subpart 8.7);

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101-26.3), the Defense Logistics Agency (see 41 CFR 101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points;

(vi) Mandatory Federal Supply Schedules (see subpart 8.4);

(vii) Optional use Federal Supply Schedules (see subpart 8.4); and

(viii) Commercial sources (including educational and nonprofit institutions).

(2) *Services*. (i) Procurement lists of services available from the Committee for Purchase from the Blind and Other Severely Handicapped (see subpart 8.7);

(ii) Mandatory Federal Supply Schedules (see subpart 8.4) and mandatory GSA term contracts for personal property rehabilitation (see 41 CFR 101-42.1);

(iii) Optional use Federal Supply Schedules (see subpart 8.4) and optional use GSA term contracts for personal property rehabilitation (see 41 CFR 101-42.1); and

(iv) Federal Prison Industries, Inc. (see subpart 8.6), or other commercial sources (including educational and nonprofit institutions).

(b) Sources other than those listed in paragraph (a) may be used as prescribed in 41 CFR 101-26.301 and in an unusual and compelling urgency as prescribed in 6.302-2 and in 41 CFR 101-25.101-5.

[48 FR 42129, Sept. 19, 1983, as amended at 50 FR 1735, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 29280, July 11, 1989]

8.002 Use of other Government supply sources.

Agencies shall satisfy requirements for the following supplies or services from or through specified sources, as applicable:

(a) Jewel bearings and related items (see subpart 8.2);

(b) Public utility services (see subpart 8.3);

(c) Printing and related supplies (see subpart 8.8);

(d) Automatic data processing and telecommunications acquisitions (see part 39);

(e) Leased motor vehicles (see subpart 8.11);

(f) Strategic and critical materials from excess GSA inventories (See 41 CFR 101-14.2); and

(g) Helium (see 30 CFR parts 601 and 602).

Subpart 8.1—Excess Personal Property

.101 Definition.

Excess personal property means any personal property (see 45.601) under the control of a Federal agency that the agency head or a designee determines is not required for its needs and for the discharge of its responsibilities.

.102 Policy.

When it is practicable to do so, agencies shall use excess personal property as the first source of supply in fulfillng their requirements and those of their cost-reimbursement contractors. Accordingly, agencies shall ensure that all personnel make positive efforts to satisfy agency requirements by obtaining and using excess personal property (including that suitable for adaptation or substitution) before initiating contracting action.

.103 Information on available excess personal property.

Information regarding the availabilty of excess personal property can be obtained through—

(a) Review of excess personal property catalogs and bulletins issued by the General Services Administration (GSA);

(b) Personal contact with GSA or the activity holding the property;

(c) Submission of supply requirements to the regional offices of GSA GSA Form 1539, Request for Excess Personal Property, is available for this purpose); and

(d) Examination and inspection of reports and samples of excess personal roperty in GSA regional offices.

8.104 Obtaining nonreportable property.

GSA will assist agencies in meeting their requirements for supplies of the types excepted from reporting as excess by the Federal Property Management Regulations (41 CFR 101-43.312). Federal agencies requiring such supplies should contact the appropriate GSA regional office.

Subpart 8.2—Jewel Bearings and Related Items

8.201 Definitions.

Jewel bearing means a piece of synthetic corundum (sapphire or ruby) of any shape, except a phonograph needle, that has one or more polished surfaces to provide supporting surfaces or low-friction contact areas for revolving, oscillating, or sliding parts in an instrument, mechanism, subassembly, or part. A jewel bearing may be unmounted or may be mounted into a ring or bushing. Examples are watch holes—olive, watch holes—straight, pallet stones, roller jewels (jewel pins), endstones (caps), vee (cone) jewels, instrument rings, cups, and double cups.

Plant, as used in this subpart, means the Government-owned, contractor-operated William Langer Plant, Rolla, ND.

Related item, as used in this subpart, means a piece of synthetic corundum (sapphire or ruby), other than a jewel bearing, that (a) is made from material produced by the Verneuil flame fusion process, (b) has a geometric shape up to a maximum of 1 inch in any dimension, (c) requires extremely close tolerances and highly polished surfaces identical to those involved in manufacturing jewel bearings, and (d) is either mounted in a retaining or supporting structure or unmounted. Examples are window, nozzle, guide, knife edge, knife edge plate, insulator domed pin, slotted insulator, sphere, ring gauge, spacer, disc, valve seat, rod, vee groove, D-shaped insulator, and notched plate.

8.202 Policy.

Except as otherwise provided in this subpart, (a) jewel bearings shall be acquired from the Plant and (b) related items shall be acquired either from domestic manufacturers or from the Plant.

8.203 Procedures.

8.203-1 Contract clause and solicitation provision.

(a) The contracting officer shall insert the clause at 52.208-1, Required Sources for Jewel Bearings and Related Items, in solicitations and contracts that may involve items (or any subassembly, component, or part of such items) in the Federal supply classes and groups listed in paragraph (b) below, except for—

(1) Small purchases under part 13;

(2) Items purchased and used outside the United States, its possessions, and Puerto Rico; or

(3) Items that the contracting officer knows do not contain jewel bearings or related items (the contractor's certification required by 8.203-2 does not in itself satisfy this requirement).

(b) Federal supply classes and groups:

(1)	Federal Supply Classes
6605	Navigational Instruments
6610	Flight Instruments
6615	Autopilot Mechanisms and Airborne Gyro Components
6620	Engine Instruments
6625	Electrical- and Electronic-Properties Measuring and Testing Instruments
6630	Chemical-Analysis Instruments
6635	Physical-Properties Testing Equipment
6636	Environmental Chambers and Related Equipment
6640	Laboratory Equipment and Supplies
6645	Time-Measuring Instruments
6650	Optical Instruments
6655	Geophysical and Astronomical Instruments
6660	Meteorological Instruments and Apperatus
6665	Hazard-Detecting Instruments and Apparatus
6670	Scales and Balances
6675	Drafting, Surveying, and Mapping Instruments
6680	Liquid- and Gas-Flow, Liquid-Level, and Mechanical-Motion Measuring Instruments
6685	Pressure-, Temperature-, and Humidity-Measuring and Controlling Instruments
6695	Combination and Miscellaneous Instruments

(2)	Federal Supply Groups
12	Fire-Control Equipment
14	Guided Missiles
15	Aircraft, Airframe Structural Components
16	Aircraft Components and Accessories
18	Space Vehicles
23	Motor Vehicles and Motorcycles
25	Vehicular Equipment Components
42	Firefighting, Rescue, and Safety Equipment
52	Measuring Tools
58	Communications Equipment
59	Electrical and Electronic Equipment Components
63	Alarm and Signal Systems
65	Medical, Dental, and Veterinary Equipment and Supplies
67	Photographic Equipment
69	Training Aids and Devices

(c) The contracting officer shall insert the solicitation provision at 52.208-2, Jewel Bearings and Related Items Certificate (see 8.203-2 following), in solicitations that contain the clause at 52.208-1, Required Sources for Jewel Bearings and Related Items, except those for research and development.

8.203-2 Offeror's certification.

(a) The provision at 52.208-2 requires the offeror to (1) certify as to whether or not jewel bearings and/or related items will be incorporated into contract end items, (2) accept certain purchase requirements, and (3) attach an estimate of the jewel bearings and related items required. While failure to submit the certificate set forth in the provision with the offer does not make the offer nonresponsive, the contracting officer must obtain the certificate before award.

(b) The contracting officer shall annotate any affirmative certificate from a successful offeror with (1) the number of the contract awarded that offeror, (2) identification of the contract administration office cognizant of that contract, and (3) the date of award. The contracting officer shall forward one copy of the certificate and the attachment it calls for to the Plant and one copy of the certificate and attachment to the cognizant contract administration office. The Plant will compare the attachment with actual orders and notify the contract administration office of any serious discrepancies.

(c) The contract administration office shall review contractor records and require corrective action, if necessary, if (1) the Plant informs it of serious discrepancies between certifications and orders or (2) the contract administration office believes that there is noncompliance with the clause at 52.208-1, Required Sources for Jewel Bearings and Related Items.

8.203-3 Declination or rejection of orders.

(a) The Plant may initially decline to accept a contractor's or subcontractor's order because of the customer's current excessive and overdue indebtedness to the Plant. The Plant's declination under these circumstances is not in itself justification for (1) a waiver of the requirement to purchase from the Plant and (2) adjustment in the contract price. If the contractor or subcontractor disagrees with the Plant as to this indebtedness, the contracting officer may require the Plant to accept the order and to make shipment on a cash-on-delivery (c.o.d.) basis.

(b) Rejection of orders by the Plant—or by any other domestic manufacturer—for reasons other than those in paragraph (a) above shall not provide relief from the requirement to purchase from the Plant or other domestic manufacturer, unless the contracting officer determines that such relief is in the Government's best interest. The contracting officer shall evaluate the impact of the rejection and make an equitable adjustment in the contract price, in the delivery schedule, or in both, if one is warranted.

Subpart 8.3—Acquisition of Utility Services

.300 Scope of subpart.

This subpart prescribes policies and rocedures for the acquisition of utiliy services. Agency policies and proceures predating the effective date of he Federal Acquisition Regulation FAR) may continue to be used. Howver, any new or changed policies or rocedures must be approved in adance by the appropriate FAR council.

8 FR 42129, Sept. 19, 1983, as amended at FR 12293, Apr. 9, 1986; 51 FR 36971, Oct. , 1986]

8.301 Definitions.

Areawide contract, as used in this subpart, means a master contract entered into between the General Services Administration (GSA) and a utility service supplier to cover the utility service acquisitions of all Federal agencies from the particular utility service supplier for a period not to exceed 10 years. Federal agencies, including the Department of Defense (DOD), are covered when an authorization attached to the areawide contract is completed and accepted by the utility service supplier and executed by the agency and the utility service supplier.

Authorization, as used in this subpart, means the ordering document under an areawide contract.

Connection charge, as used in this subpart, means a payment by an agency for special or local facilities on either one or both sides of the delivery point that are required to make connections with the nearest point of supply and are usually installed, owned, and operated by a utility service supplier.

Separate contract, as used in this subpart, means a utility services contract executed for a period not to exceed 10 years, to cover the utility services to a specific facility.

Termination liability, as used in this subpart, means a contingent obligation to pay the unamortized portion of special or local connecting facilities, usually installed, owned, and operated by the utility service supplier, if an agency terminates the utility service contract before expiration of its term specified in the contract or tariff of the utility service supplier.

Utility service, as used in this subpart, means a service such as the furnishing of electricity, gas, water, steam and sewerage that is available to the general public and performed by governmental entities or private companies. Utility services are ordinarily subject to governmental regulation. The term also includes services such as snow removal and removal or disposal of garbage, rubbish, and trash that are performed on a contractual basis, which may or may not be subject to government or public regulation. This term does not include telecommunications services (see part 39).

8.302 Applicability.

(a) Except as provided in paragraph (b) below, this subpart applies to the acquisition of utility services or connection charges costing $10,000 or more, by agencies in the United States, its possessions, and the Commonwealth of Puerto Rico.

(b) This subpart does not apply to—

(1) Utility services produced, distributed, or sold by a Federal agency (other than consolidated purchase, joint use, or cross service); or

(2) Utility services (other than those required for administrative purposes) obtained by purchase, exchange, or otherwise by a Federal power or water marketing agency incident to that agency's marketing or distribution program.

(c) The Statement of Areas of Understanding between Department of Defense and General Services Administration (15 FR 8227, as amended at 22 FR 871) governs the acquisition of utility services by DoD. Therefore, DoD shall not be subject to this subpart as specifically indicated within this subpart.

(d)(1) Section 8093 of the Department of Defense Appropriations Act, 1988, contained in Pub. L. 100-202, provides that none of the funds appropriated by that Act or any other Act with respect to any fiscal year by any Department, agency, or instrumentality of the United States, may be used for the purchase of electricity by the Government in any manner that is inconsistent with the state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements.

(2) The Act does not preclude—

(i) The head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287 (which pertains to the subject of shared energy savings);

(ii) The Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 (which pertains to contracts for energy or fuel for military installations); or

(iii) The Secretary of a military department from purchasing electricity from any provider when the utility or utilities having applicable state-owned franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

[48 FR 42129, Sept. 19, 1983, as amended at 53 FR 43389, Oct. 26, 1988]

8.303 General.

(a) Except as otherwise specified, agencies shall submit all information required by GSA under this subpart to General Services Administration, Public Buildings Service, Office of Public Utilities (PU), Washington, DC 20405.

(b) Agencies requiring technical or consulting assistance in the acquisition of utility services, including assistance in negotiating with a potential supplier (see 8.304-3), may contact GSA at the address given in paragraph (a) above.

(c) GSA will, upon request, furnish the services provided for in this subpart to any Federal agency, mixed ownership Government corporation, the District of Columbia, the Senate, the House of Representatives, or the Architect of the Capitol and any activity under its direction.

8.304 Acquiring utility services.

8.304-1 GSA long-term contracts.

(a) GSA has statutory authority to enter into long-term contracts for utility services for periods not to exceed a term of 10 years (40 U.S.C. 481). These contracts may be in the form of an areawide contract or a separate contract. GSA may delegate this authority to other agencies that have qualified staffs.

(b) A long-term contract may be justified and is usually required by any of the following circumstances:

(1) The Government will obtain lower rates, larger discounts, or more favorable conditions of service.

(2) A proposed connection charge, ermination liability, or any other fa- ilities charge to be paid by the Gov- rnment will be reduced or eliminated.

(3) The utility service supplier re- uses to render the desired service xcept under a long-term contract.

(c) Other conditions for acquisitions nder long-term contracts shall be de- ermined by the specific delegation of uthority to the agency from GSA.

.304-2 GSA areawide contracts.

(a) GSA enters into areawide con- racts with suppliers for the furnish- ng of utility services to Federal agen- ies located within the service areas of hose suppliers.

(b) An areawide contract requires he utility service supplier to furnish he needed services—

(1) Upon bilateral execution of the uthorization under the contract;

(2) Without further negotiation;

(3) At the published or unpublished urrent rate schedules and tariffs ap- licable to the classes and characteris- ics of the services;

(4) Subject to all terms of the reawide contract; and

(5) To all Government-owned or overnment-leased facilities as long as he agency pays the bills directly to he utility service supplier and not the easor as part of its lease agreement.

(c) An agency in an area covered by n areawide contract shall acquire tility services under that contract nless the agency determines that (1) nore advantageous competing services re available from another supplier ithout an effective areawide con- ract, or (2) it is in the Government's nterest to negotiate special rates or pecial services under a separate con- ract which departs from the pub- shed or unpublished current rate chedules of the utility service suppli- r.

(d) Upon request, GSA will furnish gencies a list of the current areawide ontracts showing the kinds of utility rvices, the suppliers, and the areas rved. GSA will also provide a copy of y areawide contract upon request. ch contract includes an authoriza- on form for requesting service, serv- connection, disconnection, or ange.

(e) When utility services are acquired under an areawide contract, the agency shall use the authorization attached to the appropriate GSA areawide contract. The form prescribed for ordering may be modified to satisfy the fiscal and administrative requirements of the agency and to contain any necessary additional contract terms. The authorization shall not be modified, however, to be used as a public voucher in lieu of Standard Form 1034, Public Voucher for Purchases and Services Other than Personal.

(f) All agencies acquiring utility services under an areawide contract shall furnish to GSA an executed copy of the authorization requesting service, service connection, disconnection, or change within 30 days after execution by the agency.

(g) When, pursuant to paragraph (c) above, an agency determines it appropriate to acquire utility services under a separate contract, 8.304-3 shall apply to the acquisition, except that DOD may acquire the services under its own regulations implementing the Statement of Areas of Understanding (see 8.302(c)).

8.304-3 Separate contracts.

(a) When GSA initiates or is requested to negotiate a separate contract, the acquiring agency shall furnish the following information to GSA:

(1) The technical and acquisition data required in 8.307-1(a) and 8.307-4; and

(2) Such other technical data as GSA may request to complete the contract.

(b) Other conditions for acquisition of utility services under separate contracts shall be determined by the specific delegation of authority to the agency from GSA in accordance with 8.307-3.

(c) In determining whether to negotiate special rates or special services in an area not covered by an areawide contract, consideration should be given to the following:

(1) The public utility supplier's tariff and rate schedules in light of the magnitude of the services required.

(2) Any unusual characteristics of services required which are not provided for under the supplier's tariffs and current rate schedules.

(3) Any special equipment or facility requirements which are not provided for under the supplier's tariffs and current rate schedules.

(4) Any special technical contract terms required by the agency which are not provided for under the supplier's tariff and current rate schedule.

8.304-4 Consolidated purchase, joint use, or cross-service.

(a) Agencies shall use consolidated purchase, joint use, or cross-service to acquire utility services or facilities when advantageous to the Government and in accordance with the policies and procedures at subpart 17.5, Interagency Acquistions under the Economy Act. This requirement is not applicable if utility services are furnished without charge by another Government agency as part of space acquisition.

(b) The agencies involved under paragraph (a) above shall use a memorandum of understanding or other appropriate document to specify the services or facilities to be supplied, the estimated costs, and other conditions under which they will be acquired.

(c) These memorandums shall be subject to on-site post reviews or periodic reporting as may be required by GSA. (see 8.306). This paragraph (c) does not apply to DoD.

8.304-5 Agency acquisition.

(a) This subsection 8.304-5 does not apply to DoD. DoD contracting offices shall proceed in accordance with agency procedures.

(b) In the absence of areawide contracts for a particular location, GSA separate contracts, consolidated purchases, joint use, or cross-service arrangements, or as otherwise authorized in this section 8.304, agencies may acquire utility services and facilities and pay related connection charges within the scope of their authority, subject to the policy and procedures of this subpart.

(c) The contracting officer shall determine the appropriate contracting method in accordance with the instructions of parts 6 and 13 through 15 of this regulation. Except as authorized by 8.304-5(h), agencies shall use a utility service contract instead of standard utility services supplier application forms or similar documents (also see 8.304-5(g)).

(d) The contracting officer shall determine if more than one supplier can furnish the needed utility services. Although unusual, when such competition exists, the contracting officer shall solicit sealed bids or competitive proposals for the services.

(e) The contracting officer shall acquire utility services by bilateral written contract, whether or not rates or conditions of service are fixed or adjusted by a Federal, State, or other public regulatory body, if—

(1) The supplier requires the execution of a contract;

(2) The utility service is available from more than one source (see paragraph (d) above);

(3) The annual cost of the service at the time of initiation or annual review is estimated to exceed the appropriate small purchase limitation in part 13;

(4) A proposed connection charge, termination liability, purchase cost, cumulative leasing cost, or any other facilities charge (whether or not refundable) to be paid by the agency is estimated to exceed the appropriate small purchase limitation in part 13; or

(5) The contracting officer determines that a bilateral written contract would be in the Government's interest.

(f) The contracting officer may acquire utility services by purchase order except when a bilateral written contract is required under paragraph (e) above.

(g) If a utility service supplier refuses to execute a contract, the agency shall notify GSA of the supplier's refusal to execute a contract, and forward full documentation including a copy of the record of negotiations. The agency may then acquire services by use of a Government purchase order or other written request for service, after a written definite and final refusal is received from a corporate officer of the supplier.

(h) When the utility supplier refuses to execute a contract (see 8.304-5(g)), the contracting officer may use the commercial forms and clauses of the utility companies in acquiring utility services by bilateral contract (except see paragraph (c) above). The contracting officer must take precautions to delete from such forms any language that may be contrary to Federal law and regulations. The contracting officer shall also comply with the requirements of 8.309 concerning the insertion of mandatory clauses in the contract.

(i) Each agency shall provide GSA (upon GSA's request) with duplicate copies of the agency's utility bills.

[48 FR 42129, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

8.305 Rate increases.

(a) This section 8.305 does not apply to DOD.

(b) When a supplier proposes increases in rates by filing for approval with the regulatory body controlling the supplier's rates, the agency should forward the matter, including percentage of increase and amount of increase, to GSA for appropriate action.

(c) When the regulatory body approves the utility supplier's rate increase, further modification of any utility contract is not necessary, since copies of the utility supplier's new rate schedules as approved by the regulatory body will serve as the authority to pay the increased or decreased rates.

8.306 Post contract review or periodic reporting.

All acquisition documents and supporting records retained in accordance with 4.805 shall be subject to any onsite postreview or periodic reporting that may be required by GSA. See 8.307 concerning prior review of certain acquisitions. This section 8.306 does not apply to DOD.

8.307 Precontract acquisition reviews.

This section 8.307 does not apply to DOD.

8.307-1 General.

(a) Either GSA or the acquiring agency, if authorized under this section 8.307, shall review certain proposed utility services acquisitions before the contracting officer executes a binding contract. The review shall apply to—

(1) Proposed authorizations under GSA areawide contracts;

(2) Proposed memorandums of understanding or interagency agreements for consolidated purchase, joint use, or cross-service by one agency for another; and

(3) Proposed separate utility service contracts.

(b) The review is required when—

(1) The annual cost of the service to be acquired is estimated by the using agency, at the time of initiation of the service or annual review, to exceed $150,000 for separate contracts or $250,000 for authorizations under effective areawide contracts; or

(2) A proposed connection charge, termination liability, or other facilities charge to be paid by the agency (whether or not refundable) is estimated to exceed $75,000 for separate contracts or $125,000 for authorizations under effective areawide contracts.

(c) Approval of a proposed acquisition after review shall be based on written determinations and findings from the acquiring agency that all of the following criteria, as a minimum, are met:

(1) The proposed supplier is either the sole source of the required service or has been selected after consideration of more than one source of supply.

(2) The service to be provided is adequate in terms of quantity, quality, and delivery schedule to meet the acquiring agency's needs.

(3) The selected rate schedule is the most advantageous of the rate schedules available to the agency in terms of economy, efficiency, or service and is based upon the class, conditions, and characteristics of services being rendered to the agency.

(4) The proposed facilities charge, if any, is (i) necessary to secure the required service, (ii) based on current

cost or pricing data, and (iii) reasonable in total amount, and may be certified for payment by the agency.

(5) The proposed acquisition meets the requirements of this subpart.

8.307-2 Precontract review by GSA.

(a) Each agency shall refer applicable proposed acquisitions of utility services to GSA for review unless an agency has its own program of prior review under 8.307-3.

(b) GSA shall acknowledge the date of receipt of the referral from the agency.

(c) If GSA does not provide comments to the referring agency within 20 workdays after a proposed utility services acquisition is received for review (or within a lesser period if agreed upon), the referring agency may complete negotiations and execute the contract.

(d) Proposed acquisitions forwarded for GSA prior review shall contain the technical and acquisition data required by 8.307-1(c) and 8.307-4.

8.307-3 Precontract review by acquiring agency.

(a) Agencies having authorization from GSA by direct delegation of authority may conduct their own programs of utility acquisition reviews in accordance with this subpart.

(b) Agencies that do not have the authorization indicated in paragraph (a) above, but that have the qualified technical personnel to conduct an agency review program, may seek a direct delegation of authority to conduct such a program from the Office of Public Utilities, at the address stated in 8.303(a).

(c) Agency authority to conduct prior reviews shall not preclude the referral of any specific case to GSA for assistance, if desired by the agency.

(d) Any agency having responsibility for review shall provide by agency procedure for uniform application of the guidelines in 8.307-4.

8.307-4 Guidelines and data for precontract review.

(a) The office proposing to acquire utility services shall assemble and furnish complete information relating to each proposed acquisition sufficiently in advance to permit a complete review by either GSA or the acquiring agency.

(b) The information furnished for review shall include—

(1) A technical description or specifications of the type, quantity, and quality of service required; and

(2) A copy of any service proposal or proposed contract.

(c) If not included in the foregoing, a copy of the following additional documents and data shall be furnished, if applicable:

(1) A complete copy or copies of the published or unpublished current rate schedules and tariffs of the utility supplier.

(2) The following data concerning quantity, quality, and delivery schedule of required services when new or initial services are to commence:

(i) The date initial service is required.

(ii) Data, for the first calendar year of full service, on estimated maximum demand, monthly consumption, and estimated annual cost of the service and connection charges to be paid by the agency.

(iii) Known or estimated time schedule for growth to ultimate requirements.

(iv) Estimated ultimate maximum demand and ultimate monthly consumption.

(v) A simple schematic diagram or line drawing showing the meter locations and the location of the new utility facilities to be constructed by the Government and the new connecting facilities to be constructed by the utility supplier to provide the new services.

(vi) Accounting and appropriation data to cover the required utility services and any connection charges required to be paid by the agency to receive such utility services.

(3) Identification of all available sources or methods of supply, the cost effectiveness of each, and a statement of the ability of each source to provide the required services, including the location and a description of each available supplier's facilities at the nearest point of service.

(4) Identification of any unusual factors affecting the acquisition.

(5) The following data concerning proposed facilities and related charges or costs:

(i) Proposed refundable or nonrefundable connection charge, termination liability, or other facilities charge to be paid by the Government, together with a description of the supplier's proposed facilities and estimated construction costs entering into the determination of the proposed connection charge, termination liability, or facilities charge.

(ii) The basis for the connection charge including the tariff provisions or written policy of the utility supplier.

(iii) A statement by the supplier that any proposed facilities charge is not in excess of the charge that other customers would be required to pay for ike facilities under similar class and ondition of service.

(iv) A copy of the acquiring agency's stimate to make its own connection o the supplier's facilities, in lieu of aying the connection charge proposed by the utility supplier. In the ase of proposed water and sewage ontracts, the acquiring agency shall rovide its estimates to construct and perate its own utility facilities in lieu f participating in a cost-sharing construction program with the proposed tility supplier.

(d) For existing utility services, the gency shall furnish the data required bove under 8.307-4(a), (b), (c)(1) and he following additional information:

(1) A copy of the monthly bills covering the most recent 12 months.

(2) A tabulation, by months, for the ost recent 12 months, showing the tility demands, consumption and harges, fuel adjustment charges and he average monthly cost per unit of onsumption.

(3) A tabulation by months, for the ext 12 months showing the same ata as requested in (2) above.

(4) Accounting and appropriation ata to cover the costs for the continuation of utility services.

(5) A simple schematic diagram or ne drawing suitable to be included in he utility services contract showing e meter locations.

(6) For electric service contracts, ate if the transformer at the point of delivery is owned by the Government or the utility supplier and if the metering is made on the primary or secondary side of such transformer.

8.308 Capital credits.

Capital credits are a form of cash reimbursement or offset of billings by Reconstruction Electrification Administration-financed Cooperatives to their customers. See 41 CFR 101-33.3 for procedures on processing these capital credits.

8.309 Contract clauses.

(a) The contracting officer shall insert the clause at 52.208-3, Conflicts, in solicitations and contracts for utility services.

(b) The contracting officer shall also insert in solicitations and contracts for utility services the provisions and clauses prescribed elsewhere in the FAR, as appropriate for each acquisition, depending on the conditions that are applicable.

Subpart 8.4—Ordering From Federal Supply Schedules

8.401 General.

(a) The Federal Supply Schedule program, directed and managed by the General Services Administration (GSA), provides Federal agencies with a simplified process for obtaining commonly used supplies and services at prices associated with volume buying. Indefinite delivery contracts (including requirements contracts) are established with commercial firms to provide supplies and services at stated prices for given periods of time. The schedule contracting office issues publications, titled Federal Supply Schedules, containing the information necessary for placing delivery orders with the contractors. Ordering offices issue delivery orders directly to the schedule contractors for the required supplies or services. Similar systems of schedule-type contracting are used for automatic data processing equipment and services, for telecommunications equipment and services and for military items managed by the Department of Defense. These systems are not included in the Federal Supply

Schedule program covered by this subpart.

(b) Ordering offices may request copies of schedules by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the GSA Centralized Mailing Lists Services, 819 Taylor Street, P.O. Box 17077, Fort Worth, TX 76102-0077. Copies of GSA Form 457 and the GSA publication titled "GSA Supply Catalog" (which includes a listing of schedules and information on the use of schedules) may also be obtained from the above address.

[48 FR 42129, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 29280, July 11, 1989]

8.402 Applicability.

(a) This subpart applies to—

(1) Federal agencies ordering supplies or services from Federal Supply Schedules on either a mandatory or optional (nonmandatory) basis (see 8.404);

(2) Civilian and military commissaries and nonappropriated fund activities authorized by a Federal agency to use Federal Supply Schedules for their own use, not for resale; and

(3) Contractors authorized under part 51 to order from schedules.

(b) This subpart does not apply to agencies placing orders for automatic data processing and telecommunications items or services from schedules. See part 39 for policies and procedures for placing orders for those items or services.

8.403 Types of Federal Supply Schedules.

8.403-1 Single-award schedules.

Single-award schedules cover contracts made with one supplier at a stated price for delivery to a geographic area as defined in the schedule. Most schedules contain all information necessary for placing orders. Some schedules specify that contractor catalogs must be used for additional ordering information to aid in the selection of fabrics, colors, and similar variables.

8.403-2 Multiple-award schedules.

Multiple-award schedules cover contracts made with more than one supplier for comparable supplies and services. Contracts are awarded to suppliers of the same generic types of items at varying prices for delivery within the same geographic area. Contractor catalogs and pricelists must be used with the schedules to prepare delivery orders. The catalogs and pricelists contain information such as item descriptions, prices and discounts, order limitations, and delivery.

8.403-3 New Item Introductory Schedule.

The New Item Introductory Schedule (NIIS) provides the means to introduce new or improved products into the Federal Supply System. The schedule lists brand names of products available from various suppliers. With the exception of GSA, the only mandatory user of this schedule, Federal agencies and agencies authorized by law or agreement may use the NIIS on an optional basis. Ordering offices must use contractor catalogs and pricelists with the schedule to prepare delivery orders.

8.403-4 International Federal Supply Schedule.

(a) The International Federal Supply Schedule (IFSS) provides sources of supply (supplies and services) at reasonable prices to U.S. Government activities located overseas. The use of the schedule is mandatory only on GSA.

(b) The schedule is divided into two sections. Section A includes those items which were awarded under sealed bid procedures, while Section B covers items that were awarded under negotiated procedures.

(c) Ordering offices need to review the information in the schedule and any applicable contractor's catalogs/price lists to ensure the proper placement of orders. Orders are placed directly with the contractors.

(d) Ordering offices shall forward copies of any orders (at the time the orders are issued) to the contracting office designated in the IFSS.

[51 FR 19713, May 30, 1986]

8.404 Using schedules.

(a) The planning, solicitation, and award phases of Federal Supply

Schedules comply with FAR requirements. Consequently, contracting officers need not seek further competition, synopsize the solicitation or award, determine fair and reasonable pricing, or consider small business-small purchase set-aside procedures when placing an order under a Federal Supply Schedule.

(b) Before soliciting commercial sources, executive agencies shall determine if the required supplies or services, or similar supplies or services fulfilling the same purpose, are available from schedules (see FIRMR 101-26.4). If so, the ordering office shall proceed in accordance with the procedure of 8.404-1 or 8.404-2, as appropriate.

(c) In the case of mandatory schedules, ordering offices shall not (1) solicit bids, proposals, quotations, or otherwise test the market solely for the purpose of seeking alternative sources to Federal Supply Schedules; or (2) request formal or informal quotations from Federal Supply Schedule contractors for the purpose of price comparisons.

[48 FR 42129, Sept. 19, 1983, as amended at 54 FR 29280, July 11, 1989; 55 FR 38516, Sept. 18, 1990]

8.404-1 Mandatory use.

Schedules identify executive agencies required to use them as mandatory sources of supply. The single-award schedule shall be used as a primary source and the multiple-award schedule as a secondary source. The following are exceptions to the mandatory-use requirement:

(a) *Urgent requirements.* When an ordering office requires supplies or services with a shorter delivery time than specified in the schedules, and time permits, the ordering office shall request the contractor by letter, telegram, mailgram, or telephone conversation (confirmed in writing) to state the best delivery time that can be met under the circumstances and subject to all other terms and conditions of the schedule contract. The contractor shall be instructed to reply to the inquiry within not more than 3 workdays after receipt, by the same or a faster communications medium than the one by which the inquiry was received. If the contractor offers accelerated delivery acceptable to the ordering office, orders shall obligate the contractor to make the shorter delivery under all other terms and conditions of the contract. When the contractor fails to reply, or the best delivery time does not meet the ordering office's requirements, use of the schedule is not mandatory.

(b) *Small requirements.* Dollar or quantity minimums are established for most schedules, below which ordering offices are not obligated to order and contractors are not obligated to accept orders. Ordering offices may submit orders below established minimums, subject to the contractor's acceptance. Once an order is accepted, the contractor is obligated to perform according to all the terms and conditions of the contract. Some schedules require the contractor to accept orders below the dollar or quantity minimum, but authorize the contractor to include a service charge up to a certain dollar amount. In these cases, the schedule will contain specific obligations and entitlements.

(c) *Maximum order limitation.* (1) Most schedules stipulate a dollar amount or unit quantity above which agencies shall not submit orders and contractors shall not accept orders. There may be a maximum order limitation (MOL) for each item as well as for the total order. Ordering offices should not reduce or split their requirements simply to avoid an MOL. Rather, ordering offices should consolidate their requirements whenever possible to take advantage of lower prices normally obtainable through definite quantity contracts for quantities exceeding the MOL.

(2) Ordering offices shall submit requirements exceeding the MOL in FEDSTRIP/MILSTRIP format, as applicable, to the GSA support region in accordance with FPMR 101-26.401-4(c), unless specified otherwise in the schedule. Optional schedule users may use this procedure.

(d) *Geographic coverage.* Each schedule defines geographic areas of coverage on a national, zonal, regional, or other basis. Ordering offices shall place orders with contractors serving the geographic areas in which consignees are located. When a consignee is located outside the geographic area of coverage, mandatory use is not applicable.

(e) *Lower prices for identical items.* (1) When an ordering office finds that an identical product (make and model) included on a multiple-award schedule is available from another source at a price lower than the schedule price, the office may purchase the item subject to the requirements to obtain competition.

(2) All cost and related considerations for lower priced products shall be evaluated, including but not limited to comparisons of warranties, transportation costs (origin and destinations), and delivery terms.

(3) When products are purchased from commercial sources on the open market (i.e., not under an existing Government contract) at delivered prices that are lower than the prices provided by multiple-award schedule contracts, ordering offices shall forward the following information, at the time the orders are issued, to the contracting office designated in the multiple-award schedule that was not used:

(i) Copy of the order.

(ii) Identification of the Federal Supply Schedule.

(iii) Name of the schedule contractor.

(iv) Applicable schedule contract number.

(v) Schedule contract price.

(vi) Schedule special item number (SIN).

(vii) Manufacturer's model and /or part number.

(f) *Report documentation.* Documentation of subdivisions (e)(3)(ii) through (e)(3)(vii) of this section may be provided as attachment(s) to the order, annotated directly on the order, or a combination of both. Interagency Report Control Number 0262-GSA-AR has been assigned to this report.

(g) *Absence of follow-on award.* Ordering offices, after any consultation required by the schedule, are not required to forgo or postpone their legitimate needs pending the award or renewal of any schedule contract.

[48 FR 42129, Sept. 19, 1983, as amended at 51 FR 19713, May 30, 1986]

8.404-2 Optional use.

(a) The following optional users may order from schedules and contractors may accept their orders:

(1) All executive agencies not specified in the schedules as mandatory users.

(2) All other agencies and activities of the Government, including legislative and judicial agencies as provided by law or agreement, nonappropriated fund activities as prescribed in 41 CFR 101-26.000, and the Government of the District of Columbia.

(3) Government contractors authorized to order under part 51.

(4) Mixed-ownership Government corporations as defined in the Government Corporation Control Act (31 U.S.C. 9101).

(b) If a contractor accepts an order from an optional user under a schedule contract, all terms of the schedule contract apply to that order. Acceptance may be by written notice, delivery or performance, or failure to return the order within the time specified in the contract (usually 7 workdays).

[48 FR 42129, Sept. 19, 1985, as amended at 51 FR 2649, Jan. 17, 1986]

8.404-3 Requests for waivers.

(a) When an ordering office that is a mandatory user under a schedule determines that items available from the schedule will not meet its specific needs, but similar items from another source will, it shall submit a request for waiver to the Commissioner, Federal Supply Service (F), GSA, Washington, DC 20406, except as provided in (b) below. Requests shall contain the following information:

(1) A complete description of the required items, whenever possible; e.g., descriptive literature such as cuts, illustrations, drawings, and brochures that explain the characteristics and/ or construction.

(2) A comparison of prices and the technical differences between the requested item and the schedule item, identifying as a minimum the—

(i) Inadequacies of the schedule item to perform required functions; and

(ii) Technical, economic, or other advantages of the item requested.

(3) Quantity required.

(4) Estimated annual usage or a statement that the requirement is nonrecurrent or unpredictable.

(b) Ordering offices shall not initiate action to acquire similar items from nonschedule sources until a request for waiver is approved, except as otherwise provided in interagency agreements.

[48 FR 42129, Sept. 19, 1983, as amended at 54 FR 29280, July 11, 1989]

8.405 Ordering office responsibilities.

Ordering offices shall place orders directly with contractors and shall perform contract administration on individual orders. Ordering offices should deal directly with contractors concerning contract performance (see 41 CFR 101–26.403–1).

8.405–1 Ordering from multiple-award schedules.

When ordering from multiple-award schedules, ordering offices shall use the procedures set forth below. When these procedures are followed, orders placed against schedules will result in the lowest overall cost alternative to meet the needs of the Government.

(a) Orders should be placed with the schedule contractor offering the lowest delivered price available. However, the ordering office shall fully justify in their contract file, any orders over $1,000 per line item placed at other than the lowest price. Justification for ordering a higher priced item may be based on such considerations as—

(1) Delivery time in terms of actual need that cannot be met by a contractor offering a lower price;

(2) Specific or unusual requirements such as differences in performance characteristics;

(3) Compatibility with existing equipment or systems;

(4) Trade-in considerations that favor a higher priced item and produce the lowest net cost; and

(5) Special features of one item not provided by comparable items that are required in effective program performance.

(b) When two or more items at the same delivered price will meet an ordering office's needs, the ordering office shall give preference to the items of small business and/or labor surplus area concerns by following the order of priority in 14.407–6 for equal low bids.

(c) When a schedule lists both foreign and domestic items that will meet the ordering office's needs, the ordering office shall apply the procedures of part 25, Foreign Acquisition.

(d) If an item available from a multiple-award schedule is ordered from the schedule contractor at a price lower than the schedule price, the ordering office shall notify the schedule contracting office within 10 days.

[48 FR 42129, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 661, Jan. 11, 1988]

8.405–2 Order placement.

Ordering offices may use Optional Form 347, or an agency-prescribed form, to order items from schedules and shall place orders directly with the contractor within the limitations specified in each schedule. Orders shall include, at a minimum, the following information in addition to any information required by the schedule:

(a) Complete shipping and billing addresses.

(b) Contract number and date.

(c) Agency order number.

(d) F.o.b. delivery point; i.e., origin or destination.

(e) Discount terms.

(f) Delivery time.

(g) Special item number or national stock number.

(h) Brief, complete description of each item (when ordering by model number, features and options such as color, finish, and electrical characteristics, if available, must be specified).

(i) Quantity and any variation in quantity.

(j) Number of units.

(k) Unit price.

(l) Total price of order.

(m) Points of inspection and acceptance.

(n) Other pertinent data; e.g., delivery instructions or receiving hours and size-of-truck limitation.

(o) Marking requirements.

(p) Level of preservation, packaging, and packing.

8.405-3 Inspection and acceptance.

(a) Consignees shall inspect supplies at destination except when—

(1) The schedule provides for the schedule contracting agency to perform source inspection (in this case, the schedule will indicate that mandatory source inspection is required); or

(2) A schedule item is covered by a product description, and the ordering office determines that the schedule contracting agency's inspection assistance is needed (inspection assistance may be based on the ordering volume, the complexity of items, or the past performance of the supplier).

(b) When the schedule contracting agency performs the inspection, as specified in the schedule, the ordering office will provide two copies of the order specifying source inspection to the schedule contracting agency. The schedule contracting agency will notify the ordering office of acceptance or rejection of the supplies.

(c) Material inspected at source by the schedule contracting agency, and determined to conform with the product description of the schedule, shall not be reinspected for the same purpose. The consignee shall limit inspection to quantity and condition on receipt.

(d) Unless otherwise provided in the schedule, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

8.405-4 Delinquent performance.

When the contractor fails to perform on the order, the ordering office may terminate the order for default or give the contractor further opportunity to perform by modifying the order to establish a new delivery date (obtaining consideration as necessary).

8.405-5 Termination for default.

(a) (1) An ordering office may terminate any one or more orders for default in accordance with part 49, Termination of Contracts. The schedule contracting office shall be notified of all cases where an ordering office has declared a Federal Supply Schedule contractor in default or fraud is suspected.

(2) Should the contractor claim that the failure was excusable, the ordering office shall promptly refer the matter to the schedule contracting office. In the absence of a decision by the schedule contracting office (or by the head of the schedule contracting agency, on appeal) excusing the failure, the ordering office may charge the contractor with excess costs resulting from repurchase.

(3) Any repurchase shall be made at as reasonable a price as possible considering the quality required by the Government, delivery requirement, and administrative expenses. Copies of all repurchase orders, except the copy furnished to the contractor or any other commercial concern, shall include the notation "Repurchase against the account of ——— under Delivery Order ——— under Contract ———"

(4) When excess costs are anticipated, the ordering office may withhold funds due the contractor as offset security. Ordering offices shall minimize excess costs to be charged against the contractor and collect or setoff any excess costs owed.

(5) If an ordering office is unable to collect excess costs, it shall take the following actions:

(i) Notify the schedule contracting office within 60 days after final payment to the replacement contractor The notice shall include the following information about the defaulted order

(A) Name and address of the contractor.

(B) Schedule, contract, and order number.

(C) National stock or special item number(s), and a brief description of the item(s).

(D) Cost of schedule items involved

(E) Excess costs to be collected.

(F) Other pertinent data.

(ii) In addition to the above, the notice shall include the following information about the replacement contract:

(A) Name and address of the contractor.

(B) Item repurchase cost.

(C) Repurchase order number and date of payment.

(D) Contract number, if any.

(E) Other pertinent data.

(b) Only the schedule contracting officer may terminate for default any or all items covered by the schedule contract. When notified of default action by the schedule contracting officer with respect to defaulted items, ordering offices shall—

(1) Refuse to accept further performance by the contractor;

(2) Not place further orders with the contractor;

(3) Repurchase against the contractor in default from sources designated by the schedule contracting officer; or

(4) Proceed as otherwise directed by the schedule contracting officer.

(c) All actions taken regarding terminations for default shall comply with the applicable requirements in part 49.

8.405-6 Termination for convenience.

(a) Ordering offices may terminate individual orders for the convenience of the Government. Only the schedule contracting officer may terminate any or all items covered by the schedule contract for the convenience of the Government.

(b) Before terminating orders for convenience, the ordering office shall endeavor to enter into a "no cost" cancellation agreement with the contractor.

(c) All actions taken regarding terminations for convenience shall comply with the applicable requirements in part 49.

8.405-7 Disputes.

The ordering office shall refer all unresolved disputes under orders to the schedule contracting office for action under the Disputes clause of the contract.

8.406 Blanket purchase agreements.

Ordering offices should consider using a Blanket Purchase Agreement (BPA) with schedule contractors to reduce the number of orders and billing and payment documents required for repetitive orders. When the schedule provides for quantity discounts, considerable savings may be effected by establishing a BPA for items for which there is a foreseeable demand. Ordering offices shall comply with subpart 13.2 and the schedule when establishing a BPA. When establishing dollar limitations for BPA's established against Federal Supply Schedules pursuant to 13.204(b), the limitations apply to individual orders placed under the BPA and are those prescribed in the Maximum Order Limitation clause for the particular schedule contract. No limitation is imposed on the total BPA unless specified by agency procedures.

[48 FR 42129, Sept. 19, 1983, as amended at 54 FR 29280, July 11, 1989]

8.407 Delivery.

(a) *Destination delivery.* Destination delivery (store-door) in a schedule means delivery to the door (unloading dock) of the location specified by the ordering office. This delivery is not subject to additional charges except when there is a specified charge for store-door delivery in the tariff of the delivering carrier. When destination delivery is subject to a charge, the contractor or carrier shall be instructed to annotate bills of lading or freight bills "Delivery service requested," and to show a separate item on the invoice for the charge. The ordering office may request delivery to a railroad siding at no additional cost. When destination delivery cannot be accomplished, delivery will be made to the freight station nearest the consignee at no additional cost.

(b) *Delivery within consignee's premises.* Delivery within consignee's premises is sometimes available at an additional cost. This service may be requested on an optional basis by ordering offices but contractors may refuse to provide it. Some schedules provide instructions for requesting the service, provide a means for determining the cost, and establish a time limit for the contractor to refuse. Under other schedules, when contractors refuse to deliver within the consignees' premises, ordering offices must make their own arrangements.

(c) *Shipping point/origin delivery.* Shipping point/origin delivery requires ordering offices to pay transportation costs unless delivery is requested within the commercial zone of the shipping point, as prescribed by the Interstate Commerce Commission in 49 CFR part 1048. When the carrier accepts supplies from the contractor, title for the supplies passes to the ordering office. Payment should be made upon the contractor's submission of invoices and proof of shipment.

(d) *Special transportation.* Ordering offices may request premium methods of transportation on items delivered f.o.b. destination. When this is done, ordering offices must pay the difference between "freight" and the requested mode. Transportation details such as these are subject to agreement between ordering offices and the schedule contractors.

8.408 Deficiencies or discrepancies in shipments.

Ordering offices shall process deficiencies or discrepancies in shipments as follows:

(a) The ordering office and contractor shall resolve complaints concerning the quality of material inspected at destination. However, the ordering office should report significant instances of poor quality to the schedule contracting officer.

(b) When it is established that the contractor is at fault for nonconforming supplies or services, the following options are available to the ordering office:

(1) Require the nonconforming supplies or services to be corrected in place or removed for correction, by and at the expense of the contractor.

(2) Accept the supplies or services with an agreed reduction in price.

(3) Terminate the order for default.

(c) When items are covered by warranty, quality deficiencies shall be handled as provided in subpart 46.7.

(d) Discrepancies concerning other than the quality of the material; e.g., overages, shortages, or damages, shall be—

(1) Processed as provided in 41 CFR 101-40.7 or as directed by the schedule contracting agency, when there are discrepancies in quantity or condition of material received from that shown on the covering bill of lading (transportation-type discrepancy); or

(2) Resolved between the ordering office and the contractor when there exists any discrepancy in quantity or condition of material received from that shown on the covering invoices or shipment packing list.

[48 FR 42129, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

Subpart 8.5—[Reserved]

Subpart 8.6—Acquisition From Federal Prison Industries, Inc.

8.601 General.

(a) Federal Prison Industries, Inc. (FPI), also referred to as UNICOR, is a self-supporting, wholly owned Government corporation of the District of Columbia.

(b) FPI provides training and employment for prisoners confined in Federal penal and correctional institutions through the sale of its products and services to Government agencies (18 U.S.C. 4121-4128).

(c) FPI diversifies its products and services to prevent private industry from experiencing unfair competition from prison workshops or activities.

8.602 Policy.

(a) Agencies shall purchase required supplies of the classes listed in the Schedule of Products made in Federal Penal and Correctional Institutions (referred to in this subpart as *the Schedule*) at prices not to exceed current market prices, using the procedures in this subpart.

(b) Agencies are encouraged to use the facilities of FPI to the maximum extent practicable in purchasing (1) supplies that are not listed in the Schedule, but that are of a type manufactured in Federal penal and correctional institutions, and (2) services that are listed in the Schedule.

(c) Agencies should ask FPI whether unlisted products of the type normally produced by FPI can be added to the Schedule.

8.603 Purchase priorities.

(a) FPI and the Workshops for the Blind and Other Severely Handicapped may produce identical supplies or services. When this occurs, ordering offices shall purchase supplies and services in the following priorities:

(1) Supplies:

(i) Federal Prison Industries, Inc. (41 U.S.C. 48).

(ii) Workshops.

(iii) Commercial sources.

(2) Services:

(i) Workshops.

(ii) Federal Prison Industries, Inc.

(iii) Commercial sources.

(b) Supplies and services manufactured or performed by FPI are in strict conformity with Federal Specifications. These supplies and services are listed in the Schedule. Copies of the Schedule are available from Federal Prison Industries, Inc., Department of Justice, Washington, DC 20534.

8.604 Ordering procedures.

(a) Contracting officers shall order (1) less-than-carload lots of common-use items (Schedule A of the Schedule) from the regional warehouses of GSA, unless it is more practical and economical to purchase directly from FPI, and (2) carload lots of common-use items, and other items listed in the Schedule, from FPI.

(b) Contracting officers shall prepare orders to FPI using the procedures in the Schedule.

(c) When the contracting officer believes that the FPI price exceeds the market price, the matter may be referred to the cognizant product division identified in the Schedule or to the FPI Washington office for resolution.

8.605 Clearances.

(a) Clearance is required from FPI before products on the Schedule are acquired from other sources, except when the conditions in 8.606 apply. FPI clearances ordinarily are of the following types:

(1) General or blanket clearances issued when classes of articles or services are not available from FPI.

(2) Formal clearances issued in response to requests from offices desiring to acquire, from other sources, supplies listed in the Schedule and not covered by a general clearance. Requests should be addressed to Federal Prison Industries, Inc., Department of Justice, Washington, DC 20534.

(b) Purchases from other sources because of a lower price are not normally authorized, and clearances will not be issued on this basis except as a result of action taken to resolve questions of price under 8.604(c).

(c) Disputes regarding price, quality, character, or suitability of products produced by FPI are subject to arbitration as specified in 18 U.S.C. 4124. The statute provides that the arbitration shall be conducted by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the Director of the Office of Management and Budget, or their representatives. The decisions of the board are final and binding on all parties.

8.606 Exceptions.

FPI clearances are not required when—

(a) Public exigency requires immediate delivery or performance;

(b) Suitable used or excess supplies are available;

(c) Purchases are made from GSA of less-than-carload lots of common-use items stocked by GSA (see Schedule A of the Schedule);

(d) The products are acquired and used outside the United States; or

(e) Orders are for listed items totaling $25 or less that require delivery within 10 days.

Subpart 8.7—Acquisition From the Blind and Other Severely Handicapped

8.700 Scope of subpart.

This subpart prescribes the policies and procedures for implementing the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c), referred to in this subpart as *the Act*, and the rules of the Committee for Purchase from the Blind and Other Severely Handicapped (41 CFR part 51).

8.701 Definitions.

Allocation, as used in this subpart, means an action taken by a central nonprofit agency to designate the workshops that will produce definite quantities of supplies or perform specific services upon receipt of orders from ordering offices.

Central nonprofit agency, as used in this subpart, means the National Industries for the Blind, which has been designated to represent workshops serving blind individuals; or the National Industries for the Severely Handicapped, which has been designated to represent workshops serving severely handicapped individuals other than blind.

Committee, as used in this subpart, means the Committee for Purchase from the Blind and Other Severely Handicapped.

Government or *entity of the Government* means any entity of the legislative or judicial branch, any executive agency, military department, Government corporation, or independent establishment, the U.S. Postal Service, or any nonappropriated-fund instrumentality of the Armed Forces.

Ordering office means any activity in an entity of the Government that places orders for the purchase of supplies or services.

Procurement List, as used in this subpart, means a list of supplies (including military resale commodities) and services that the Committee has determined are suitable for purchase by the Government under the Javits-Wagner-O'Day Act.

Workshop for the blind or *workshop for the other severely handicapped* (referred to jointly as workshops) means a qualified nonprofit agency for the blind or for the other severely handicapped approved by the Committee to produce a commodity for or provide a service to the Government under the Act.

8.702 General.

The Committee is an independent Government activity with members appointed by the President of the United States. It is responsible for—

(a) Determining those supplies and services to be purchased by all entities of the Government from workshops for the blind and other severely handicapped;

(b) Establishing prices for the supplies and services; and

(c) Establishing rules and regulations to implement the Act.

8.703 Procurement List.

(a) The Committee publishes a Procurement List of all the supplies and services required to be purchased from the workshops. Copies of the Procurement List may be obtained by submitting GSA Form 457 to the General Services Administration, Building 41, Denver Federal Center, Denver, CO 80225. Mailing code OOSC-0002 applies.

(b) The Procurement List identifies—

(1) Workshop supplies available from the General Services Administration (GSA) stocks at supply distribution facilities and the Defense Logistics Agency (DLA) system; and

(2) Supplies that are also available from Federal Prison Industries, Inc.

[48 FR 42129, Sept. 19, 1983, as amended at 51 FR 19713, May 30, 1986]

8.704 Purchase priorities.

(a) The Act requires the Government to purchase supplies or services on the Procurement List, at prices established by the Committee, from qualified workshops if they are available within the period required. When identical supplies or services are on the Procurement List and the Schedule of Products issued by Federal Prison Industries, Inc., ordering offices shall purchase supplies and services in the following priorities:

(1) Supplies:

(i) Federal Prison Industries, Inc. (41 U.S.C. 48).

(ii) Workshops.

(iii) Commercial sources.

(2) Services:

(i) Workshops.

(ii) Federal Prison Industries, Inc.

(iii) Commercial sources.

(b) No other provision of the FAR shall be construed as permitting an exception to the mandatory purchase of items on the Procurement List.

(c) The Procurement List identifies those supplies for which the ordering office must obtain a formal clearance (8.605) from Federal Prison Industries, Inc., before making any purchases from workshops.

[48 FR 42129, Sept. 19, 1983, as amended at 51 FR 19713, May 30, 1986]

8.705 Procedures.

8.705-1 General.

(a) Ordering offices shall obtain supplies and services on the Procurement List from the central nonprofit agency or its designated workshops, except that supplies identified on the Procurement List as available from DLA or GSA supply distribution facilities shall be obtained through DLA or GSA procedures. If a distribution facility cannot provide the supplies, it shall inform the ordering office, which shall then order from the workshop designated by the Committee.

(b) Supply distribution facilities in DLA and GSA shall obtain supplies on the Procurement List from the central nonprofit agency identified or its designated workshops.

8.705-2 Direct-order process.

Central nonprofit agencies may authorize ordering offices to transmit orders for specific supplies or services directly to a workshop. The written authorization remains valid until it is revoked by the central nonprofit agency or the Committee. The central nonprofit agency shall specify the normal delivery or performance leadtime required by the workshop. The ordering office shall reflect this leadtime in its orders.

8.705-3 Allocation process.

(a) When the direct order process has not been authorized, the ordering office shall submit a letter request for allocation (requesting the designation of the workshop to produce the supplies or perform the service) to the central nonprofit agency designated in the Procurement List. Ordering offices shall request allocations in sufficient time for a reply, for orders to be placed, and for the workshop to produce the supplies or provide the service within the required delivery or performance schedule.

(b) The ordering office's request to the central nonprofit agency for allocation shall include the following information:

(1) For supplies—Item name, stock number, latest specification, quantity, unit price, date delivery is required, and destination to which delivery is to be made.

(2) For services—Type and location of service required, latest specification, work to be performed, estimated volume, and required date or dates for completion.

(3) Other requirements; e.g., packing, marking, as necessary.

(c) When an allocation is received, the ordering office shall promptly issue an order to the specified workshop or to the central nonprofit agency, as instructed by the allocation. If the issuance of an order is to be delayed for more than 15 days beyond receipt of the allocation, or canceled, the ordering office shall advise the central nonprofit agency immediately.

(d) Ordering offices may issue orders without limitation as to dollar amount and shall record them upon issuance as obligations. Each order shall include, as a minimum, the information contained in the request for allocation. Ordering offices shall also include additional instructions necessary for performance under the order; e.g., on the handling of Government-furnished property, reports required, and notification of shipment.

8.705-4 Compliance with orders.

(a) The central nonprofit agency shall inform the ordering office of changes in leadtime experienced by its workshops to minimize requests for extensions once the ordering office places an order.

(b) The ordering office shall grant a request by a central nonprofit agency or workshop for revision in the delivery or completion schedule, if feasible. If extension of the delivery or completion date is not feasible, the ordering office shall notify the appropriate central nonprofit agency and request that it reallocate the order, or grant a purchase exception authorizing acquisition from commercial sources.

(c) When a workshop fails to perform under the terms of an order, the ordering office shall make every effort to resolve the noncompliance with the workshop involved and to negotiate an adjustment before taking action to cancel the order. If the problem cannot be resolved with the workshop, the ordering office shall refer the matter for resolution first to the central nonprofit agency and then, if necessary, to the Committee.

(d) When, after complying with 8.705-4(c), the ordering office determines that it must cancel an order, it shall notify the central nonprofit agency and, if practical, request a reallocation of the order. When the central nonprofit agency cannot reallocate the order, it shall grant a purchase exception permitting use of commercial sources, subject to approval by the Committee when the value of the purchase exception is $2,500 or more.

8.706 Purchase exceptions.

(a) Ordering offices may acquire supplies or services listed on the Procurement List from commercial sources only if the acquisition is specifically authorized in a purchase exception granted by the designated central nonprofit agency.

(b) The central nonprofit agency shall promptly grant purchase exceptions when—

(1) The workshops cannot provide the supplies or services within the time required, and commercial sources can provide them earlier in the quantities required; or

(2) The quantity required cannot be produced or provided economically by the workshops.

(c) The central nonprofit agency granting the exception shall specify the quantity and delivery or performance period covered by the exception.

(d) When a purchase exception is granted, the contracting officer shall—

(1) Initiate purchase action within 15 days following the date of the exception or any extension granted by the central nonprofit agency; and

(2) Provide a copy of the solicitation to the central nonprofit agency when it is issued.

(e) The Committee may also grant a purchase exception, under any circumstances it considers appropriate.

8.707 Prices.

(a) The prices on the Procurement List are fair market prices established by the Committee. All prices for supplies ordered under this subpart are f.o.b. origin.

(b) Prices for supplies are normally adjusted semiannually. Prices for services are normally adjusted annually.

(c) The Committee may request the agency responsible for acquiring the supplies or service to assist it in establishing or revising the fair market price. The Committee has the authority to establish prices without prior coordination with the responsible contracting office.

(d) Price changes shall normally apply to all orders received by the workshop on or after the effective date of the change. In special cases, after considering the views of the ordering office, the Committee may make price changes applicable to orders received by the workshop prior to the effective date of the change.

(e) If an ordering office desires packing, packaging, or marking of supplies other than the standard pack as provided on the Procurement List, any difference in costs shall be included as a separate item on the workshop's invoice. The ordering office shall reimburse the workshop for these costs.

(f) Ordering offices may make recommendations to the Committee at any time for price revisions for supplies and services on the Procurement List.

8.708 Shipping.

(a) Delivery is accomplished when a shipment is placed aboard the vehicle of the initial carrier. The time of delivery is the date shipment is released to and accepted by the initial carrier.

(b) Shipment is normally under Government bills of lading. However, for small orders, ordering offices may specify other shipment methods.

(c) When shipments are under Government bills of lading, the bills of lading may accompany orders or be otherwise furnished promptly. Failure of an ordering office to furnish bills of lading or to designate a method of transportation may result in an excusable delay in delivery.

(d) Workshops shall include transportation costs for small shipments paid by workshops as an item on the

oice. The ordering office shall reim-
se the workshop for these costs.

FR 42129, Sept. 19, 1983, as amended at
R 19713, May 30, 1986]

9 Payments.

he ordering office shall normally
ke payments for supplies or services
the Procurement List within 20
s, but no later than 30 days after
oment or after receipt of a correct
oice or voucher.

0 Quality of merchandise.

upplies and services provided by
kshops shall comply with the ap-
able Government specifications
standards cited in the order.
en no specifications or standards
t—
) Supplies shall be of the highest
lity and equal to similar items
ilable on the commercial market;

) Services shall conform to good
mercial practices.

1 Quality complaints.

) When the quality of supplies or
ices received is unsatisfactory, the
g activity shall take the following
ons:
) For supplies received from DLA
ply centers or GSA supply distribu-
facilities, notify the supplying
ncy.
) For supplies or services received
n workshops for the blind or other
erely handicapped, address com-
nts to the workshop involved, with
py to the appropriate central non-
fit agency.
) When quality problems cannot
resolved by the workshop and the
ering office, the ordering office
ll first contact the central nonprof-
gency and then, if necessary, the
mittee for resolution.

2 Specification changes.

) The contracting activity shall
fy the workshop and appropriate
ral nonprofit agency of any
nge in specifications or descrip-
s. In the absence of such written
fication, the workshop shall
luce the supplies or provide the
services under the specification or description cited in the order.

(b) The contracting activity shall provide 90-days advance notification to the Committee and the central nonprofit agency on actions that affect supplies on the Procurement List and shall permit them to comment before action is taken, particularly when it involves—

(1) Changes that require new national stock numbers or item designations;

(2) Deleting items from the supply system;

(3) Standardization; or

(4) Developing new items to replace items on the Procurement List.

(c) For services, the contracting activity shall notify the workshop and central nonprofit agency concerned at least 90 days prior to the date that any changes in the scope of work or other conditions will be required.

(d) When, in order to meet its emergency needs, a contracting activity is unable to give the 90-day notification required in paragraphs (b) and (c) of this section, the contracting activity shall, at the time it places the order or change notice, inform the workshop and the central nonprofit agency in writing of the reasons that it cannot meet the 90-day notification requirement.

[48 FR 42129, Sept. 19, 1983, as amended at 51 FR 19714, May 30, 1986]

8.713 Optional acquisition of supplies and services.

(a) Ordering offices may acquire supplies and services not included on the Procurement List from a workshop that is the low responsive, responsible offeror under a solicitation issued by other authorized acquisition methods.

(b) Ordering offices should forward solicitations to workshops that may be qualified to provide the supplies or services required.

8.714 Communications with the central nonprofit agencies and the Committee.

(a) The addresses of the central nonprofit agencies are contained in the current issue of the Procurement List.

(b) Any matter requiring referral to the Committee shall be addressed to the Executive Director of the Committee at the address contained in the current issue of the Procurement List.

8.715 Replacement commodities.

When a commodity on the Procurement List is replaced by another commodity which has not been previously acquired, and a qualified workshop can produce the replacement commodity in accordance with the Government's quality standards and delivery schedules and at a fair market price, the replacement commodity is automatically on the Procurement List and shall be acquired from the workshop designated by the Committee. The commodity being replaced shall continue to be included on the Procurement List until there is no longer a requirement for that commodity.

[51 FR 19714, May 30, 1986]

Subpart 8.8—Acquisition of Printing and Related Supplies

8.800 Scope of subpart.

This subpart provides policy for the acquisition of Government printing and related supplies.

[52 FR 9037, Mar. 20, 1987]

8.801 Definitions.

Government printing means printing, binding, and blankbook work for the use of an executive department, independent agency, or establishment of the Government.

Related supplies, as used in this subpart, means supplies that are used and equipment that is usable in printing and binding operations.

[48 FR 42129, Sept. 19, 1983, as amended at 52 FR 9037, Mar. 20, 1987]

8.802 Policy.

(a) Government printing must be done by or through the Government Printing Office (GPO) (44 U.S.C. 501), unless—

(1) The GPO cannot provide the printing service (44 U.S.C. 504);

(2) The printing is done in field printing plants operated by an executive agency (44 U.S.C. 501(2));

(3) The printing is acquired by an executive agency from allotments for contract field printing (44 U.S.C. 501(2)); or

(4) The printing is specifically authorized by statute to be done other than by the GPO.

(b) The head of each agency shall designate a central printing authority; that central printing authority may serve as the liaison with the Congressional Joint Committee on Printing (JCP) and the Public Printer on matters related to printing. Contracting officers shall obtain approval from their designated central printing authority before contracting in any manner, whether directly or through contracts for other supplies or services, for the items defined in 8.801 and for composition, platemaking, presswork, binding, and micrographics (when used as a substitute for printing).

(c) Further, 44 U.S.C. 1121 provides that the Public Printer may acquire and furnish paper and envelopes (excluding envelopes printed in the course of manufacture) in common use by two or more Government departments, establishments, or services within the District of Columbia, and provides for reimbursement of the Public Printer from available appropriations or funds. Paper and envelopes that are furnished by the Public Printer may not be acquired in any other manner.

[48 FR 42129, Sept. 19, 1983, as amended at 52 FR 9037, Mar. 20, 1987; 54 FR 48982, Nov. 28, 1989]

Subparts 8.9—8.10 [Reserved]

Subpart 8.11—Leasing of Motor Vehicles

8.1100 Scope of subpart.

This subpart covers the procedures for the leasing, from commercial concerns, of motor vehicles that comply with Federal Motor Vehicle Safety Standards and applicable State motor vehicle safety regulations. It does not apply to motor vehicles leased outside the United States.

8.1101 Definitions.

Leasing, as used in this subpart, means the acquisition of motor vehi-

es, other than by purchase from pri-
te or commercial sources, and in-
udes the synonyms *hire* and *rent*.
Motor vehicle means an item of
uipment, mounted on wheels and
signed for highway and/or land use,
at (a) derives power from a self-con-
ined power unit or (b) is designed to
towed by and used in conjunction
th self-propelled equipment.

102 Presolicitation requirements.

a) Except as specified in 8.1102(b),
fore preparing solicitations for leas-
g of motor vehicles, contracting offi-
rs shall obtain from the requiring
tivity a written certification that—
1) The vehicles requested are of
ximum fuel efficiency and mini-
m body size, engine size, and equip-
ent (if any) necessary to fulfill oper-
onal needs, and meet prescribed
el economy standards;
2) The head of the requiring
ency, or a designee, has certified
at the requested passenger automo-
es (sedans and station wagons)
ger than Type IA, IB, or II (small,
bcompact, or compact) are essential
the agency's mission;
3) Internal approvals have been re-
ved; and
4) The General Services Adminis-
tion has advised that it cannot fur-
h the vehicles.
b) With respect to requirements fo
sing motor vehicles for a period of
s than 60 days, the contracting offi-
need not obtain the certification
cified in 8.1102(a)—
1) If the requirement is for type 1A,
, or II vehicles, which are by defini-
n fuel efficient; or
2) If the requirement is for passen-
vehicles larger than 1A, 1B, or II,
d the agency has established proce-
res for advance approval, on a case-
case basis, of such requirements.
c) Generally, solicitations shall not
limited to current-year production
dels. However, with the prior ap-
val of the head of the contracting
ice, solicitations may be limited to
rent models on the basis of overall
nomy.

FR 42129, Sept. 19, 1983, as amended at
R 25527, June 21, 1990]

8.1103 Contract requirements.

Contracting officers shall include the following items in each contract for leasing motor vehicles:

(a) Scope of contract.

(b) Method of computing payments.

(c) A listing of the number and type of vehicles required, and the equipment and accessories to be provided with each vehicle.

(d) Responsibilities of the contractor or the Government for furnishing gasoline, motor oil, antifreeze, and similar items.

(e) Unless it is determined that it will be more economical for the Government to perform the work, a statement that the contractor shall perform all maintenance on the vehicles.

(f) A statement as to the applicability of pertinent State and local laws and regulations, and the responsibility of each party for compliance with them.

(g) Responsibilities of the contractor or the Government for emergency repairs and services.

8.1104 Contract clauses.

The contracting officer shall insert the following clauses in solicitations and contracts for leasing of motor vehicles, unless the motor vehicles are leased in foreign countries:

(a) The clause at 52.208-4, Vehicle Lease Payments.

(b) The clause at 52.208-5, Condition of Leased Vehicles.

(c) The clause at 52.208-6, Marking of Leased Vehicles.

(d) A clause substantially the same as the clause at 52.208-7, Tagging of Leased Vehicles, for vehicles leased over 60 days (see 41 CFR 101-38.6).

(e) The provisions and clauses prescribed elsewhere in the FAR for solicitations and contracts for supplies when a fixed-price contract is contemplated, but excluding—

(1) The clause at 52.212-9, Variation in Quantity;

(2) The clause at 52.232-1, Payments;

(3) The clause at 52.222-20, Walsh-Healey Public Contracts Act; and

(4) The clause at 52.246-16, Responsibility for Supplies.

[48 FR 42129, Sept. 19, 1983, as amended at 51 FR 19714, May 30, 1986]

PART 9—CONTRACTOR QUALIFICATIONS

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42142, Sept. 19, 1983, unless otherwise noted.

9.000 Scope of part.

This part prescribes policies, standards, and procedures pertaining to prospective contractors' responsibility; debarment, suspension, and ineligibility; qualified products; first article testing and approval; contractor team arrangements; defense production pools and research and development pools; and organizational conflicts of interest.

Subpart 9.1—Responsible Prospective Contractors

9.100 Scope of subpart.

This subpart prescribes policies, standards, and procedures for determining whether prospective contractors and subcontractors are responsible.

9.101 Definitions.

Preaward survey means an evaluation by a surveying activity of a prospective contractor's capability to perform a proposed contract.

Responsible prospective contractor means a contractor that meets the standards in 9.104.

Surveying activity means the cognizant contract administration office or, if there is no such office, another organization designated by the agency to conduct preaward surveys.

9.102 Applicability.

(a) This subpart applies to all proposed contracts with any prospective contractor that is located—

(1) In the United States, its possessions, or Puerto Rico; or

(2) Elsewhere, unless application of the subpart would be inconsistent with the laws or customs where the contractor is located.

(b) This subpart does not apply to proposed contracts with (1) foreign, State, or local governments; (2) other U.S. Government agencies or their instrumentalities; or (3) agencies for the blind or other severely handicapped (see subpart 8.7).

9.103 Policy.

(a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.

(b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determinations of Eligibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see subpart 19.8.)

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

9.104 Standards.

9.104-1 General standards.

To be determined responsible, a prospective contractor must—

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance record (see 9.104-3(c));

(d) Have a satisfactory record of integrity and business ethics;

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(b));

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

[48 FR 42142, Sept. 19, 1983, as amended at 51 FR 27119, July 29, 1986]

9.104-2 Special standards.

(a) When it is necessary for a particular acquisition or class of acquisitions, the contracting officer shall develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors.

(b) Contracting officers shall award contracts for subsistence only to those prospective contractors that meet the general standards in 9.104-1 and are approved in accordance with agency sanitation standards and procedures.

9.104-3 Application of standards.

(a) *Manufacturer or regular dealer.* (See 22.608-2.)

(b) *Ability to obtain resources.* Except to the extent that a prospective contractor has sufficient resources or proposes to perform the contract by subcontracting, the contracting officer shall require acceptable evidence of the prospective contractor's ability to obtain required resources (see 9.104-1(a), (e), and (f)). Acceptable evidence normally consists of a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel.

(c) *Satisfactory performance record.* A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. The contracting officer shall consider the number of contracts involved and extent of deficiency of each in making this evaluation. Prior compliance with subcontracting plans required by subpart 19.7 shall be considered in determining the responsibility of an offeror bidding on a contract requiring a subcontracting plan.

(d) *Affiliated concerns.* Affiliated concerns (see *Affiliates* and *Concerns* in 19.101) are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility.

(e) *Small business concerns.* If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency (see subpart 19.6).

[48 FR 42142, Sept. 19, 1983, as amended at 53 FR 27463, July 20, 1988; 53 FR 34226, Sept. 2, 1988]

9.104-4 Subcontractor responsibility.

(a) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and

9.405-2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.

(b) When it is in the Government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility.

9.105 Procedures.

9.105-1 Obtaining information.

(a) Before making a determination of responsibility, the contracting officer shall possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards in 9.104.

(b) (1) Generally, the contracting officer shall obtain information regarding the responsibility of prospective contractors, including requesting preaward surveys when necessary (see 9.106), promptly after a bid opening or receipt of offers. However, in negotiated contracting, especially when research and development is involved, the contracting officer may obtain this information before issuing the request for proposals. Requests for information shall ordinarily be limited to information concerning (i) the low bidder or (ii) those offerors in range for award.

(2) Preaward surveys shall be managed and conducted by the surveying activity.

(i) If the surveying activity is a contract administration office—

(A) That office shall advise the contracting officer on prospective contractors' financial competence and credit needs; and

(B) The administrative contracting officer shall obtain from the auditor any information required concerning the adequacy of prospective contractors' accounting systems and these systems' suitability for use in administering the proposed type of contract.

(ii) If the surveying activity is not a contract administration office, the contracting officer shall obtain from the auditor any information required concerning prospective contractors' financial competence and credit needs, the adequacy of their accounting systems, and these systems' suitability for use in administering the proposed type of contract.

(3) Information on financial resources and performance capability shall be obtained or updated on as current a basis as is feasible up to the date of award.

(c) The contracting officer should use the following sources of information to support determinations of responsibility or nonresponsibility:

(1) The list entitled Parties Excluded from Procurement Programs (list of contractors debarred, suspended, proposed for debarment, and declared ineligible) maintained in accordance with subpart 9.4.

(2) Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices.

(3) The prospective contractor—including bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information.

(4) Preaward survey reports (see 9.106).

(5) Other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.

(6) If the contract is for construction, the contracting officer may consider performance evaluation reports (see 36.201(c)(2)).

(d) Contracting offices and cognizant contract administration offices that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully shall promptly exchange relevant information.

[48 FR 42142, Sept. 19, 1983, as amended at 51 FR 27119, July 29, 1986; 52 FR 9038, Mar. 20, 1987; 54 FR 19813, May 8, 1989]

9.105-2 Determinations and documentation.

(a) *Determinations.* (1) The contracting officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the contracting officer shall make, sign, and place in the contract file a determination of nonresponsibility, which shall state the basis for the determination.

(2) If the contracting officer determines and documents that a responsive small business lacks certain elements of responsibility, the contracting officer shall comply with the procedures in subpart 19.6. When a certificate of competency is issued for a small business concern (see subpart 19.6), the contracting officer may accept the factors covered by the certificate without further inquiry.

(b) *Support documentation.* Documents and reports supporting a determination of responsibility or nonresponsibility, including any preaward survey reports and any applicable Certificate of Competency, must be included in the contract file.

9.105-3 Disclosure of preaward information.

(a) Except as provided in subpart 24.2, Freedom of Information Act, information (including the preaward survey report) accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.

(b) The contracting officer may discuss preaward survey information with the prospective contractor before determining responsibility. After award, the contracting officer or, if it is appropriate, the head of the surveying activity or a designee may discuss the findings of the preaward survey with the company surveyed.

(c) Preaward survey information may contain proprietary and/or source selection information and should be marked with the appropriate legend and protected accordingly (see 3.104-4 (j) and (k)).

[48 FR 42142, Sept. 19, 1983, as amended by 54 FR 20496, May 11, 1989]

Effective Date Note: At 54 FR 50718, Dec. 8, 1989, paragraph (c) in section 9.105-3 was suspended for the period December 1, 1989, through November 30, 1990.

9.106 Preaward surveys.

9.106-1 Conditions for preaward surveys.

(a) A preaward survey is normally required when the information on hand or readily available to the contracting officer is not sufficient to make a determination regarding responsibility. However, if the contemplated contract (1) will be for $25,000 or less or (2) will have a fixed price of less than $100,000 and will involve commercial products (see 11.001) only, the contracting officer should *not* request a preaward survey unless circumstances justify its cost.

(b) When a cognizant contract administration office becomes aware of a prospective award to a contractor about which unfavorable information exists and no preaward survey has been requested, it shall promptly obtain and transmit details to the contracting officer.

(c) Before beginning a preaward survey, the surveying activity shall ascertain whether the prospective contractor is debarred, suspended, or ineligible (see subpart 9.4). If the prospective contractor is debarred, suspended, or ineligible, the surveying activity shall advise the contracting officer promptly and not proceed with the preaward survey unless specifically requested to do so by the contracting officer.

[48 FR 42142, Sept. 19, 1983, as amended at 51 FR 27489, July 31, 1986]

9.106-2 Requests for preaward surveys.

The contracting officer's request to the surveying activity (Preaward Survey of Prospective Contractor (General), SF 1403) shall—

(a) Identify additional factors about which information is needed;

(b) Include the complete solicitation package (unless it has previously been furnished), and any information indicating prior unsatisfactory performance by the prospective contractor;

(c) State whether the contracting office will participate in the survey;

(d) Specify the date by which the report is required. This date should be consistent with the scope of the survey requested and normally shall allow at least 7 working days to conduct the survey; and

(e) When appropriate, limit the scope of the survey.

9.106-3 Interagency preaward surveys.

(a) When the contracting office and the surveying activity are in different agencies, the procedures of this section 9.106 and subpart 42.1 shall be followed along with the regulations of the agency in which the surveying activity is located, except that reasonable special requests by the contracting office shall be accommodated.

(b) For contracts or contract modifications expected to exceed $100,000, the surveying activity shall furnish with its report a list of all persons, classes of persons, and to the maximum extent practicable, the names of all individuals within the class, who have been provided access to the proprietary or source selection information (see 3.104-5(d)) at or by the surveying activity.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 20496, May 11, 1989; 55 FR 36795, Sept. 6, 1990]

9.106-4 Reports.

(a) The surveying activity shall complete the applicable parts of SF 1403, Preaward Survey of Prospective Contractor (General); SF 1404, Preaward Survey of Prospective Contractor—Technical; SF 1405, Preaward Survey of Prospective Contractor—Production; SF 1406, Preaward Survey of Prospective Contractor—Quality Assurance; SF 1407, Preaward Survey of Prospective Contractor—Financial Capability; and SF 1408, Preaward Survey of Prospective Contractor—Accounting System; and provide a narrative discussion sufficient to support both the evaluation ratings and the recommendations.

(b) When the contractor surveyed is a small business that has received preferential treatment on an ongoing contract under Section 8(a) of the Small Business Act (15 U.S.C. 637) or has received a Certificate of Competency during the last 12 months, the surveying activity shall consult the appropriate Small Business Administration field office before making an affirmative recommendation regarding the contractor's responsibility or nonresponsibility.

(c) When a preaward survey discloses previous unsatisfactory performance, the surveying activity shall specify the extent to which the prospective contractor plans, or has taken, corrective action. Lack of evidence that past failure to meet contractual requirements was the prospective contractor's fault does not necessarily indicate satisfactory performance. The narrative shall report any persistent pattern of need for costly and burdensome Government assistance (e.g., engineering, inspection, or testing) provided in the Government's interest but not contractually required.

(d) When the surveying activity possesses information that supports a recommendation of complete award without an on-site survey and no special areas for investigation have been requested, the surveying activity may provide a short-form preaward survey report. The short-form report shall consist solely of the Preaward Survey of Prospective Contractor (General), SF 1403. Sections III and IV of this form shall be completed and block 21 shall be checked to show that the report is a short-form preaward report.

Subpart 9.2—Qualifications Requirements

SOURCE: 50 FR 35476, Aug. 30, 1985, unless otherwise noted.

9.200 Scope of subpart.

This subpart implements 10 U.S.C. 2319 and 41 U.S.C. 253(e) and prescribes policies and procedures regarding qualification requirements and the acquisitions that are subject to such requirements.

9.201 Definitions.

Procuring activity, as used in this part or subpart, means a component of an executive agency having a significant acquisition function and designated as such by the head of the agency. Unless agency regulations specify otherwise, the term *procuring activity* shall be synonymous with *contracting activity* as defined in subpart 2.1.

Qualification requirement means a Government requirement for testing or other quality assurance demonstration that must be completed before award of a contract.

Qualified bidders list (QBL) means a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements.

Qualified manufacturers list (QML) means a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product.

Qualified products list (QPL) means a list of products which have been examined, tested, and have satisfied all applicable qualification requirements.

[50 FR 35476, Aug. 30, 1985, as amended at 53 FR 34227, Sept. 2, 1988]

9.202 Policy.

(a)(1) The head of the agency or designee shall, before establishing a qualification requirement, prepare a written justification—

(i) Stating the necessity for establishing the qualification requirement and specifying why the qualification requirement must be demonstrated before contract award;

(ii) Estimating the likely costs for testing and evaluation which will be incurred by the potential offeror to become qualified; and

(iii) Specifying all requirements that a potential offeror (or its product) must satisfy in order to become qualified. Only those requirements which are the least restrictive to meet the purposes necessitating the establishment of the qualification requirements shall be specified.

(2) Upon request to the contracting activity, potential offerors shall be provided—

(i) All requirements that they or their products must satisfy to become qualified;

(ii) At their expense (but see 9.204(a)(2) with regard to small businesses), a prompt opportunity to demonstrate their abilities to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned, or of another agency obtained through interagency agreements, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency).

(3) If the services in (a)(2)(ii) above are provided by contract, the contractors selected to provide testing and evaluation services shall be—

(i) Those that are not expected to benefit from an absence of additional qualified sources; and

(ii) Required by their contracts to adhere to any restriction on technical data asserted by the potential offeror seeking qualification.

(4) A potential offeror seeking qualification shall be promptly informed as to whether qualification is attained and, in the event it is not, promptly furnished specific reasons why qualification was not attained.

(b) When justified under the circumstances, the agency activity responsible for establishing a qualification requirement shall submit to the competition advocate for the procuring activity responsible for purchasing the item subject to the qualification requirement, a determination that it is unreasonable to specify the standards for qualification which a prospective offeror (or its product) must satisfy. After considering any comments of the competition advocate reviewing the determination, the head of the procuring activity may waive the requirements of 9.202(a)(1)(ii) through (4) above for up to 2 years with respect to the item subject to the qualification requirement. A copy of the waiver shall be furnished to the head of the agency or other official responsible for actions under 9.202(a)(1). The waiver authority provided in this paragraph does not apply with respect to qualification requirements contained in a QPL, QML, or QBL.

(c) If a potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror (or its product) meets the standards established for qualification or can meet them before the date specified for award of the contract, a potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror—

(1) Is not on a QPL, QML, or QBL maintained by the Department of Defense (DOD) or the National Aeronautics and Space Administration (NASA); or

(2) Has not been identified as meeting a qualification requirement established after October 19, 1984, by DOD or NASA; or

(3) Has not been identified as meeting a qualification requirement established by a civilian agency (not including NASA).

(d) The procedures in subpart 19.6 for referring matters to the Small Business Administration are not mandatory on the contracting officer when the basis for a referral would involve a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(e) The contracting officer need not delay a proposed award in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification. In addition, when approved by the head of an agency or designee, a procurement need not be delayed in order to comply with 9.202(a).

(f) Within 7 years following enforcement of a QPL, QML, or QBL by DOD or NASA, or within 7 years after any qualification requirement was originally established by a civilian agency other than NASA, the qualification requirement shall be examined and revalidated in accordance with the requirements of 9.202(a). For DOD and NASA, qualification requirements, other than QPL's, QML's, and QBL's, shall be examined and revalidated within 7 years after establishment of the requirement under 9.202(a). Any periods for which a waiver under 9.202(b) is in effect shall be excluded in computing the 7 years within which review and revalidation must occur.

[50 FR 35476, Aug. 30, 1985, as amended at 53 FR 34227, Sept. 2, 1988]

9.203 QPL's, QML's, and QBL's.

(a) Qualification and listing in a QPL, QML, or QBL is the process by which products are obtained from manufacturers or distributors, examined and tested for compliance with specification requirements, or manufacturers or potential offerors, are provided an opportunity to demonstrate their abilities to meet the standards specified for qualification. The names of successful products, manufacturers, or potential offerors are included on lists evidencing their status. Generally, qualification is performed in advance and independently of any specific acquisition action. After qualification, the products, manufacturers, or potential offerors are included in a Federal or Military QPL, QML, or QBL. (See 9.202(a)(2) with regard to any product, manufacturer, or potential offeror not yet included on an applicable list.)

(b) Specifications requiring a qualified product are included in the following publications:

(1) GSA Index of Federal Specifications, Standards and Commercial Item Descriptions.

(2) Department of Defense Index of Specifications and Standards.

(c) Instructions concerning qualification procedures are included in the following publications:

(1) Federal Standardization Handbook, FPMR 101-29, Chapter IV.

(2) Defense Standardization Manual 4120.3-M, Chapter IV, as amended by Military Standards 961 and 962.

(d) The publications listed in paragraphs (b) and (c) above are sold to the public by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Civil agencies may obtain the publications from the General Services Administration, Specifications Section (WFSIS), Washington, DC 20407. Defense agencies may obtain the publications from the Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120.

[50 FR 35476, Aug. 30, 1985, as amended at 53 FR 17857, May 18, 1988]

9.204 Responsibilities for establishment of a qualification requirement.

The responsibilities of agency activities that establish qualification requirements include the following:

(a) Arranging publicity for the qualification requirements. If active competition on anticipated future qualification requirements is likely to be fewer than two manufacturers or the products of two manufacturers, the activity responsible for establishment of the qualification requirements shall—

(1) Periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification unless the contracting officer determines that such publication would compromise the national security.

(2) Bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement. However, such costs may be borne only if it is determined in accordance with agency procedures that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time, considering the duration and dollar value of anticipated future requirements. A prospective contractor requesting the United States to bear testing and evaluation costs must certify as to its status as a small business concern under section 3 of the Small Business Act in order to receive further consideration.

(b) Qualifying products that meet specification requirements.

(c) Listing manufacturers and suppliers whose products are qualified in accordance with agency procedures.

(d) Furnishing QPL's, QML's, or QBL's or the qualification requirements themselves to prospective offerors and the public upon request (see 9.202(a)(2)(i) above).

(e) Clarifying, as necessary, qualification requirements.

(f) In appropriate cases, when requested by the contracting officer, providing concurrence in a decision not to enforce a qualification requirement for a solicitation.

(g) Withdrawing or omitting qualification of a listed product, manufacturer or offeror, as necessary.

(h) Advising persons furnished any list of products, manufacturers or offerors meeting a qualification requirement and suppliers whose products are on any such list that—

(1) The list does not constitute endorsement of the product, manufacturer, or other source by the Government;

(2) The products or sources listed have been qualified under the latest applicable specification;

(3) The list may be amended without notice;

(4) The listing of a product or source does not release the supplier from compliance with the specification; and

(5) Use of the list for advertising or publicity is permitted. However, it must not be stated or implied that a particular product or source is the only product or source of that type qualified, or that the Government in any way recommends or endorses the products or the sources listed.

(i) Reexamining a qualified product or manufacturer when—

(1) The manufacturer has modified its product, or changed the material or the processing sufficiently so that the validity of previous qualification is questionable;

(2) The requirements in the specification have been amended or revised sufficiently to affect the character of the product; or

(3) It is otherwise necessary to determine that the quality of the product is

aintained in conformance with the
ecification.

**205 Opportunity for qualification before
award.**

(a) If an agency determines that a
alification requirement is necessary,
e agency activity responsible for es-
blishing the requirement shall urge
anufacturers and other potential
urces to demonstrate their ability to
eet the standards specified for quali-
ation and, when possible, give suffi-
ent time to arrange for qualification
fore award. The responsible agency
tivity shall, before establishing any
alification requirement, furnish
tice to the U.S. Department of Com-
erce, Office of Field Operations, P.O.
x 5999, Chicago, Illinois 60680, for
ropsis in the Commerce Business
ily. The notice shall include—

1) Intent to establish a qualification
quirement;

2) The specification number and
me of the product;

3) The name and address of the ac-
ity to which a request for the infor-
ation and opportunity described in
02(a)(2) should be submitted;

4) The anticipated date that the
ency will begin awarding contracts
bject to the qualification require-
ent;

5) A precautionary notice that
en a product is submitted for quali-
ation testing, the applicant must
rnish any specific information that
y be requested of the manufacturer
fore testing will begin; and

6) The approximate time period fol-
ving submission of a product for
lification testing within which the
plicant will be notified whether the
duct passed or failed the qualifica-
n testing (see 9.202(a)(4)).

b) The activity responsible for es-
lishing a qualification requirement
ll keep any list maintained of those
ady qualified open for inclusion of
itional products, manufacturers, or
er potential sources, including eli-
e products from designated coun-
s under terms of the International
eement on Government Procure-
t (see subpart 25.4).

9.206 Acquisitions subject to qualification requirements.

9.206-1 General.

(a) Agencies may not enforce any QPL, QML, or QBL without first complying with the requirements of 9.202(a). However, qualification requirements themselves, whether or not previously embodied in a QPL, QML, or QBL, may be enforced without regard to 9.202(a) if they are in either of the following categories:

(1) Any qualification requirement established by statute prior to October 30, 1984, for civilian agencies (not including NASA); or

(2) Any qualification requirement established by statute or administrative action prior to October 19, 1984, for DOD or NASA. Qualification requirements established after the above dates must comply with 9.202(a) to be enforceable.

(b) Except when the agency head or designee determines that an emergency exists, whenever an agency elects, whether before or after award, not to enforce a qualification requirement which it established, the requirement may not thereafter be enforced unless the agency complies with 9.202(a).

(c) If a qualification requirement applies, the contracting officer need consider only those offers identified as meeting the requirement or included on the applicable QPL, QML, or QBL, unless an offeror can satisfactorily demonstrate to the contracting officer that it or its product or its subcontractor or its product can meet the standards established for qualification before the date specified for award.

(d) If a product subject to a qualification requirement is to be acquired as a component of an end item, the contracting officer must assure that all such components and their qualification requirements are properly identified in the solicitation since the product or source must meet the standards specified for qualification before award.

(e) In acquisitions subject to qualification requirements, the contracting officer shall take the following steps:

(1) Use presolicitation notices in appropriate cases to advise potential sup-

pliers before issuing solicitations involving qualification requirements. The notices shall identify the specification containing the qualification requirement and establish an allowable time period, consistent with delivery requirements, for prospective offerors to demonstrate their abilities to meet the standards specified for qualification. The notice shall be publicized in accordance with 5.204. Whether or not a presolicitation notice is used, the general synopsizing requirements of subpart 5.2 apply.

(2) Distribute solicitations to prospective contractors whether or not they have been identified as meeting applicable qualification requirements.

(3) When appropriate, request in accordance with agency procedures that a qualification requirement not be enforced in a particular acquisition and, if granted, so specify in the solicitation (see 9.206-1(b)).

(4) Forward requests from potential suppliers for information on a qualification requirement to the agency activity responsible for establishing the requirement.

(5) Allow the maximum time, consistent with delivery requirements, between issuing the solicitation and the contract award. As a minimum, contracting officers shall comply with the time frames specified in 5.203 when applicable.

[50 FR 35476, Aug. 30, 1985, as amended at 53 FR 34227, Sept. 2, 1988]

9.206-2 Contract clause.

The contracting officer shall insert the clause at 52.209-1, Qualification Requirements, in solicitations and contracts when the acquisition is subject to a qualification requirement.

[53 FR 34227, Sept. 2, 1988]

9.206-3 Competition.

(a) *Presolicitation.* If a qualification requirement applies to an acquisition, the contracting officer shall review the applicable QPL, QML, or QBL or other identification of those sources which have met the requirement before issuing a solicitation to ascertain whether the number of sources is adequate for competition. (See 9.204(a) for duties of the agency activity responsible for establishment of the qualification requirement.) If the number of sources is inadequate, the contracting officer shall request the agency activity which established the requirement to—

(1) Indicate the anticipated date on which any sources presently undergoing evaluation will have demonstrated their abilities to meet the qualification requirement so that the solicitation could be rescheduled to allow as many additional sources as possible to qualify; or

(2) Indicate whether a means other than the qualification requirement is feasible for testing or demonstrating quality assurance.

(b) *Postsolicitation.* The contracting officer shall submit to the agency activity which established the qualification requirement the names and addresses of concerns which requested copies of the solicitation but are not included on the applicable QPL, QML, or QBL or identified as meeting the qualification requirement. The activity will then assist interested concerns in meeting the standards specified for qualification (see 9.202(a) (2) and (4)).

9.207 Changes in status regarding qualification requirements.

(a) The contracting officer shall promptly report to the agency activity which established the qualification requirement any conditions which may merit removal or omission from a QPL, QML, or QBL or affect whether a source should continue to be otherwise identified as meeting the requirement. These conditions exist when—

(1) Products or services are submitted for inspection or acceptance that do not meet the qualification requirement;

(2) Products or services were previously rejected and the defects were not corrected when resubmitted for inspection or acceptance;

(3) A supplier fails to request reevaluation following change of location or ownership of the plant where the product which met the qualification requirement was manufactured (see the clause at 52.209-1, Qualification Requirements);

(4) A manufacturer of a product
/hich met the qualification require-
ient has discontinued manufacture of
he product;

(5) A source requests removal from a
PL, QML, or QBL;

(6) A condition of meeting the quali-
ication requirement was violated; e.g.,
dvertising or publicity contrary to
.204(h)(5);

(7) A revised specification imposes a
ew qualification requirement;

(8) Manufacturing or design changes
ave been incorporated in the qualifi-
ation requirement;

(9) The source is on the Consolidat-
d List of Debarred, Suspended, and
neligible Contractors (see subpart
4); or

(10) Performance of a contract sub-
ct to a qualification requirement is
therwise unsatisfactory.

(b) After considering any of the
bove or other conditions reasonably
elated to whether a product or source
ontinues to meet the standards speci-
ed for qualification, an agency may
ke appropriate action without ad-
ance notification. The agency shall,
owever, promptly notify the affected
arties if a product or source is re-
oved from a QPL, QML, or QBL, or
ill no longer be identified as meeting
e standards specified for qualifica-
on. This notice shall contain specific
formation why the product or source
o longer meets the qualification re-
irement.

0 FR 35476, Aug. 30, 1985, as amended at
FR 34227, Sept. 2, 1988]

bpart 9.3—First Article Testing and Approval

01 Definitions.

Approval, as used in this subpart,
eans the contracting officer's written
tification to the contractor accept-
g the test results of the first article.

First article, as used in this subpart,
eans preproduction models, initial
oduction samples, test samples, first
s, pilot lots, and pilot models.

irst article testing means testing
d evaluating the first article for con-
mance with specified contract re-
irements before or in the initial
ge of production.

9.302 General.

First article testing and approval (hereafter referred to as testing and approval) ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance. Before requiring testing and approval, the contracting officer shall consider the—

(a) Impact on cost or time of delivery;

(b) Risk to the Government of foregoing such test; and

(c) Availability of other, less costly, methods of ensuring the desired quality.

9.303 Use.

Testing and approval may be appropriate when—

(a) The contractor has not previously furnished the product to the Government;

(b) The contractor previously furnished the product to the Government, but—

(1) There have been subsequent changes in processes or specifications;

(2) Production has been discontinued for an extended period of time; or

(3) The product acquired under a previous contract developed a problem during its life.

(c) The product is described by a performance specification; or

(d) It is essential to have an approved first article to serve as a manufacturing standard.

9.304 Exceptions.

Normally, testing and approval is not required in contracts for—

(a) Research or development;

(b) Products requiring qualification before award (e.g., when an applicable qualified products list exists (see subpart 9.2));

(c) Products normally sold in the commercial market; or

(d) Products covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that it is questionable whether the products would meet the requirements without testing and approval.

9.305 Risk.

Before first article approval, the acquisition of materials or components, or commencement of production, is normally at the sole risk of the contractor. To minimize this risk, the contracting officer shall provide sufficient time in the delivery schedule for acquisition of materials and components, and for production after receipt of first article approval. When Government requirements preclude this action, the contracting officer may, before approval of the first article, authorize the contractor to acquire specific materials or components or commence production to the extent essential to meet the delivery schedule (see Alternate II of the clause at 52.209-3, First Article Approval—Contractor Testing, and Alternate II of the clause at 52.209-4, First Article Approval—Government Testing. Costs incurred based on this authorization are allocable to the contract for (1) progress payments and (2) termination settlements if the contract is terminated for the convenience of the Government.

9.306 Solicitation requirements.

Solicitations containing a testing and approval requirement shall—

(a) Provide, in the circumstance where the contractor is to be responsible for the first article approval testing—

(1) The performance or other characteristics that the first article must meet for approval;

(2) The detailed technical requirements for the tests that must be performed for approval; and

(3) The necessary data that must be submitted to the Government in the first article approval test report.

(b) Provide, in the circumstance where the Government is to be responsible for the first article approval testing—

(1) The performance or other characteristics that the first article must meet for approval; and

(2) The tests to which the first article will be subjected for approval.

(c) Inform offerors that the requirement may be waived when supplies identical or similar to those called for have previously been delivered by the offeror and accepted by the Government (see 52.209-3(h) and 52.209-4(i));

(d) Permit the submission of alternative offers, one including testing and approval and the other excluding testing and approval (if eligible under 9.306(c));

(e) State clearly the first article's relationship to the contract quantity (see paragraph (e) of the clause at 52.209-3, First Article Approval—Contractor Testing, or 52.209-4, First Article Approval—Government Testing);

(f) Contain a delivery schedule for the production quantity (see 12.104). The delivery schedule may—

(1) Be the same whether or not testing and approval is waived; or

(2) Provide for earlier delivery when testing and approval is waived and the Government desires earlier delivery. In the latter case, any resulting difference in delivery schedules shall not be a factor in evaluation for award. The clause at 52.209-4, First Article Approval—Government Testing, shall contain the delivery schedule for the first article;

(g) Provide for the submission of contract numbers, if any, to document the offeror's eligibility under 9.306(c);

(h) State whether the approved first article will serve as a manufacturing standard; and

(i) Include, when the Government is responsible for first article testing, the Government's estimated testing costs as a factor for use in evaluating offers (when appropriate).

(j) Inform offerors that the prices for first articles and first article tests in relation to production quantities shall not be materially unbalanced (see 15.814) if first article test items or tests are to be separately priced.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 34753, Aug. 21, 1989; 55 FR 25527, June 21, 1990]

9.307 Government administration procedures.

(a) Before the contractor ships the first article, or the first article test report, to the Government laboratory or other activity responsible for approval at the address specified in the contract, the contract administration office shall provide that activity with

uch advance notification as is fea-
of the forthcoming shipment,
—

Advise that activity of the con-
tual requirements for testing and
oval, or evaluation, as appropri-

Call attention to the notice re-
ement in paragraph (b) of the
se at 52.209-3, First Article Ap-
al— Contractor Testing, or 52.209-
rst Article Approval—Government
ing; and

Request that the activity inform
contract administration office of
date when testing or evaluation
oe completed.

The Government laboratory or
r activity responsible for first arti-
esting or evaluation shall inform
contracting office whether to ap-
e. conditionally approve, or disap-
e the first article. The contracting
er shall then notify the contrac-
f the action taken and furnish a
of the notice to the contract ad-
stration office. The notice shall
de the first article shipment
ber, when available, and the appli-
contract line item number. Any
ges in the drawings, designs, or
fications determined by the con-
ing officer to be necessary shall
nade under the Changes clause,
not by the notice of approval, con-
nal approval, or disapproval fur-
d the contractor.

Contract clauses.

1 Testing performed by the contrac-
r.

(1) The contracting officer shall
the clause at 52.209-3, First Ar-
Approval—Contractor Testing, in
tations and contracts when a
-price contract is contemplated
is intended that the contract re-
(i) first article approval and (ii)
he contractor be required to con-
he first article testing.

If it is intended that the contrac-
required to produce the first ar-
and the production quantity at
me facility, the contracting offi-
all use the clause with its Alter-
.

f it is necessary to authorize the
ctor to purchase material or to

commence production before first article approval, the contracting officer shall use the clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require (i) first article approval and (ii) that the contractor be required to conduct the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate II.

9.308-2 Testing performed by the Government.

(a) (1) The contracting officer shall insert the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a fixed-price contract is contemplated and it is intended that the contract require first article approval and that the Government will be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use the basic clause with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the, contracting officer shall use the basic clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require first article approval and that the Government be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate II.

Subpart 9.4—Debarment, Suspension, and Ineligibility

9.400 Scope of subpart.

(a) This subpart—

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of *ineligible* in 9.403); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19814, May 8, 1989]

9.401 Applicability.

This subpart does not apply to the exclusion of participants or principals from Federal financial or nonfinancial assistance programs and benefits pursuant to Executive Order 12549. Such exclusions are contained within the list entitled Parties Excluded from Nonprocurement Programs of the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

[54 FR 19814, May 8, 1989]

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19814, May 8, 1989]

9.403 Definitions.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliates. Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contract or that was debarred, suspended, or proposed for debarment.

Agency, as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

Civil judgment means a judgment or finding of a civil offense by any court of competent jurisdiction.

Contractor, as used in this subpart, means any individual or other legal entity that (a) submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract or (b) conducts business with the government as an agent or representative of another contractor.

Conviction means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

Debarment, as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is *debarred.*

Debarring official means (a) an agency head or (b) a designee authorized by the agency head to impose debarment.

Indictment means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible, as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

Legal proceedings means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

Parties Excluded from Procurement Programs, formerly referred to as the Consolidated List of Debarred, Suspended, and Ineligible Contractors means a list compiled, maintained, and distributed by the General Services Administration, in accordance with 9.404, containing the names of contractors debarred, suspended, or proposed for debarment by agencies under the procedures of this subpart, as well as contractors declared ineligible under other statutory or regulatory authority other than Executive Order 12549. The list of Parties Excluded from Procurement Programs is contained within the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

Preponderance of the evidence means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Suspending official means (a) an agency head or (b) a designee authorized by the agency head to impose suspension.

Suspension, as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is *suspended.*

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19814, May 8, 1989]

9.404 Parties excluded from procurement programs.

(a) The General Services Administration (GSA) shall—

(1) Compile and maintain a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

(2) Periodically revise and distribute the list and issue supplements, if necessary, to all agencies and the General Accounting Office; and

(3) Include in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The list entitled Parties Excluded from Procurement Programs shall indicate—

(1) The names and addresses of all contractors debarred, suspended, proposed for debarment, or declared ineligible, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The name of the agency or other authority taking the action;

(3) The cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) The effect of the action;

(5) The termination date for each listing;

(6) The DUNS No.; and

(7) The name and telephone number of the point of contact for the action.

(c) Each agency shall—

(1) Notify GSA of the information required by paragraph (b) above within 5 working days after the action becomes effective;

(2) Notify GSA within 5 working days after modifying or rescinding an action;

(3) Notify GSA of the names and addresses of agency organizations that are to receive the consolidated list and the number of copies to be furnished to each;

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(5) Establish procedures to provide for the effective use of the Parties Excluded from Procurement Programs, including internal distribution thereof, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the Parties Excluded from Procurement Programs, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors to the agency or other authority that took the action.

(d) The public may obtain a subscription to the list from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Order and Inquiry Desk at (202) 783-3238.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19814, May 8, 1989]

9.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the acquiring agency's head or designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.50(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors included on the Parties Excluded from Procurement Programs as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties (see part 28).

[48 FR 42142, Sept. 19, 1983, as amended at 52 FR 9038, Mar. 20, 1987; 54 FR 19814, May 8, 1989; 54 FR 48982, Nov. 28, 1989; 55 FR 21707, May 25, 1990]

9.405-1 Continuation of current contracts.

(a) Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(b) Agencies shall not renew or otherwise extend the duration of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension.

[54 FR 19815, May 8, 1989]

9.405-2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, or proposed for debarment is proposed as a subcontractor for any subcontract subject to Government consent (see subpart 44.2), contracting officers shall not consent to subcontracts with such contractors unless the acquiring agency's head or a designee states in writing the compelling reasons for this approval action. (See 9.405(b) concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors shall not enter into any subcontract equal to or in excess of $25,000 with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to subcontract with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion on the list of Parties Excluded from Procurement Programs (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, to notify the contracting officer, in writing, before entering into such subcontract. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor being on the list of Parties Excluded from Procurement Programs;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the list of Parties Excluded from Procurement Programs; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see subpart 44.3).

[54 FR 19815, May 8, 1989]

9.406 Debarment.

9.406-1 General.

(a) The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily *require* that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision. In this connection, the supplying of information by the contractor to the Government pursuant to the Anti-Kickback Act of 1986 (see 3.502) shall be favorable evidence of the contractor's responsibility.

(b) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The debarring official may extend the debarment decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(c) A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(d)(1) When the debarring official has authority to debar contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to the Federal Property Management Regulations (FPMR) 101-45.6, that official shall consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the debarment notice shall so indicate and the appropriate FAR and FPMR citations shall be included.

[48 FR 42142, Sept. 19, 1983, as amended at 52 FR 6121, Feb. 27, 1987; 54 FR 19815, May 8, 1989; 55 FR 21707, May 25, 1990; 55 FR 30465, July 26, 1990]

9.406-2 Causes for debarment.

(a) The debarring official may debar a contractor for a conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(1) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(i) Willful failure to perform in accordance with the terms of one or more contracts; or

(ii) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(2) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 4968, Jan. 31 ,1989; 54 FR 19815, May 8, 1989; 55 FR 21707, May 25, 1990]

9.406-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official advising the contractor and any specifically named affiliates, by certified mail, return receipt requested—

(1) That debarment is being considered;

(2) Of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(3) Of the cause(s) relied upon under 9.406-2 for proposing debarment;

(4) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(5) Of the agency's procedures governing debarment decisionmaking;

(6) Of the effect of the issuance of the notice of proposed debarment; and

(7) Of the potential effect of an actual debarment.

(d) *Debarring official's decision.* (1) In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted by the contractor, unless the debarring official extends this period for good cause.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by certified mail, return receipt requested—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an acquiring agency or a designee makes the statement called for by 9.406-1(c).

(2) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 19815, May 8, 1989]

9.406-4 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that debarment for violation of the provisions of the Drug-Free Workplace Act of 1988 (see 23.506) may be for a period not to exceed 5 years. If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of 9.406-3 above shall be followed to extend the debarment.

(c) The debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring offical deems appropriate.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 4968, Jan. 31 ,1989; 54 FR 19815, May 8, 1989; 55 FR 21707, May 25, 1990]

9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

9.407 Suspension.

9.407-1 General.

(a) The suspending official may, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending official may extend the suspension decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the suspension and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's suspension shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)(1) When the suspending official has authority to suspend contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to FPMR 101-45.6, that official shall consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the suspension notice shall so indicate and the appropriate FAR and FPMR citations shall be included.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 4968, Jan. 31 ,1989; 54 FR 19816, May 8, 1989; 55 FR 21707, May 25, 1990]

9.407-2 Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(5) Commission of any other offense ndicating a lack of business integrity r business honesty that seriously and irectly affects the present responsiility of a Government contractor or ubcontractor.

(b) Indictment for any of the causes n paragraph (a) above constitutes dequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

[48 FR 42142, Sept. 19, 1983, as amended at 54 FR 4968, Jan. 31, 1989; 55 FR 21707, May 25, 1990]

9.407-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the suspending official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the suspension decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(2) In actions not based on an indictment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension.* When a contractor and any specifically named affiliates are suspended, they shall be immediately advised by certified mail, return receipt requested—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities (i) of a serious nature in business dealings with the Government or (ii) seriously reflecting on the propriety of further Government dealings with the contractor—any such irregularities shall be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts; and

(6) That additional proceedings to determine disputed material facts will be conducted unless (i) the action is based on an indictment or (ii) a determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(d) *Suspending official's decision.* (1) In actions (i) based on an indictment, (ii) in which the contractor's submission does not raise a genuine dispute over material facts, or (iii) in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official's decision shall be based on all the information in the administrative record, including any submission made by the contractor.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending official may modify or terminate the suspension or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of (i) suspension by any other agency or (ii) debarment by any agency.

(4) Prompt written notice of the suspending official's decision shall be sent to the contractor and any affiliates involved, by certified mail, return receipt requested.

[48 FR 42142, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

9.407-4 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless sooner terminated by the suspending official or as provided in this subsection.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that Deartment an opportunity to request an xtension.

8 FR 42142, Sept. 19, 1983, as amended at FR 2649, Jan. 17, 1986]

407-5 Scope of suspension.

The scope of suspension shall be the me as that for debarment (see 9.406- , except that the procedures of 407-3 shall be used in imposing suspension.

408 Certification regarding debarment, suspension, proposed debarment, and other responsibility matters.

(a) When an offeror, in compliance ith the provision at 52.209-5, Certifition Regarding Debarment, Suspenon, Proposed Debarment, and Other esponsibility Matters, indicates an dictment, charge, civil judgment, nviction, suspension, debarment, oposed debarment, ineligibility, or fault of a contract, the contracting ficer shall—

(1) Request such additional informaon from the offeror as the contract- g officer deems necessary in order to ake a determination of the offeror's sponsibility (but see 9.405); and

(2) Notify, prior to proceeding with ard, in accordance with agency produres (see 9.406-3(a) and 9.407-3(a)), e agency official responsible for initing debarment or suspension tion, where an offeror indicates the istence of an indictment, charge, nviction, or civil judgment.

(b) Offerors who do not furnish the rtification or such information as ay be requested by the contracting ficer shall be given an opportunity remedy the deficiency. Failure to rnish the certification or such information may render the offeror nonreonsible.

4 FR 19816, May 8, 1989]

09 Solicitation provision and contract clause.

a) The contracting officer shall ert the provision at 52.209-5, Certiation Regarding Debarment, Sussion, Proposed Debarment, and her Responsibility Matters, in solicilons where the contract value is exted to exceed $25,000.

(b) The contracting officer shall insert the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, in solicitations and contracts where the contract value exceeds $25,000.

[54 FR 19816, May 8, 1989]

Subpart 9.5—Organizational Conflicts of Interest

9.500 Scope of subpart.

This subpart prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. It also provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations.

9.501 Definition.

An *organizational conflict of interest* exists when the nature of the work to be performed under a proposed Government contract may, without some restriction on future activities, (a) result in an unfair competitive advantage to the contractor or (b) impair the contractor's objectivity in performing the contract work.

9.502 Applicability.

(a) This subpart applies to contracts with either profit or nonprofit organizations, including nonprofit organizations created largely or wholly with Government funds.

(b) The applicability of this subpart is not limited to any particular kind of acquisition. However, organizational conflicts of interest are more likely to occur in contracts involving—

(1) Management support services;

(2) Consultant or other professional services;

(3) Contractor performance of or assistance in technical evaluations; or

(4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production.

9.503 Waiver.

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

9.504 Contracting officer responsibilities.

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.

(b) Contracting officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses (see 9.508).

(c) Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the head of the contracting activity a course of action for resolving the conflict (see 9.507).

(d) In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.

9.505 General rules.

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.509. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.509. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are—

(a) Preventing the existence of conflicting roles that might bias a contractor's judgment; and

(b) Preventing unfair competitive advantage.

9.505-1 Providing systems engineering and technical direction.

(a) A contractor that provides systems engineering and technical direction for a system but does not have overall contractual responsibility for its development, its integration, assembly, and checkout, or its production shall not (1) be awarded a contract to supply the system or any of its major components or (2) be a subcontractor or consultant to a supplier of the system or any of its major components.

(b) Systems engineering includes a combination of substantially all of the following activities: determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design. Technical direction includes a combination of substantially all of the following activities: developing work statements, determining parameters, directing other contractors' operations, and resolving technical controversies. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore this contractor should not be in a position to make decisions favoring its own products or capabilities.

5-2 Preparing specifications or work statements.

a) (1) If a contractor prepares and
nishes complete specifications cov-
g nondevelopmental items, to be
d in a competitive acquisition, that
tractor shall not be allowed to fur-
n these items, either as a prime
tractor or as a subcontractor, for a
sonable period of time including, at
st, the duration of the initial pro-
tion contract. This rule shall not
ly to—

) Contractors that furnish at Gov-
ment request specifications or data
arding a product they provide, even
ugh the specifications or data may
e been paid for separately or in the
e of the product; or

i) Situations in which contractors,
ng as industry representatives,
o Government agencies prepare,
ne, or coordinate specifications, re-
dless of source, provided this assist-
e is supervised and controlled by
vernment representatives.

) If a single contractor drafts com-
e specifications for nondevelop-
ntal equipment, it should be elimi-
ed for a reasonable time from com-
tion for production based on the
cifications. This should be done in
er to avoid a situation in which the
tractor could draft specifications
oring its own products or capabili-
. In this way the Government can
assured of getting unbiased advice
o the content of the specifications
can avoid allegations of favoritism
he award of production contracts.

) In development work, it is
mal to select firms that have done
most advanced work in the field.
se firms can be expected to design
develop around their own prior
wledge. Development contractors
frequently start production earlier
more knowledgeably than firms
did not participate in the develop-
t, and this can affect the time and
lity of production, both of which
important to the Government. In
y instances the Government may
e financed the development. Thus,
le the development contractor has
ompetitive advantage, it is an un-
dable one that is not considered
air; hence no prohibition should be
osed.

(b) (1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

(ii) It has participated in the development and design work; or

(iii) More than one contractor has been involved in preparing the work statement.

(2) Agencies should normally prepare their own work statements. When contractor assistance is necessary, the contractor might often be in a position to favor its own products or capabilities. To overcome the possibility of bias, contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services, unless excepted in subparagraph (1) above.

(3) For the reasons given in 9.505-2(a)(3), no prohibitions are imposed on development and design contractors.

9.505-3 Providing technical evaluation or advisory and assistance services.

Contracts involving (a) technical evaluations of other contractors' offers or products or (b) advisory and assistance services (see 37.201) shall not generally be awarded to a contractor that would evaluate, or advise the Government concerning, its own products or activities, or those of a competitor, without proper safeguards to ensure objectivity and protect the Government's interests. In this connection, OMB Circular No. A-120, Guidelines for the Use of Advisory and Assistance Services, and implementing agency regulations, should be consulted for additional guidance.

[48 FR 42142, Sept. 19, 1983, as amended at 53 FR 43389, Oct. 26, 1988]

9.505-4 Obtaining access to proprietary information.

(a) A contractor that gains access to proprietary information of other companies in performing advisory services for the Government must agree with the other companies to (1) protect their information from unauthorized use or disclosure for as long as it remains proprietary and (2) refrain from using the information for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.

(b) Proprietary information is information considered so valuable by its owners that it is held secret by them and their licensees. When a contractor requires such information from others to perform a Government contract and can use the leverage of the contract to obtain it, the contractor may gain an unfair competitive advantage unless restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information (1) furnished voluntarily without limitations on its use or (2) available to the Government or contractor from other sources without restriction.

9.506 Information sources.

When information concerning prospective contractors is necessary to identify and evaluate potential organizational conflicts of interest or to develop recommended actions, contracting officers should first seek it from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities, and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

9.507 Procedures.

(a) If the contracting officer initially decides that a particular acquisition involves a significant potential organizational conflict of interest, before issuing the solicitation the contracting officer shall submit for approval to the chief of the contracting office (unless a higher level official is designated by the agency)—

(1) A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict, based on the general rules in 9.505 or on another basis not expressly stated in that section;

(2) A draft solicitation provision (see 9.508-1); and,

(3) If appropriate, a proposed contract clause (see 9.508-2).

(b) The approving official shall—

(1) Review the contracting officer's analysis and recommended course of action, including the draft provision and any proposed clause;

(2) Consider the benefits and detriments to the Government and prospective contractors; and

(3) Approve, modify, or reject the recommendation in writing.

(c) The contracting officer shall—

(1) Include the approved provision and any approved clause in the solicitation;

(2) Consider additional information provided by prospective contractors in response to the solicitation or during negotiations; and,

(3) Before awarding the contract, resolve the potential conflict in a manner consistent with the approval or other direction by the head of the contracting activity; or,

(4) If the prospective contractor disagrees and requests higher level review, provide the decision and the contractor's position to the agency head or a designee for review and final decision.

(d) If, during the effective period of any restriction (see 9.508), a contracting office transfers acquisition responsibility for the item or system involved, it shall notify the successor contracting office of the restriction, sending a copy of the contract under which the restriction was imposed.

[48 FR 42142, Sept. 19, 1983, as amended at 53 FR 43390, Oct. 26, 1988]

9.508 Solicitation provision and contract clause.

9.508-1 Solicitation provision.

As indicated in the general rules in 9.505, significant potential organiza-

nal conflicts of interest are normal-
resolved by imposing some restraint,
propriate to the nature of the con-
t, upon the contractor's eligibility
future contracts or subcontracts.
erefore, affected solicitations shall
tain a provision that—
a) Invites offerors' attention to this
part 9.5;
b) States the nature of the poten-
l conflict as seen by the contracting
icer;
c) States the nature of the proposed
traint upon future contractor ac-
ities; and,
d) Depending on the nature of the
uisition, states whether or not the
ms of any proposed clause and the
plication of this subpart to the con-
ct are subject to negotiation.

08-2 Contract clause.

a) If, as a condition of award, the
tractor's eligibility for future
me contract or subcontract awards
l be restricted or the contractor
st agree to some other restraint,
solicitation shall contain a pro-
sed clause that specifies both the
ture and duration of the proposed
traint. The contracting officer shall
lude the clause in the contract, first
gotiating the clause's final terms
h the successful offeror, if it is ap-
priate to do so (see 9.508-1(d)
ove).
b) The restraint imposed by a
use shall be limited to a fixed term
reasonable duration, sufficient to
id the circumstance of unfair com-
itive advantage or potential bias.
is period varies. It might end, for
mple, when the first production
tract using the contractor's specifi-
ions or work statement is awarded,
it might extend through the entire
of a system for which the contrac-
has performed systems engineering
l technical direction. In every case,
restriction shall specify termina-
n by a specific date or upon the oc-
rence of an identifiable event.

9 Examples.

he examples in paragraphs (a)
ough (i) following illustrate situa-
ns in which questions concerning
anizational conflicts of interest
y arise. They are not all inclusive,
but are intended to help the contracting officer apply the general rules in 9.505 to individual contract situations.

(a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (i.e., turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (e.g., fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.

(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components.

(c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.

(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.

(e) Before an ADP equipment acquisition is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on ADP hardware acquisition.

(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.

(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.

(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to (1) enter into agreements with these firms to protect any proprietary information they provide and (2) refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it was intended.

(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.

Subpart 9.6—Contractor Team Arrangements

9.601 Definition.

Contractor team arrangement means an arrangement in which—

(a) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or

(b) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

9.602 General.

(a) Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to (1) complement each other's unique capabilities and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.

(b) Contractor team arrangements may be particularly appropriate in complex research and development acquisitions, but may be used in other appropriate acquisitions, including production.

(c) The companies involved normally form a contractor team arrangement before submitting an offer. However, they may enter into an arrangement later in the acquisition process, including after contract award.

9.603 Policy.

The Government will recognize the integrity and validity of contractor team arrangements; *provided*, the arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of contractor team arrangements.

9.604 Limitations.

Nothing in this subpart authorizes contractor team arrangements in violation of antitrust statutes or limits the Government's rights to—

(a) Require consent to subcontracts (see subpart 44.2);

(b) Determine, on the basis of the stated contractor team arrangement, the responsibility of the prime contractor (see subpart 9.1);

(c) Provide to the prime contractor data rights owned or controlled by the Government;

(d) Pursue its policies on competitive contracting, subcontracting, and component breakout after initial production or at any other time; and

(e) Hold the prime contractor fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors.

Subpart 9.7—Defense Production Pools and Research and Development Pools

9.701 Definition.

Pool, as used in this subpart, means a group of concerns (see 19.001) that have—

(a) Associated together in order to obtain and perform, jointly or in conjunction with each other, defense production or research and development contracts;

(b) Entered into an agreement governing their organization, relationship, and procedures; and

(c) Obtained approval of the agreement by either—

(1) The Small Business Administration (SBA) under section 9 or 11 of the Small Business Act (15 U.S.C. 638 or 640) (see 13 CFR part 125); or

(2) A designated official under Part V of Executive Order 10480, August 14, 1953 (18 FR 4939, August 20, 1953) and section 708 of the Defense Production Act of 1950 (50 U.S.C. App. 2158).

[48 FR 42142, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

9.702 Contracting with pools.

(a) Except as specified in this subpart, a pool shall be treated the same as any other prospective or actual contractor.

(b) The contracting officer shall not award a contract to a pool unless the offer leading to the contract is submitted by the pool in its own name or by an individual pool member expressly stating that the offer is on behalf of the pool.

(c) Upon receipt of an offer submitted by a group representing that it is a pool, the contracting officer shall verify its approved status with the SBA District Office Director or other approving agency and document the contract file that the verification was made.

(d) Contracts with pools are exempt from the *manufacturer or regular dealer* requirement of the Walsh-Healey Public Contracts Act (41 U.S.C. 35) (see subparts 9.1 and 22.6 and 41 CFR 50-201.604(d)).

(e) Pools approved by the SBA under the Small Business Act are entitled to the preferences and privileges accorded to small business concerns. Approval under the Defense Production Act does not confer these preferences and privileges.

(f) Before awarding a contract to an unincorporated pool, the contracting officer shall require each pool member participating in the contract to furnish a certified copy of a power of attorney identifying the agent authorized to sign the offer or contract on that member's behalf. The contracting officer shall attach a copy of each power of attorney to each signed copy of the contract retained by the Government.

9.703 Contracting with individual pool members.

(a) Pool members may submit individual offers, independent of the pool. However, the contracting officer shall not consider an independent offer by a pool member if that pool member participates in a competing offer submitted by the pool.

(b) If a pool member submits an individual offer, independent of the pool, the contracting officer shall consider the pool agreement, along with other factors, in determining whether that pool member is a responsible prospective contractor under subpart 9.1.

PART 10—SPECIFICATIONS, STANDARDS, AND OTHER PURCHASE DESCRIPTIONS

Sec.
10.000 Scope of part.
10.001 Definitions.
10.002 Policy.
10.003 Responsibilities.
10.004 Selecting specifications or descriptions for use.
10.005 Management of purchase descriptions.
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10.007 Deviations.
10.008 Identification and availability of specifications.
10.009 User satisfaction.
10.010 Acquiring used or reconditioned material, former Government surplus property, and residual inventory.

Sec.
10.011 Solicitation provisions and contract clauses.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42155, Sept. 19, 1983, unless otherwise noted.

10.000 Scope of part.

This part prescribes policies and procedures for using specifications, standards, and other purchase descriptions, and related considerations of acquisition streamlining (see 7.101).

[53 FR 34227, Sept. 2, 1988]

10.001 Definitions.

Brand-name description means a purchase description that identifies a product by its brand name and model or part number or other appropriate nomenclature by which the product is offered for sale.

Department of Defense Index of Specifications and Standards (DoDISS) means the Department of Defense (DoD) publication that lists unclassified Federal and military specifications and standards, related standardization documents, and voluntary standards approved for use by DoD.

Federal specification or standard means a specification or standard issued or controlled by the General Services Administration (GSA) and listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions.

General Services Administration Index of Federal Specifications, Standards and Commercial Item Descriptions means the GSA publication that lists Federal specifications and standards, including supplements, that have been implemented for use by all Federal agencies.

Market research means the process used for collecting and analyzing information about the entire market available to satisfy the minimum agency needs to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services.

Purchase description means a description of the essential physical characteristics and functions required to meet the Government's minimum needs.

Responsible agency means the agency controlling the index in which a particular specification or standard is listed.

Specification means a description of the technical requirements for a material, product, or service that includes the criteria for determining whether these requirements are met. Specifications shall state only the Government's actual minimum needs and be designed to promote full and open competition, with due regard to the nature of the supplies or services to be acquired.

Standard means a document that establishes engineering and technical limitations and applications of items, materials, processes, methods, designs, and engineering practices. It includes any related criteria deemed essential to achieve the highest practical degree of uniformity in materials or products, or interchangeability of parts used in those products. Standards may be used in specifications, invitations for bids, proposals, and contracts.

Voluntary standard means a standard established by a private sector body and available for public use. The term does not include private standards of individual firms. For further guidance, see OMB Circular No. A-119, Federal Participation in Development and Use of Voluntary Standards.

[48 FR 42155, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 10233, Mar. 14, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 17857, May 18, 1988]

10.002 Policy.

(a) In fulfilling requirements of 10 U.S.C. 2305(a)(1) and 41 U.S.C. 253a(a) regarding the preparation for acquisition of supplies and services:

(1) Agencies shall specify needs in a manner designed to promote full and open competition (see part 6) for acquisitions.

(2) Agencies shall develop specifications and purchase descriptions using market research in a manner designed to promote full and open competition, with due regard to the nature of the supplies or services to be acquired.

(3) In solicitations, agencies shall include specifications and purchase descriptions that—

(i) Permit full and open competition; and

(ii) Include restrictive provisions or conditions only to the extent necessary to satisfy the minimum needs of the agency or as authorized by law.

(4) Agencies shall prepare specifications and purchase descriptions which reflect the minimum needs of the agency and the market available to satisfy such needs. Specifications and purchase descriptions may be stated in terms of—

(i) Function, so that a variety of products or services may qualify;

(ii) Performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(iii) Design requirements.

(b) Acquisition policies and procedures shall require descriptions of agency requirements, whenever practicable, to be stated in terms of functions to be performed or performance required.

(c) Requiring agencies, for programs which they have designated as subject to acquisition streamlining, should apply specifications standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies should not dictate detailed design solutions prematurely. The objective of acquisition streamlining is to reduce the time and cost, and improve the quality of systems acquisitions, by ensuring that contracts contain only those necessary specifications, standards, and related documents which have been tailored for application at the most appropriate time in the system acquisition cycle. To the extent practicable, contractors should be involved in recommending application and tailoring of such specifications, standards, and related documents in one phase for proposed application to the succeeding phase of the acquisition cycle.

[48 FR 42155, Sept. 19, 1983, as amended at 50 FR 52433, Dec. 23, 1985; 53 FR 34227, Sept. 2, 1988; 54 FR 48982, Nov. 28, 1989]

10.003 Responsibilities.

(a) The Administrator of GSA, under separate authority and regulations, prepares, maintains, and controls specifications and standards covering products commonly used by Government agencies, and lists those descriptions in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions.

(b) The Secretary of Defense, under separate authority and regulations, prepares, maintains, and controls military specifications, standards, and other documents unique to DoD and lists those product descriptions in the DoDISS.

[48 FR 42155, Sept. 19, 1983, as amended at 53 FR 17857, May 18, 1988]

10.004 Selecting specifications or descriptions for use.

(a) (1) Plans, drawings, specifications, standards, or purchase descriptions for acquisitions shall state only the Government's actual minimum needs and describe the supplies and/or services in a manner designed to promote full and open competition.

(2) Items to be acquired shall be described (i) by citing the applicable specifications and standards or (ii) by a description containing the necessary requirements.

(3) Specifications and standards shall be selectively applied and tailored in their application.

(i) *Selective application* is the process of reviewing and selecting from available specifications, standards, and related documents those which have application to a particular acquisition.

(ii) *Tailoring* is the process by which individual sections, paragraphs or sentences of the selected specifications, standards, and related document are reviewed and modified so that each one selected states only the Government's minimum requirements. Such tailoring need not be made a part of the basic specification or standard but will vary with each application, dependent upon the nature of the acquisition.

(b) (1) When authorized by 10.006(a), or when no applicable specification exists, agencies may use a purchase description, subject to pertinent restrictions on repetitive use. An adequate purchase description should set forth the essential physical and functional characteristics of the materials or services required. As many of the following characteristics as are necessary to express the Government's minimum requirements should be used in preparing purchase descriptions:

(i) Common nomenclature.

(ii) Kind of material; i.e., type, grade, alternatives, etc.

(iii) Electrical data, if any.

(iv) Dimensions, size, or capacity.

(v) Principles of operation.

(vi) Restrictive environmental conditions.

(vii) Intended use, including—

(A) Location within an assembly, and

(B) Essential operating condition.

(viii) Equipment with which the item is to be used.

(ix) Other pertinent information that further describes the item, material, or service required.

(2) Purchase descriptions shall not be written so as to specify a product, or a particular feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless it is determined, in accordance with agency procedures, that the particular feature is essential to the Government's requirements, and that other companies' similar products lacking the particular feature would not meet the minimum requirements for the item.

(3) Generally, the minimum acceptable purchase description is the identification of a requirement by use of brand name followed by the words *or equal.* This technique should be used only when an adequate specification or more detailed description cannot feasibly be made available by means other than inspection and analysis in time for the acquisition under consideration. Agencies should provide detailed guidance and necessary clauses for use by contracting activities when using this technique.

(4) Purchase descriptions of services should outline to the greatest degree practicable the specific services the contractor is expected to perform.

(c) Except as provided in (b) above, when considering the acquisition of products sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices, agencies should consult part 11 and implementing agency regulations for guidance on acquiring commercial products.

(d) *Foreign purchase descriptions.* Unless precluded by law, products that are acquired overseas may be acquired by using purchase descriptions prepared by foreign governments or foreign industry associations, if the description will satisfy the agency's actual minimum requirements.

(e) *Packing, packaging, and marking requirements.* In accordance with agency regulations, contracting offices shall require adequate packaging and marking of supplies to prevent deterioration and damage during shipping, handling, and storage. In acquiring commercial products, contracting offices should consult part 11 and implementing agency regulations.

[48 FR 42155, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

10.005 Management of purchase descriptions.

(a) Responsible agencies shall ensure compliance with the policies prescribed in this part for all specifications and standards listed in their indexes.

(b) When a responsible agency determines, in accordance with its established procedures and criteria, that a listed specification or standard does not meet a particular minimum need of the Government, applicable amendments, revisions, or new descriptions shall be prepared and used. (See 10.007 with regard to deviations.)

(c) Recommendations for changes in specifications and standards listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions should be submitted to the General Services Administration, Federal Supply Service, Item Management Division, Washington, DC 20406. Recommendations for changes in military specifications and standards and other standardization documents listed in the DoDISS should be submitted to the cognizant preparing activity.

[48 FR 42155, Sept. 19, 1983, as amended at 53 FR 17857, May 18, 1988]

10.006 Using specifications and standards.

(a) *Mandatory specifications and standards.* (1) Unless otherwise authorized by law or approved under 10.007(a) below, specifications and standards listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions are mandatory for use by all agencies acquiring supplies or services covered by such specifications and standards, except when the acquisition is—

(i) Required under an unusual and compelling urgency, and using the indexed product description would delay obtaining the requirement;

(ii) Under the small purchase limitation in 13.000;

(iii) For products acquired and used overseas;

(iv) For items, excluding military clothing, acquired for authorized resale; or

(v) For construction or new installations of equipment, where nationally recognized industry or technical source specifications and standards are available.

(2) Military specifications and standards are mandatory for use by the Department of Defense (DoD), as are voluntary standards adopted by DoD and listed in the DoDISS, except when any of the exceptions in (a)(1) above apply.

(b) *Commercial exception.* (1) In addition to the exceptions given in paragraph (a) above, agencies should consider stating their needs in a purchase description, when appropriate under part 11 and implementing agency regulations, even though there is an indexed specification.

(2) The agency responsible for a specification may designate it as one for which this exception cannot be used, if the agency head or a designee determines this to be necessary.

[48 FR 42155, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 17857, May 18, 1988; 54 FR 48982, Nov. 28, 1989]

10.007 Deviations.

When the exceptions in 10.006 above do not apply and an existing specification does not meet an agency's minimum needs, agencies may authorize deviations as follows:

(a) Each agency taking deviations shall establish procedures whereby a designated official having substantial contracting responsibility shall be responsible for ensuring that—

(1) Federal specifications are used, and requirements for exceptions and deviations are complied with;

(2) Justification for exceptions and deviations are subject to competent review before authorization, and that such justifications can be fully substantiated if post audit is required;

(3) Major or repeated deviations are not taken except as prescribed in (b) below; and

(4) Notification of deviation or recommendation for change in the specification is sent promptly in duplicate to the General Services Administration (FCM), Washington, DC 20406. (A statement of the deviations with a justification and, where applicable, recommendation for revision or amendment of the specification shall be included. A notification is required for major deviations such as those that will result in the introduction of a new item of supply as evidenced by the development of a new item identification, or when a deviation is taken repeatedly.)

(b) Deviations taken and reported by the agency in accordance with (a) above may not be continued, except under the following conditions:

(1) When an agency submits notification of major or repeated deviations that have been taken but makes no recommendation for change in the specification, GSA will notify the agency as to whether such deviations may be continued in subsequent contracting. In cases where continued deviations are not approved and the agency contracting has progressed to a point where it would be impracticable to amend or cancel the action, such action may be completed, but the deviation shall not be continued by the agency in subsequent contracts.

(2) When an agency has recommended changing the specification consistent with the deviations it has taken and reported, those deviations may be continued until such time as the recommended change is incorporated in the specification. When coordination with Federal agencies and industry does not result in acceptance of the change, such deviations shall not be continued by the agency in subsequent contracts.

(c) Deviations from military specifications shall be in accordance with any applicable DoD regulations.

[48 FR 42155, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

10.008 Identification and availability of specifications.

(a) Solicitations citing specifications listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, DoDISS, or other agency index shall identify each specification's approval date and the dates of any applicable amendments and revisions. Contracting offices will not normally furnish these cited specifications with the solicitation, except when—

(1) The product being acquired will be so complex that the specification must be furnished with the solicitation to enable prospective contractors to make a competent initial evaluation of the solicitation;

(2) In the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the specifications in reasonable time to respond to the solicitation; or

(3) A prospective contractor who has not previously bid on the product requests a copy of the specification.

(b) Solicitations shall not contain general identification references such as *the issue in effect on the date of the solicitation.*

(c) Solicitations citing voluntary standards shall advise offerors to obtain the standards from the publisher.

(d) Contracting offices shall clearly identify in the solicitation specifications and any other pertinent documents not listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions or DoDISS and normally furnish them with the solicitation.

(e) When specifications refer to other specifications, such references shall (1) be restricted to documents, or appropriate portions of documents that shall apply in the acquisition; (2) cite the extent of their applicability; (3) not conflict with other specifications and provisions of the solicitation, and (4) identify all applicable first tier references.

(f) Contracting offices shall furnish with the solicitation any brand name or equal description used.

(g) The GSA Index of Federal Specifications, Standards and Commercial Item Descriptions and DoDISS may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

[48 FR 42155, Sept. 19, 1983, as amended at 53 FR 17857, May 18, 1988]

10.009 User satisfaction.

(a) Agencies shall encourage users to communicate with acquisition organizations on—

(1) The adequacy of specifications to communicate the user's minimum needs;

(2) Product capability;

(3) Product failures and deficiencies; and

(4) Suggestions for corrective actions.

(b) Whenever practicable, the agency may provide affected industry an opportunity to comment on the critiques.

(c) Acquisition organizations shall consider user critiques and take appropriate action on bona fide complaints and suggestions.

10.010 Acquiring used or reconditioned material, former Government surplus property, and residual inventory.

(a) Generally, all contractually furnished supplies and their components, including former Government property, will be new, including recycled (see subpart 23.4 for policy on recovered materials). However, agencies may acquire used or reconditioned material, former Government surplus property, or residual inventory conforming to the solicitation's requirements, if the contracting officer determines that it is acceptable. When such a determination is made, the solicitation shall clearly identify the supplies or their components that need not be new, along with the necessary details on their acceptability. Offerors wishing to provide such used or reconditioned material, former Government surplus property, or residual inventory shall do so in accordance with the clause at 52.210-5, New Material, or the provision at 52.210-6, Listing of Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property, and the clause at 52.210-7, Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property, as appropriate.

(b) Contracting officers shall consider the following when determining whether used or reconditioned materials, former Government surplus property, or residual inventory are acceptable:

(1) Safety of persons or property.

(2) Total cost to the Government (including maintenance, inspection, testing, and useful life).

(3) Performance requirements.

(4) Availability and cost of new materials and components.

(c) With regard to former Government surplus property, the contracting officer shall ensure that the prices paid for such items are reasonable considering overall cost savings to the Government. When a contract calls for material to be furnished at cost, the allowable charge for former Government surplus property shall not exceed the cost at which the contractor acquired the property.

10.011 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.210-1, Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that (i) are issued by civilian agency contracting offices and (ii) cite specifications listed in the Index that are not furnished with the solicitation.

(b) The contracting officer shall insert the provision at 52.210-2, Availability of Specifications Listed in the DoD Index of Specifications and Standards (DoDISS), in solicitations that (i) are issued by DoD contracting offices and (ii) cite specifications listed in the DoDISS that are not furnished with the solicitation.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.210-3, Availability of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are not furnished with the solicitation, but may be obtained from a designated source.

(d) The contracting officer shall insert a provision substantially the same as the provision at 52.210-4, Availability for Examination of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are available for examination at a specified location.

(e) (1) The contracting officer shall insert the clause at 52.210-5, New Material, in solicitations and contracts for supplies, unless, in the judgment of the contracting officer, the clause would serve no useful purpose.

(2) The contracting officer may insert the clause in solicitations and contracts for services that may involve the incidental furnishing of parts.

(f) (1) The contracting officer shall insert the provision at 52.210-6, Listing of Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property, in solicitations for supplies, unless, in the judgment of the contracting officer, the provision would serve no useful purpose.

(2) The contracting officer may insert the provision in solicitations for services that may involve the incidental furnishing of parts.

(g) (1) The contracting officer shall insert the clause at 52.210-7, Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property, in solicitations and contracts for supplies, unless, in the judgment of the contracting officer, the clause would serve no useful purpose.

(2) The contracting officer may insert the clause in solicitations and contracts for services that may involve the incidental furnishing of parts.

[48 FR 42155, Sept. 19, 1983, as amended at 53 FR 17857, May 18, 1988]

PART 11—ACQUISITION AND DISTRIBUTION OF COMMERCIAL PRODUCTS

Sec.

11.000 Scope of part.
11.001 Definitions.
11.002 Policy.
11.003 General.
11.004 Market research and analysis.
11.005 Acceptability.
11.006 Evaluation.
11.007 Distribution options.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42158, Sept. 19, 1983, unless otherwise noted.

11.000 Scope of part.

This part prescribes policies and procedures for the acquisition of commercial products and the use of commercial distribution systems.

11.001 Definitions.

Commercial product means a product, such as an item, material, component, subsystem, or system, sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices (see 15.804-3(c) for explanation of terms).

Commercial-type product means a commercial product (a) modified to meet some Government-peculiar physical requirement or addition or (b) otherwise identified differently from its normal commercial counterparts.

[48 FR 42158, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

11.002 Policy.

In a manner consistent with statutes, Executive Orders, and the requirements of part 6 regarding maximum competition, agencies shall acquire commercial products and use commercial distribution systems whenever these products or distribution systems adequately satisfy the Government's needs (except see part 8, Required Sources of Supplies and Services). In a manner consistent with statutes, Executive Orders, and the requirements of part 6 regarding competition, agencies shall acquire commercial products and use commercial distribution systems whenever these products or distribution systems adequately satisfy the Government's needs (except see part 8, Required Sources of Supplies and Services). DoD, NASA, and the Coast Guard are required by 10 U.S.C. 2301(b) to promote the use of commercial products whenever practicable consistent with the requirements of part 6.

[48 FR 42158, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

11.003 General.

Acquisition of commercial products begins with a description of the Government's needs stated in functional terms in sufficient detail so that market research and analysis can be used to help determine whether commercial products, distribution systems, and logistics support are available to fill those needs.

11.004 Market research and analysis.

(a) *General.* Once the Government's needs have been functionally described, market research and analysis shall be conducted to ascertain the availability of commercial products to meet those needs and to identify the market practices, including warranty terms, of firms engaged in producing, distributing, and supporting these products.

(b) *Requirements.* Agencies shall conduct market research and analysis as needed to ensure full and open competition and that the Government's needs are met in a cost effective manner. The extent of market research and analysis will vary depending upon such factors as urgency, estimated dollar value, complexity, and past experience.

(c) *Developing information.* Market research and analysis involves obtain-

ng the following information, as ap-
ropriate:

(1) The availability of products suit-
ble, as is or with minor modification,
or meeting the need.

(2) The terms and conditions and
varranty practices under which com-
nercial sales of the products are
nade.

(3) The requirements of controlling
aws and regulations.

(4) The number of sales and length
f time over which they must occur to
rovide reasonable assurance that a
articular product is reliable.

(5) The distribution and support ca-
abilities of potential suppliers, in-
luding alternative arrangements and
ost estimates.

(6) The potential cost of modifying
ommercial products to meet particu-
r needs, if required.

(d) *Information sources.* The infor-
nation described in paragraph (c)
bove may be acquired from the fol-
owing sources, among others:

(1) Source lists for items of a similar
ature maintained at contracting ac-
ivities.

(2) Catalogs published by manufac-
urers, distributors, and dealers.

(3) Informational requests for quota-
ions.

(4) Responses to advance notices and
olicitation synopses published in
ommerce Business Daily.

(5) GSA Federal Supply Schedules.

(6) Other Federal agencies.

**8 FR 42158, Sept. 19, 1983, as amended at
) FR 1736, Jan. 11, 1985; 50 FR 52429, Dec.
, 1985]**

.005 Acceptability.

(a) The acceptability of commercial
roducts to meet Government needs
epends upon reliability, performance,
gistics support requirements, and
ost, among other things.

(b) When products meeting detailed
ecifications have satisfied user needs
the past, solicitations for commer-
al or commercial-type products to fill
e same requirement should include
rovisions allowing the former produc-
s to be considered for award under
e detailed specifications as long as
e specifications are current and all
otential suppliers are competing on a
milar basis.

11.006 Evaluation.

To establish that a product offered is a commercial or commercial-type product, certain information may be required from each offeror. This information should cover the minimum period of time identified by market research and analysis as necessary to establish reliability. Requested information may include:

(a) Catalogue identification.

(b) Total sales of the same or similar items to the public.

(c) Length of time the product has been sold in the commercial market place.

(d) Period covered by the information.

(e) Other pertinent information necessary to determine that the product is a commercial or commercial-type product.

11.007 Distribution options.

Market research and analysis should examine what commercial distribution systems are available in the market place. If these systems offer economic advantages to the Government, provide adequate logistics support, and are compatible with competitive contracting, they should be considered for use in conjunction with commercial purchases.

PART 12—CONTRACT DELIVERY OR PERFORMANCE

Sec.

12.000 Scope of part.

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12.102 Factors to consider in establishing schedules.
12.103 Supplies or services.
12.104 Contract clauses.

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12.501 General.
12.502 Suspension of work.
12.503 Stop-work orders.
12.504 Government delay of work.
12.505 Contract clauses.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42159, Sept. 19, 1983, unless otherwise noted.

12.000 Scope of part.

This part prescribes policies and procedures relating to delivery or performance under contracts for supplies, services, and construction.

Subpart 12.1—Delivery or Performance Schedules

12.101 General.

(a) The time of delivery or performance is an essential contract element and shall be clearly stated in solicitations. Contracting officers shall ensure that delivery or performance schedules are realistic and meet the requirements of the acquisition. Schedules that are unreasonably tight or difficult of attainment (1) tend to restrict competition, (2) are inconsistent with small business policies, and (3) may result in higher contract prices.

(b) Solicitations shall, except when clearly unnecessary, inform bidders or offerors of the basis on which their bids or proposals will be evaluated with respect to time of delivery or performance.

(c) If timely delivery or performance is unusually important to the Government, liquidated damages clauses may be used (see subpart 12.2).

12.102 Factors to consider in establishing schedules.

(a) *Supplies or services.* When establishing a contract delivery or performance schedule, consideration shall be given to applicable factors such as the—

(1) Urgency of need;

(2) Production time;

(3) Market conditions;

(4) Transportation time;

(5) Industry practices;

(6) Capabilities of small business concerns;

(7) Administrative time for obtaining and evaluating offers and for awarding contracts;

(8) Time for contractors to comply with any conditions precedent to contract performance; and

(9) Time for the Government to perform its obligations under the contract; e.g., furnishing Government property.

(b) *Construction.* When scheduling the time for completion of a construction contract, the contracting officer shall consider applicable factors such as the—

(1) Nature and complexity of the project;

(2) Construction seasons involved;

(3) Required completion date;

(4) Availability of materials and equipment;

(5) Capacity of the contractor to perform; and

(6) Use of multiple completion dates. (In any given contract, separate completion dates may be established for separable items of work. When multiple completion dates are used, requests for extension of time must be evaluated with respect to each item, and the affected completion dates modified when appropriate.)

12.103 Supplies or services.

(a) The contracting officer may express contract delivery or performance schedules in terms of—

(1) Specific calendar dates;

(2) Specific periods from the date of the contract; i.e., from the date of award or acceptance by the Government, or from the date shown as the effective date of the contract;

(3) Specific periods from the date of
ceipt by the contractor of the notice
award or acceptance by the Govern-
ent (including notice by receipt of
ntract document executed by the
overnment); or

(4) Specific time for delivery after
ceipt by the contractor of each indi-
dual order issued under the contract,
in indefinite delivery type contracts
d GSA schedules.

(b) The time specified for contract
erformance should not be curtailed
the prejudice of the contractor be-
use of delay by the Government in
ving notice of award.

(c) If the delivery schedule is based
the date of the contract, the con-
acting officer shall mail or otherwise
rnish to the contractor the contract,
tice of award, acceptance of propos-
, or other contract document not
ter than the date of the contract.

(d) If the delivery schedule is based
the date the contractor receives the
tice of award, or if the delivery
hedule is expressed in terms of spe-
fic calendar dates on the assumption
at the notice of award will be re-
ived by a specified date, the con-
acting officer shall send the con-
act, notice of award, acceptance of
oposal, or other contract document
certified mail, return receipt re-
ested, or by any other method that
ll provide evidence of the date of re-
ipt.

(e) In invitations for bids, if the de-
very schedule is based on the date of
e contract, and a bid offers delivery
sed on the date the contractor re-
ives the contract or notice of award,
e contracting officer shall evaluate
e bid by adding 5 days (as represent-
the normal time for arrival
rough ordinary mail). If the offered
livery date computed with mailing
me is later than the delivery date re-
ired by the invitation for bids, the
d shall be considered nonresponsive
d rejected. If award is made, the de-
very date will be the number of days
fered in the bid after the contractor
tually receives the notice of award.

.104 Contract clauses.

(a) *Supplies or services.* (1) The con-
acting officer may use a time of de-
very clause to set forth a required delivery schedule and to allow an offeror to propose an alternative delivery schedule. The clauses and their alternates may be used in solicitations and contracts substantially as shown, they may be changed, or new clauses may be written.

(2) The contracting officer may insert in solicitations and contracts for supplies or services a clause substantially the same as the clause at 52.212-1, Time of Delivery, if the Government requires delivery by a particular time and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III.

(3) The contracting officer may insert in solicitations and contracts for supplies or services a clause substantially the same as the clause at 52.212-2, Desired and Required Time of Delivery, if the Government desires delivery by a certain time but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III.

(b) *Construction.* The contracting officer shall insert the clause at

52.212-3, Commencement, Prosecution, and Completion of Work, in solicitations and contracts when a fixed-price construction contract is contemplated. The clause may be changed to accommodate the issuance of orders under indefinite-delivery contracts. If the completion date is expressed as a specific calendar date, computed on the basis of the contractor receiving the notice to proceed by a certain day, the contracting officer may use the clause with its Alternate I.

Subpart 12.2—Liquidated Damages

12.201 General.

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction.

[48 FR 42159, Sept. 19, 1983, as amended at 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

12.202 Policy.

(a) Liquidated damages clauses should be used only when both (1) the time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damage clause in a contract, the contracting officer should consider the probable effect on such matters as pricing, competition, and the costs and difficulties of contract administration.

(b) The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. The contract may also include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed, to ensure that the result is not an unreasonable assessment of liquidated damages.

(c) The contracting officer shall take all reasonable steps to mitigate liquidated damages. If a liquidated damages clause is included in a contract and a basis for termination for default exists, the contracting officer should take appropriate action expeditiously to obtain performance by the contractor or to terminate the contract (see subpart 49.4). If delivery or performance is desired after termination for default, efforts must be made to obtain the delivery or performance elsewhere within a reasonable time. Efficient administration of contracts containing a liquidated damages clause is imperative to prevent undue loss to defaulting contractors and to protect the interests of the Government.

(d) If a contract provides for liquidated damages for delay, the Comptroller General, on the recommendation of the head of the agency concerned, is authorized and empowered by law to make a remission, that in the discretion of the Comptroller General is just and equitable, of the whole or any part of such damages.

12.203 Procedures.

(a) If a liquidated damages clause is to be used in a contract, the applicable clause and appropriate rate(s) of liquidated damages shall be included in the solicitation.

(b) If a liquidated damages clause is used in a construction contract, the rate(s) of liquidated damages to be assessed against the contractor should be for each day of delay and the rate(s) should as a minimum cover the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the Government will suffer other specific losses due to the failure of the contractor to complete the work on time, the rate(s) should also include an amount for these items. Examples of specific losses are—

(1) The cost of substitute facilities;

(2) The rental of buildings and/or equipment; or

(3) The continued payment of quarters allowances.

(c) If appropriate to reflect the probable damages, considering that the Government can terminate for default or take other appropriate action, the rate of assessment of liquidated dam-

may be in two or more incre-
s which provide a declining rate
sessment as the delinquency con-
s. The contract may also include
erall maximum dollar amount or
d of time, or both, during which
dated damages may be assessed,
sure that the result is not an un-
nable assessment of liquidated
ges.

Contract clauses.

The contracting officer may
t the clause at 52.212-4, Liquidat-
amages—Supplies, Services, or Re-
h and Development, in solicita-
and contracts when a fixed-price
act is contemplated for supplies,
ces, or research and development
2.202).

The contracting officer may
t the clause at 52.212-5, Liquidat-
amages—Construction, in solicita-
and contracts for construction,
t construction contracts on a
plus-fixed-fee basis (see 12.202). If
rent completion dates are speci-
n the contract for separate parts
ages of the work, the contracting
r shall use the clause with its Al-
te I.

The contracting officer shall
t the clause at 52.212-6, Time Ex-
ons, in solicitations and contracts
onstruction in which the clause at
2-5, Liquidated Damages—Con-
tion, is used with its Alternate I.

Subpart 12.3—Priorities and Allocations

ace: 51 FR 19714, May 30, 1986, unless
wise noted.

Scope of subpart.

is subpart implements the De-
Priorities and Allocations
m (DPAS), a Department of
merce (DOC) regulation in sup-
of authorized national defense
ams (see 15 CFR part 350).

Definitions.

horized program, as used in this
rt, means a program approved by
Federal Emergency Management
y (FEMA) for priorities and allo-
s support under the Defense
ction Act of 1950, as amended
(50 U.S.C. app. 2061, *et seq.*), to promote the national defense. Schedule I of the DPAS lists currently authorized programs.

Controlled materials, as used in this subpart, means the various shapes and forms of steel, copper, aluminum, and nickel alloys specified in Schedule II, and defined in Schedule III, of the DPAS.

Delegate Agency, as used in this subpart, means an agency of the U.S. Government authorized by delegation from DOC to place priority ratings on contracts that support authorized programs. Schedule I of the DPAS lists the Delegate Agencies.

Rated order means a prime contract for any product, service, or material (including controlled materials) placed by a Delegate Agency under the provisions of the DPAS in support of an authorized program and which requires preferential treatment, and includes subcontracts and purchase orders resulting under such contracts.

12.302 General.

(a) Under Title I of the Defense Production Act of 1950, as amended (50 U.S.C. app. 2061, *et seq.*), the President is authorized (1) to require that contracts in support of the national defense be accepted and performed on a preferential or priority basis over all other contracts, and (2) to allocate materials and facilities in such a manner as to promote the national defense.

(b) The Office of Industrial Resource Administration (OIRA), DOC, is responsible for administering and enforcing a system of priorities and allocations to carry out Title I of the Defense Production Act for industrial items. The DPAS has been established to promote the timely availability of the necessary industrial resources to meet current national defense requirements and to provide a framework to facilitate rapid industrial mobilization in case of national emergency.

(c) The Delegate Agencies (see Schedule I of the DPAS) have been given authority by DOC to place rated orders in support of authorized programs. Other government agencies, Canada, and other friendly foreign nations may apply for special rating authority in support of authorized programs (see 15 CFR 350.55).

(d) Rated orders shall be placed in accordance with the procedures in the DPAS. Contracting officers responsible for acquisitions in support of authorized programs shall be familiar with the DPAS and should provide guidance on the DPAS to contractors and suppliers receiving rated orders. Agency heads shall ensure compliance with the DPAS by contracting activities within their agencies.

(e) Under the Defense Production Act, any willful violation of the Act, the DPAS, or any official action taken by DOC under the DPAS, is a crime punishable by a maximum fine of $10,000, one year in prison, or both (see 15 CFR 350.70 and 15 CFR 350.74).

12.303 Procedures.

(a) There are two levels of priority for rated orders established by the DPAS, identified by the rating symbols "DO" and "DX." All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated and unrated orders. DX ratings are used for special defense programs designated by the President to be of the highest national priority.

(b) DOC may issue a Directive to compel a contractor or supplier to accept a rated order, to rearrange production or delivery schedules, or to improve shipments against particular rated orders. Directives issued by DOC take precedence over all rated and unrated orders as stated in the Directive.

(c) In addition to any other contractual requirements, a valid rated order must contain (see 15 CFR 350.12) the following:

(1) A priority rating consisting of the appropriate DO or DX rating symbol and a program of identification symbol to indicate the authorized program (see Schedule I of the DPAS).

(2) A required delivery date or delivery dates.

(3) The signature of an individual authorized by the agency to sign rated orders.

(d) The DPAS has the following three basic elements which are essential to the operation of the system:

(1) *Mandatory acceptance of rated orders.* A rated order shall be accepted by a contractor or supplier unless rejected for the reasons provided for mandatory rejection in 15 CFR 350.13(b), or for optional rejection in 15 CFR 350.13(c).

(2) *Mandatory extension of priority ratings throughout the acquisition chain.* Contractors and suppliers receiving rated orders shall extend priority ratings to subcontractors or vendors when acquiring items to fill the rated orders (see 15 CFR 350.15).

(3) *Priority scheduling of production and delivery.* Contractors and suppliers receiving rated orders shall give the rated orders priority over other contracts as needed to meet delivery requirements (see 15 CFR 350.14).

(e) Agencies shall provide contracting activities with specific guidance on the issuance of rated orders in support of agency programs.

(f) Contracting officers shall follow agency procedural instructions concerning the use of rated orders in support of agency programs.

(g) Contracting officers, contractors, or subcontractors at any tier, that experience difficulty placing rated orders, obtaining timely delivery under rated orders, locating a contractor or supplier to fill a rated order, ensuring that rated orders receive preferential treatment by contractors or suppliers, or require rating authority for items not automatically ratable under the DPAS, should promptly seek special priorities assistance in accordance with agency procedures (see 15 CFR 350.50–350.55).

(h) Contracting officers shall report promptly any violations of the DPAS to DOC in accordance with agency procedures.

12.304 Solicitation provision and contract clause.

(a) Contracting officers shall insert the provision at 52.212-7, Notice of Priority Rating for National Defense Use, in solicitations when the contract to be awarded will be a rated order.

(b) Contracting officers shall insert the clause at 52.212-8, Defense Priority and Allocation Requirements, in contracts that are rated orders.

Subpart 12.4—Variation in Quantity

12.401 Supply contracts.

(a) A fixed-price supply contract may authorize Government acceptance of a variation in the quantity of items called for if the variation is caused by conditions of loading, shipping, or packing, or by allowances in manufacturing processes. Any permissible variation shall be stated as a percentage and it may be an increase, a decrease, or a combination of both; however, contracts for subsistence items may use other applicable terms of variation in quantity.

(b) There should be no standard or usual variation percentage. The overrun or underrun permitted in each contract should be based upon the normal commercial practices of a paricular industry for a particular item, and the permitted percentage should e no larger than is necessary to afford a contractor reasonable protecion. The permissible variation shall not exceed plus or minus 10 percent unless a different limitation is estabished in agency regulations. Consideration shall be given to the quantity to which the percentage variation applies. For example, when delivery will e made to multiple destinations and t is desired that the quantity variaion apply to the item quantity for ach destination, this requirement must be stated in the contract.

(c) Contractors are responsible for elivery of the specified quantity of ems in a fixed-price contract, within llowable variations, if any. If a conractor delivers a quantity of items in xcess of the contract requirements lus any allowable variation in quantity, particularly small dollar value vershipments, it results in unnecesary administrative costs to the Govrnment in determining disposition of he excess quantity. Accordingly, the ontract may include the clause at 2.212-10, Delivery of Excess Quanties, to provide that—

(1) Excess quantities of items totalg up to $250 in value may be retained without compensating the contractor; and

(2) Excess quantities of items totaling over $250 in value may, at the Government's option, be either returned at the contractor's expense or retained and paid for at the contract unit price.

[48 FR 42159, Sept. 19, 1983, as amended at 54 FR 34753, Aug. 21, 1989]

12.402 Construction contracts.

Construction contracts may authorize a variation in estimated quantities of unit-priced items. When the variation between the estimated quantity and the actual quantity of a unit-priced item is more than plus or minus 15 percent, an equitable adjustment in the contract price shall be made upon the demand of either the Government or the contractor. The contractor may request an extension of time if the quantity variation is such as to cause an increase in the time necessary for completion. The contracting officer must receive the request in writing within 10 days from the beginning of the period of delay. However, the contracting officer may extend this time limit before the date of final settlement of the contract. The contracting officer shall ascertain the facts and make any adjustment for extending the completion date that the findings justify.

12.403 Contract clauses.

(a) The contracting officer shall insert the clause at 52.212-9, Variation in Quantity, in solicitations and contracts, when a fixed-price supply contract is contemplated for supplies, and for services that involve the furnishing of supplies.

(b) The contracting officer may insert the clause at 52.212-10, Delivery of Excess Quantities, in solicitations and contracts, when a fixed-price supply contract is contemplated.

(c) The contracting officer shall insert the clause at 52.212-11, Variation in Estimated Quantity, in solicitations and contracts when a fixed-price construction contract is contemplated that authorizes a variation in the estimated quantity of unit-priced items.

Subpart 12.5—Suspension of Work, Stop-Work Orders, and Government Delay of Work

[48 FR 42159, Sept. 19, 1983, as amended at 54 FR 34753, Aug. 21, 1989]

12.501 General.

Situations may occur during contract performance that cause the Government to order a suspension of work, or a work stoppage. This subpart provides clauses to meet these situations and a clause for settling contractor claims for unordered Government caused delays that are not otherwise covered in the contract.

12.502 Suspension of work.

A suspension of work under a construction or architect-engineer contract may be ordered by the contracting officer for a reasonable period of time. If the suspension is unreasonable, the contractor may submit a written claim for increases in the cost of performance, excluding profit.

12.503 Stop-work orders.

(a) Stop-work orders may be used, when appropriate, in any negotiated fixed-price or cost-reimbursement supply, research and development, or service contract if work stoppage may be required for reasons such as advancement in the state-of-the-art, production or engineering breakthroughs, or realignment of programs.

(b) Generally, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. Issuance of a stop-work order shall be approved at a level higher than the contracting officer. Stop-work orders shall not be used in place of a termination notice after a decision to terminate has been made.

(c) Stop-work orders should include—

(1) A description of the work to be suspended;

(2) Instructions concerning the contractor's issuance of further orders for materials or services;

(3) Guidance to the contractor on action to be taken on any subcontracts; and

(4) Other suggestions to the contractor for minimizing costs.

(d) Promptly after issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer shall take appropriate action to—

(1) Terminate the contract;

(2) Cancel the stop-work order (any cancellation of a stop-work order shall be subject to the same approvals as were required for its issuance); or

(3) Extend the period of the stop-work order if it is necessary and if the contractor agrees (any extension of the stop-work order shall be by a supplemental agreement).

12.504 Government delay of work.

(a) The clause at 52.212-15, Government Delay of Work, provides for the administrative settlement of contractor claims that arise from delays and interruptions in the contract work caused by the acts, or failures to act, of the contracting officer. This clause is not applicable if the contract otherwise specifically provides for an equitable adjustment because of the delay or interruption; e.g., when the Changes clause is applicable.

(b) The clause does not authorize the contracting officer to order a suspension, delay, or interruption of the contract work and it shall not be used as the basis or justification of such an order.

(c) If the contracting officer has notice of an unordered delay or interruption covered by the clause, the contracting officer shall act to end the delay or take other appropriate action as soon as practicable.

(d) The contracting officer shall retain in the file a record of all negotiations leading to any adjustment made under the clause, and related cost or pricing data.

12.505 Contract clauses.

(a) The contracting officer shall insert the clause at 52.212-12, Suspension of Work, in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated.

(b)(1) The contracting officer may, when contracting by negotiation, insert the clause at 52.212-13, Stop-Work Order, in solicitations and contracts for supplies, services, or research and development.

(2) If a cost-reimbursement contract is comtemplated, the contracting officer shall use the clause with its Alternate I.

(c) The contracting officer shall insert the clause at 52.212-14, Stop-Work Order—Facilities, in solicitations and contracts when a facilities acquisition contract or a consolidated facilities contract is contemplated.

(d) The contracting officer shall insert the clause at 52.212-15, Government Delay of Work, in solicitations and contracts when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial items. The clause use is optional when a fixed-price contract is contemplated for services, or for supplies that are commercial or modified-commercial items.

[48 FR 42159, Sept. 19, 1983, as amended at 50 FR 2270, Jan. 15, 1985; 50 FR 25680, June 20, 1985]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 13—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42163, Sept. 19, 1983, unless otherwise noted.

13.000 Scope of part.

This part prescribes policies and procedures for the acquisition of supplies, nonpersonal services, and construction from commercial sources, the aggregate amount of which does not exceed $25,000.

[49 FR 12974, Mar. 30, 1984]

Subpart 13.1—General

13.101 Definitions.

Bulk funding means a system whereby a contracting officer receives authorization from a fiscal and accounting officer to obligate funds on purchase documents against a specified lump sum of funds reserved for the purpose for a specified period of time rather than obtaining individual obligational authority on each purchase document.

Delivery Order, as used in this part, means an order for supplies or services placed against an established contract or with Government sources of supply.

Purchase Order, as used in this part, means an offer by the Government to buy certain supplies or nonpersonal services and construction from commercial sources, upon specified terms and conditions, the aggregate amount of which does not exceed the small purchase limit. The Optional Form

347, Order for Supplies or Services, is designed for this purpose.

Small purchase means an acquisition of supplies, nonpersonal services, and construction in the amount of $25,000 or less using the procedures prescribed in this part.

Small purchase procedures means the methods prescribed in this part for making small purchases using imprest funds, purchase orders, and blanket purchase agreements. The term excludes—

(a) Requirements obtained through the use of Delivery Orders;

(b) Contracts with the Small Business Administration (SBA) under Section 8(a) of the Small Business Act (see part 19); and

(c) Contracts awarded through (1) sealed bidding (see part 14), (2) the negotiation procedures in part 15, or (3) small business or labor surplus area set-asides (see part 19 and 20), other than small business-small purchase set-asides prescribed in 13.105.

[48 FR 42163, Sept. 19, 1983, as amended at 49 FR 12974, Mar. 30, 1984; 50 FR 1736, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

13.102 Purpose.

The purpose of this part is to prescribe simplified procedures for small purchases in order to (1) reduce administrative costs and (2) improve opportunities for small business concerns and small disadvantaged business concerns to obtain a fair proportion of Government contracts.

13.103 Policy.

(a) The procedures prescribed in this part shall be used to the maximum extent practicable for all purchases of supplies or services not exceeding the small purchase limitation unless requirements can be met by using required sources of supply (see part 8).

(b) Small purchase procedures shall not be used in the acquisition of supplies and services initially estimated to exceed the small purchase limitation even though resulting awards do not exceed that limit. Requirements aggregating more than the small purchase dollar limitation shall not be broken down into several purchases that are less than the limit merely to permit the use of small purchase procedures.

[48 FR 42163, Sept. 19, 1983, as amended at 50 FR 52433, Dec. 23, 1985]

13.104 Procedures.

(a) Contracting officers shall use the small purchase procedure that is most suitable, efficient, and economical in the circumstances of each acquisition. Contracting officers may use the procedures in this part in acquisitions from Government supply sources (see part 8), if their use is authorized by the basic contract or concurred in by the source.

(b) Related items (such as small hardware items or spare parts for vehicles) may be included in one solicitation and the award made on an *all-or-none* basis if suppliers are so advised when quotations are requested.

(c) Agencies shall use bulk funding to the maximum extent practicable to reduce processing time, handling, and documentation. Bulk funding is particularly appropriate if numerous purchases using the same type of funds are to be made during a given period.

(d) Agencies shall inspect items or services acquired under small purchase procedures as prescribed in 46.404.

(e) Agencies shall use United States-owned foreign currency, if appropriate, in making payments for small purchases (see subpart 25.3).

(f) This part does not preclude using (1) Standard Form 1442, Solicitation, Offer and Award (Construction, Alteration, or Repair), for construction contracts (see 36.701(b)) or (2) negotiated two-party contracts (see part 15), for acquisitions not exceeding the small purchase limitation.

(g) When proposed purchases covered by this part are required to be publicized under 5.201, the contracting officer shall proceed in accordance with 5.203. See 5.101 (a)(2) for public display requirements.

(h) When a quotation, oral or written, is to be rejected because a small business firm is determined to be not responsible (see subpart 9.1), see 19.6 with respect to Certificates of Competency.

[48 FR 42163, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 27489, July 31, 1986; 52 FR 21886, June 9, 1987]

13.105 Small business-small purchase set-asides.

(a) Except as provided in paragraphs (b), (c), and (d) below, each acquisition of supplies or services that has an anticipated dollar value of $25,000 or less and is subject to small purchase procedures, shall be reserved exclusively for small business concerns. This shall be accomplished by using the category of set-asides established by Pub. L. 95-507, specifically for small purchases, identified as small business-small purchase set-asides established by section 15(j) of the Small Business Act (15 U.S.C. 644(j)) (see Pub. L. 95-507).

(b) The requirements of this section 13.105 apply only to purchases in the United States, its territories and possessions, Puerto Rico, and the Trust Territory of the Pacific Islands (see 19.000(b)). Foreign concerns shall not be solicited or awarded acquisitions reserved for small business concerns.

(c) The requirement for small business-small purchase set-asides does not affect the responsibility of agencies to make purchases from required sources of supply, such as Federal Prison Industries, Industries for the Blind and Other Severely Handicapped, and mandatory multiple-award Federal Supply Schedule contracts.

(d) (1) Each written solicitation under a small business-small purchase set-aside shall contain the provision at 52.219-4, Notice of Small Business-Small Purchase Set-Aside. If the solicitation is oral, however, information substantially identical to that which is in the provision shall be given to potential quoters.

(2) If the contracting officer determines there is no reasonable expectation of obtaining quotations from two or more responsible small business concerns (or at least one if the purchase does not exceed the dollar threshold, prescribed in 13.106, for obtaining competition and price reasonableness) that will be competitive in terms of market price, quality, and delivery, the contracting officer need not proceed with the small business-small purchase set-aside and may purchase on an unrestricted basis. If the SBA procurement center representative disagrees with a contracting officer's decision not to proceed with a small business-small purchase set-aside, the SBA procurement center representative may appeal the decision in accordance with the procedures set forth in 19.505.

(3) If the contracting officer proceeds with the small business-small purchase set-aside and receives a quotation from only one responsible small business concern at a reasonable price (see 13.106(c)), the contracting officer shall make an award to that concern. However, if the contracting officer does not receive a reasonable quotation from a responsible small business concern, the contracting officer may cancel the small business- small purchase set-aside and complete the purchase on an unrestricted basis.

(4) When proceeding under 13.105(d)(1) or (3), the contracting officer shall ascertain the availability of small business suppliers by telephone or other informal means (see 13.106(b)(4)).

(5) If the purchase is on an unrestricted basis under 13.105(d)(2), the contracting officer shall document in the file the reason for the unrestricted purchase.

(e) Policy concerning nonmanufacturers under small business-small purchase set-asides is prescribed in 19.501(f)(2).

[48 FR 42163, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986; 51 FR 36971, Oct. 16, 1986; 52 FR 21886, June 9, 1987]

13.106 Competition and price reasonableness.

(a) *Purchases not over 10 percent of the small purchase limitation.* (1) Purchases not exceeding this limit may be made without securing competitive quotations if the contracting officer considers the prices to be reasonable.

(2) Such purchases shall be distributed equitably among qualified suppliers.

(3) If practical, a quotation shall be solicited from other than the previous supplier before placing a repeat order.

(4) The administrative cost of verifying the reasonableness of the price of purchases not exceeding 10 percent of the small purchase limitation may more than offset potential savings from detecting instances of overpric-

g. Therefore, action to verify price
asonableness need be taken only
hen—
(i) The buyer or contracting officer
spects or has information (e.g., com-
rison to previous prices paid or per-
nal knowledge of the item involved)
indicate that the price may not be
asonable; or
ii) Purchasing an item for which no
mparable pricing information is
adily available (e.g., an item that is
t the same as, or is not similar to,
her items that have been recently
rchased on a competitive basis).
b) *Purchase over 10 percent of the*
all purchase limitation. (1) Con-
cting officers shall solicit quota-
ns from a reasonable number of
rces to promote competition to the
ximum extent practicable and
ure that the purchase is advanta-
us to the Government, price and
er factors considered, including the
ministrative cost of the purchase.
icitations may only be limited to
source if the contracting officer
ermines that only one source is rea-
ably available.
2) Generally, quotations should be
cited orally except that written so-
tations shall be used for construc-
contracts over $2,000. Written so-
tations should be used when obtain-
oral quotations is not considered
nomical or practical.
) Maximum practicable competi-
for small purchases ordinarily can
obtained without soliciting quota-
s from sources outside the trade
in which the purchasing office is
ated. Contracting officers shall not
t solicitations to suppliers of well
wn and widely distributed makes
brands, nor shall quotations be so-
ed on a personal preference basis.
supply sources, disclosed through
e journals or other media, shall be
tinuously reviewed and, if appro-
te, added to the list of available
rces.
) (i) Unless exempted from this re-
ement by the head of the con-
ting activity, each contracting
e shall maintain a small purchase
ce list (or lists, if more conven-
) and shall record on the list the
us of each source (when the status
is made known to the contracting office) in the following categories:

(A) Small business.

(B) Small disadvantaged business.

(C) Certified in a labor surplus area.

(ii) The status information shall be used to ensure that small business concerns are given opportunities to submit quotations in response to small purchase solicitations. The names of additional concerns may be obtained from the Small and Disadvantaged Business Utilization Specialist who, in turn, may request support from the SBA Procurement Center Representative or other Federal and private sources which maintain lists of small business concerns. (See subpart 19.1 for pertinent definitions.)

(5) Generally, solicitation of at least three sources may be considered to promote competition to the maximum extent practicable. If practicable, two sources not included in the previous solicitation should be requested to furnish quotations.

(6) The following factors influence the number of quotations required in connection with any particular purchase:

(i) The nature of the article or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or is relatively noncompetitive.

(ii) Information obtained in making recent purchases of the same or similar item.

(iii) The urgency of the proposed purchase.

(iv) The dollar value of the proposed purchase.

(v) Past experience concerning specific dealers' prices.

(7) If suppliers furnish standing price quotations on supplies or services required on an intermittent and recurring basis, the information may be used in lieu of obtaining individual quotations each time a purchase is contemplated. The buyer shall ensure that the price information is current and that the Government obtains the benefit of maximum discounts.

(8) Occasionally an item can be obtained only from a supplier who quotes a minimum order price or quantity that either unreasonably exceeds stated quantity requirements or

results in an unreasonable price for the quantities required. In these instances, the contracting officer should inform the requiring activity of all facts regarding the quotation and request it to confirm or alter its requirement. The file shall be documented to support the final action taken.

(9) Notification to unsuccessful suppliers shall be given only if requested.

(c) *Data to support small purchases over 10 percent of the small purchase limitation.* (1) The determination that a proposed price is reasonable should be based on competitive quotations. If only one response is received, or the price variance between multiple responses reflects lack of adequate competition, a statement shall be included in the contract file giving the basis of the determination of fair and reasonable price. The determination may be based on a comparison of the proposed price with prices found reasonable on previous purchases, current price lists, catalogs, advertisements, similar items in a related industry, value analysis, the contracting officer's personal knowledge of the item being purchased, or any other reasonable basis. In any case, the contracting officer should gain as much knowledge as practicable of the physical and material characteristics and intended use of the item to be purchased as an aid to determine price reasonableness.

(2) If only one source is solicited, an additional notation shall be made to explain the absence of competition, except for acquisition of utility services available only from one source or of educational services from nonprofit institutions.

(3) The following illustrate the extent to which quotation information should be recorded:

(i) *Oral solicitations.* The contracting office shall establish and maintain informal records of oral price quotations in order to reflect clearly the propriety of placing the order at the price paid with the supplier concerned. In most cases, this will consist merely of showing the names of the suppliers contacted and the prices and other terms and conditions quoted by each. Handwritten notations on the purchase requisition are satisfactory for this purpose.

(ii) *Written solicitations.* Writte records of solicitations may be limite to notes or abstracts to show price delivery, references to printed pric lists used, the vendor or vendors contacted, and other pertinent data.

(4) Purchasing offices shall retai data supporting small purchases t the minimum extent and duration necessary for management review purposes. (See subpart 4.8, Contrac Files.)

[48 FR 42163, Sept. 19, 1983, as amended a 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec 23, 1985; 52 FR 19803, May 27, 1987; 55 F 25527, June 21, 1990]

13.107 Solicitation and evaluation of quotations.

(a) *Forms.* (1) Except when quotations are solicited orally, Standar Form 18, Request for Quotations (illustrated in 53.301-18), is designed fo use in obtaining price, delivery, and related information from suppliers.

(2) Standard Form 18 is available fo use by all agencies, and shall be used when using the form is considered economical and efficient for obtaining written quotations for small purchases.

(3) Optional Form 336, Continuation Sheet, may be used with Standard Form 18 when additional space i needed.

(4) If Standard Form 18 is not used for written solicitations, contracting officers may request quotations using an agency-designed form, an agency-approved automated format, or teletype.

(5) Each agency-designed request for quotations form shall conform with Standard Form 18, insofar as practical

(6) When using a teletype for transmission of a request for quotations the provisions and clauses applicable to the solicitation shall be incorporated by reference.

(b) *Discounts.* Consistent with the applicable principles in 14.407-3, contracting officers shall make every effort to obtain trade and prompt payment discounts. However, prompt payment discounts shall not be considered in the evaluation of quotations.

(c) *Transportation charges.* Contracting officers shall evaluate quota ons inclusive of transportation charges from the shipping point of the supplier to the delivery destination.

(d) *Economic purchase quantities (supplies).* Contracting officers shall comply with the economic purchase quantity planning requirements for supplies in subpart 7.2. If quotations are solicited in writing, contracting officers shall comply with 7.203 and 7.204. If quotations are solicited orally, contracting officers shall orally request the information covered by the provision at 52.207-4 in accordance with the instructions at 7.203 and then comply with 7.204.

[48 FR 42163, Sept. 19, 1983, as amended at 51 FR 27119, July 29, 1986; 52 FR 30076, Aug. 12, 1987]

13.108 Legal effect of quotations.

(a) A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract (see 15.402(e)). Therefore, issuance by the Government of an order for supplies or services in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract comes into being when the supplier accepts the offer.

(b) When appropriate, the contracting officer may request the supplier to indicate acceptance of an order by notification to the Government, preferably in writing. In other circumstances, the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred.

(c) If the Government issues an order resulting from a quotation, the Government may (by written notice to the supplier, at any time before acceptance occurs) withdraw, amend, or cancel its offer. (See 13.504 for procedures on termination or cancellation of purchase orders.)

13.109 Agency use of indefinite delivery contracts.

Small purchase costs and processing time may be reduced through the use of indefinite delivery contracts (see subpart 16.5) that permit delivery orders to be placed by several contracting or ordering offices in one or more executive agencies. Therefore, contracting offices are encouraged to seek opportunities to cooperate with each other to achieve small purchase efficiency and economy through the use of indefinite delivery contracts.

Subpart 13.2—Blanket Purchase Agreements

13.201 General.

(a) A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing *charge accounts* with qualified sources of supply (see subpart 16.7 for additional coverage of agreements).

(b) BPA's are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual purchase documents.

(c) BPA's should be established at the appropriate level responsible for providing supplies for its own operations or for other offices, installations, projects, or functions. Such levels, for example, may be organized supply points, separate independent or detached field parties, or one-person posts or activities.

(d) The use of BPA's does not exempt the agency from responsibility for keeping obligations and expenditures within available funds, but this should be done by using simplified methods and by avoiding formal fiscal recording of individual deliveries and transactions.

13.202 [Reserved]

13.203 Establishment of Blanket Purchase Agreements.

13.203-1 General.

(a) The following are circumstances under which contracting officers may establish BPA's:

(1) If there is a wide variety of items in a broad class of goods (e.g., hardware) that are generally purchased but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.

(2) If there is a need to provide commercial sources of supply for one or more offices or projects in a given area that do not have or need authority to purchase otherwise.

(3) In any other case in which the writing of numerous purchase orders can be avoided through the use of this procedure.

(b) A BPA should be established without a purchase requisition.

(c) A BPA shall not cite accounting and appropriation data (but see 13.204(e)(4)).

(d) BPA's should be made with firms from which numerous individual purchases will likely be made in a given period. For example, if past experience has shown that certain firms are dependable and consistently lower in price than other firms dealing in the same commodities, and if numerous small purchases are usually made from such suppliers, it would be advantageous to establish BPA's with those firms.

(e) To the extent practical, BPA's for items of the same type should be placed concurrently with more than one supplier. All competitive sources should be given an equal opportunity to furnish supplies or services under BPA's.

(f) BPA's may also be established with Federal Supply Schedule contractors (see subpart 8.4) and GSA Nonmandatory ADP Schedule contractors (see part 39), if not inconsistent with the terms of the applicable schedule contract.

(g) If it is determined that BPA's would be advantageous, suppliers should be contacted to make the necessary arrangements for securing maximum discounts, documenting the individual purchase transactions, periodic billing, and other necessary details.

(h) A BPA may be limited to furnishing individual items or commodity groups or classes, or it may be unlimited for all items or services that the source of supply is in a position to furnish.

(i) BPA's shall be prepared and issued on any agency-authorized purchase order form.

(j) BPA's shall contain the following terms and conditions:

(1) *Description of agreement.* A statement that the supplier shall furnish supplies or services, described in general terms, if and when requested by the contracting officer (or the authorized representative of the contracting officer) during a specified period and within a stipulated aggregate amount, if any.

(2) *Extent of obligation.* A statement that the Government is obligated only to the extent of authorized purchases actually made under the BPA.

(3) *Pricing.* A statement that the prices to the Government shall be as low or lower than those charged the supplier's most favored customer for comparable quantities under similar terms and conditions, in addition to any discounts for prompt payment.

(4) *Purchase limitation.* A statement that specifies the dollar limitation for each individual purchase under the BPA (see 13.204(b)).

(5) *Notice of individuals authorized to purchase under the BPA and dollar limitations by title of position or name.* A statement that a list of individuals authorized to purchase under the BPA, identified either by title of position or by name of individual, organizational component, and the dollar limitation per purchase for each position title or individual shall be furnished to the supplier by the contracting officer.

(6) *Delivery tickets.* A requirement that all shipments under the agreement, except subscriptions and other charges for newspapers, magazines, or other periodicals, shall be accompanied by delivery tickets or sales slips which shall contain the following minimum information:

(i) Name of supplier.

(ii) BPA number.

(iii) Date of purchase.

(iv) Purchase number.

(v) Itemized list of supplies or services furnished.

(vi) Quantity, unit price, and extension of each item, less applicable discounts (unit prices and extensions need not be shown when incompatible with the use of automated systems; *provided*, that the invoice is itemized to show this information).

(vii) Date of delivery or shipment.

Invoices. One of the following
nents (except that statement (iii)
d not be used if the accumulation
individual invoices by the Gov-
ent materially increases the ad-
trative costs of this purchase
od):
A summary invoice shall be sub-
d at least monthly or upon expi-
of this BPA, whichever occurs
for all deliveries made during a
period, identifying the delivery
s covered therein, stating their
dollar value, and supported by
ted copies of the delivery tickets.
An itemized invoice shall be sub-
at least monthly or upon expi-
of this BPA, whichever occurs
for all deliveries made during a
period and for which payment
ot been received. These invoices
not be supported by copies of de-
tickets.
When billing procedures provide
individual invoice for each de-
these invoices shall be accumu-
provided, that—
A consolidated payment will be
for each specified period; and
The period of any discounts will
ence on the final date of the bill-
riod or on the date of receipt of
s for all deliveries accepted
the billing period, whichever is

An invoice for subscriptions or
charges for newspapers, maga-
or other periodicals shall show
arting and ending dates and
tate either that ordered sub-
ons have been placed in effect
be placed in effect upon receipt
nent.
PA's in which the fast payment
ure is used shall include the re-
ents stated under 13.303(b).

42163, Sept. 19, 1983, as amended at
036, Mar. 20, 1987; 53 FR 661, Jan.
53 FR 43390, Oct. 26, 1988]

Clauses.

The contracting officer shall
n each BPA the clauses pre-
elsewhere in the FAR that are
for or applicable to the par-
BPA.
Unless a clause prescription
otherwise, (e.g., see
)(1), 22.605(a)(5), or 22.1006),
if the prescription includes a dollar threshold, the amount to be compared to that threshold is that of any particular order under the BPA.

13.204 Purchases under Blanket Purchase Agreements.

(a) The use of a BPA does not authorize purchases that are not otherwise authorized by law or regulation. For example, the blanket purchase agreement, being a method of simplifying the making of individual small purchases, shall not be used to avoid the small purchase limitation.

(b) Unless otherwise specified in agency regulations, individual purchases under BPA's, except those BPA's established in accordance with 13.203-1(f), shall not exceed the dollar limitation for small purchases (see 13.103).

(c) The existence of a BPA does not justify from only one source purchasing or avoiding small business-small purchase set-asides. The requirements of 13.106 and 13.107 also apply to each order under a BPA.

(d) If there is an insufficient number of BPA's to ensure maximum practicable competition for a particular purchase, the contracting officer shall—

(1) Solicit quotations from other sources and make the purchase as appropriate; and

(2) Establish additional BPA's to facilitate future purchases if (i) recurring requirements for the same or similar items or services seem likely, (ii) qualified sources are willing to accept BPA's, and (iii) it is otherwise practical to do so.

(e) Documentation of purchases under BPA's shall be limited to essential information and forms, as follows:

(1) Purchases under BPA's generally should be made orally, but a purchase document may be issued if written communications are necessary to ensure that the vendor and the purchaser agree concerning the transaction.

(2) If a purchase document is not issued, the essential elements (e.g., date, vendor, items or services, price, delivery date) shall be recorded on the purchase requisition, in an informal

memorandum, or on a form developed locally for the purpose.

(3) If a purchase document is issued, informal correspondence, an authorized purchase form, or a form developed locally for the purpose, may be used.

(4) Documentation of individual purchases under BPA's shall also cite the pertinent purchase requisitions and the accounting and appropriation data.

(5) When delivery is made or the services are performed, the vendor's sales document, delivery document, or invoice may (if it reflects the essential elements) be used for the purpose of recording receipt and acceptance of the items or services. However, if the purchase is assigned to another activity for administration, receipt and acceptance of supplies or services shall be documented by signature and date on the agency specified form by the authorized Government representative after verification and notation of any exceptions.

[48 FR 42163, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 31426, Sept. 3, 1986]

13.205 Review procedures.

(a) The contracting officer placing orders under a BPA, or the designated representative of the contracting officer, shall review a sufficient random sample of the BPA files at least annually to ensure that authorized procedures are being followed.

(b) The contracting officer that entered into the BPA shall—

(1) Ensure that each BPA is reviewed at least annually and, if necessary, updated at that time; and

(2) Maintain awareness of changes in market conditions, sources of supply, and other pertinent factors that may warrant making new arrangements with different suppliers or modifying existing arrangements.

(c) If an office other than the purchasing office that established a BPA is authorized to make purchases under that BPA, the agency that has jurisdiction over the office authorized to make the purchases shall ensure that the procedures in paragraph (a) above are being followed.

[48 FR 42163, Sept. 19, 1983, as amended at 53 FR 43390, Oct. 26, 1988]

13.206 Completion of Blanket Purchase Agreements.

An individual BPA is considered complete when the purchases under it equal its total dollar limitation, if any, or when its stated time period expires.

Subpart 13.3—Fast Payment Procedure

13.301 General.

The fast payment procedure allows payment under limited conditions to a contractor prior to the Government's verification that supplies have been received and accepted. The procedure provides for payment for supplies based on the contractor's submission of an invoice that constitutes a representation that—

(a) The supplies have been delivered to a post office, common carrier, or point of first receipt by the Government; and

(b) The contractor agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase agreements.

[48 FR 42163, Sept. 19, 1983, as amended at 53 FR 27463, July 20, 1988]

13.302 Conditions for use.

If the conditions in paragraphs (a) through (f) of this section are present, the fast payment procedure may be used, provided that use of the procedure is consistent with the other conditions of the purchase. The conditions for use of the fast payment procedure are as follows:

(a) Individual orders do not exceed $25,000 except that executive agencies may permit higher dollar limitations for specified activities or items on a case-by-case basis.

(b) Deliveries of supplies are to occur at locations where there is both a geographical separation and a lack of adequate communications facilities between Government receiving and disbursing activities that will make it impractical to make timely payment based on evidence of Government acceptance. Use of the fast payment pro-

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cedure would not be indicated, for example, for small purchases by an activity if material being purchased is destined for use at that activity and contract administration will be performed by the purchasing office at that activity.

(c) Title to the supplies will vest in the Government (1) upon delivery to a post office or common carrier for mailing or shipment to destination, or (2) upon receipt by the Government if the shipment is by means other than Postal Service or common carrier.

(d) The supplier agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements.

(e) The purchasing instrument is a firm-fixed-price contract, a purchase order, or a delivery order for supplies.

(f) A system is in place to ensure: (1) documenting evidence of contractor performance under fast payment acquisitions, (2) timely feedback to the contracting officer in case of contractor deficiencies, and (3) identification of suppliers who have a current history of abusing the fast payment procedure. (Also see subpart 9.1.)

[48 FR 42163, Sept. 19, 1983, as amended at 53 FR 27463, July 20, 1988]

13.303 Preparation and execution of orders.

(a) Orders incorporating the fast payment procedure shall be issued on Optional Form 347, Order for Supplies or Services, or other agency authorized purchase order form (but see 13.204(e) for purchases under BPA's). Orders may be either priced or unpriced.

(b) Contracts, purchase orders, or BPA's using the fast payment procedure shall include the following:

(1) A requirement that the supplies be shipped transportation or postage prepaid.

(2) A requirement that invoices be submitted directly to the finance or other office designated in the order, or in the case of unpriced purchase orders, to the contracting officer (see 13.502(c)).

(3) The following statement on consignee's copy: *Consignee's Notification to Purchasing Activity of Nonreceipt, Damage, or Nonconformance.* The consignee shall notify the purchasing office promptly after the specified date of delivery of supplies not received, damaged in transit, or not conforming to specifications of the purchase order. Unless extenuating circumstances exist, the notification should be made not later than 60 days after the specified date of delivery.

(4) A requirement that the contractor mark outer shipping containers "FAST PAY".

13.304 Responsibility for collection of debts.

The contracting officer shall be primarily responsible for collecting debts resulting from failure of contractors to properly replace, repair, or correct supplies lost, damaged, or not conforming to purchase requirements (see 32.605(b) and 32.606).

13.305 Contract clause.

The contracting officer shall insert the clause at 52.213-1, Fast Payment Procedure, in solicitations and contracts when the conditions in 13.302 are applicable and it is intended that the fast payment procedure be used in the contract (in the case of BPA's, the contracting officer may elect to insert the clause either in the BPA or in orders under the BPA).

Subpart 13.4—Imprest Fund

13.401 Definition.

Imprest fund, as used in this subpart, means a cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small purchases.

13.402 General.

This subpart prescribes policies and procedures for using imprest funds to make small purchases of supplies or services. Related policies and regulations concerning the establishment of and accounting for imprest funds, including the responsibilities of designated cashiers and alternates, are contained in part IV of the Treasury Financial Manual for Guidance of Departments and Agencies, Title 7 of the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies, and the agency implementing regulations. Agencies shall also be guided by the Manual of Procedures and Instructions for Cashiers, issued by the Financial Management Service, Department of the Treasury.

[48 FR 42163, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987]

13.403 Agency responsibilities.

Each agency using imprest funds shall—

(a) Periodically review and determine whether there is continuing need for each fund established, and that amounts of those funds are not in excess of actual needs;

(b) Take prompt action to have imprest funds adjusted to a level commensurate with demonstrated needs whenever circumstances warrant such action; and

(c) Develop and issue appropriate implementing regulations. These regulations shall include (but are not limited to) procedures covering—

(1) Designation of personnel authorized to make purchases using imprest funds; and

(2) Documentation of purchases using imprest funds, including documentation of (i) receipt and acceptance of supplies and services by the Government, (ii) receipt of cash payments by the suppliers, and (iii) cash advances and reimbursements.

13.404 Conditions for use.

Imprest funds may be used for small purchases when—

(a) The transaction does not exceed $500 or such other limits as have been approved by the agency head;

(b) The use of imprest funds is considered to be advantageous to the Government; and

(c) The use of imprest funds for the transaction otherwise complies with any additional conditions established by agencies and with the policies and regulations referenced in 13.402.

[48 FR 42129, Sept. 19, 1983, as amended at 51 FR 19715, May 30, 1986]

13.405 Procedures.

(a) Each purchase using imprest funds shall be based upon an authorized purchase requisition.

(b) Normally, orders to suppliers should be placed orally and without soliciting competition if prices are considered reasonable.

(c) Purchases shall be distributed equitably among qualified suppliers (see 13.105).

(d) Prompt payment discounts shall be solicited.

(e) Any agency-authorized purchase order form or Standard Form 1165, Receipt for Cash-Subvoucher, may be used if a written order is considered necessary; e.g., if required by the supplier for discount, tax exemption, or other reasons. If a purchase order is used for this purpose, it shall be endorsed "Payment to be made from Imprest Fund."

(f) The individual authorized to make purchases using imprest funds shall—

(1) Furnish to the imprest fund cashier a copy of the purchase requisition annotated to reflect (i) that an imprest fund purchase has been made, (ii) the unit prices and extensions, (iii) the supplier's name and address, and (iv) the date of anticipated delivery; and

(2) Require the supplier to include with delivery of the supplies an invoice, packing slip, or other sales instrument giving (i) the supplier's name and address, (ii) list and quantity of items, (iii) unit prices and extensions, and (iv) cash discount, if any.

Subpart 13.5—Purchase Orders

13.501 General.

(a) Except as provided under the unpriced purchase order method (see 13.502), purchase orders (1) shall be issued on a fixed-price basis, and (2) shall not contain economic price adjustment or redetermination clauses.

(b) Purchase orders shall include any trade and prompt payment discounts that are offered, consistent with the applicable principles in 14.407-3.

(c) Purchase orders shall specify the quantity of supplies or services ordered (but see subpart 12.4).

(d) Inspections under small purchases shall be as prescribed in part 46. Orders generally shall provide that inspection and acceptance will be at destination and source inspection should be specified only if required by part 46. If inspection and acceptance are to be performed at destination, advance copies of the purchase order shall be furnished to consignee(s) for material receipt purposes. Receiving reports shall be accomplished immediately upon receipt and acceptance of material.

(e) F.o.b. destination shall be specified for supplies to be delivered within the United States, except Alaska and Hawaii, unless there are valid reasons to the contrary.

(f) Each purchase order shall contain a determinable date by which delivery of supplies or performance of services is required.

(g) The contracting officer's signature on purchase orders shall be in accordance with 4.101. Facsimile signature may be used in the production of purchase orders by automated methods.

(h) Distribution of copies of purchase orders and related forms shall be limited to those copies required for essential administration and transmission of contractual information.

[48 FR 42163, Sept. 19, 1983, as amended at 50 FR 23606, June 4, 1985; 53 FR 17857, May 18, 1988]

13.502 Unpriced purchase orders.

(a) An unpriced purchase order is an order for supplies or services, the price of which is not established at the time of issuance of the order.

(b) An unpriced purchase order may be used only when—

(1) It is anticipated that the transaction will not exceed the small purchase limit;

(2) It is impractical to obtain pricing in advance of issuance of the purchase order; and

(3) The purchase is for—

(i) Repairs to equipment requiring disassembly to determine the nature and extent of repairs;

(ii) Material available from only one source and for which cost cannot be readily established; or

(iii) Supplies or services for which prices are known to be competitive but exact prices are not known (e.g., miscellaneous repair parts, maintenance agreements).

(c) Unpriced purchase orders may be issued by using written purchase orders or written telecommunications (see 13.506). A realistic monetary limitation, either for each line item or for the total order, shall be placed on each unpriced purchase order (see 13.507(d)). The monetary limitation shall be an obligation subject to adjustment when the firm price is established. The contracting office shall follow-up each order to ensure timely pricing. The contracting officer or the contracting officer's designated representative shall review the invoice price and, if reasonable (see 13.106(c)), process the invoice for payment.

[48 FR 42163, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

13.503 Obtaining contractor acceptance and modifying purchase orders.

(a) When it is desired to consummate a binding contract between the parties before the contractor undertakes performance, the contracting officer shall require written acceptance of the purchase order by the contractor.

(b) A purchase order may be modified by use of (1) Standard Form 30, Amendment of Solicitation/Modification of Contract; (2) an agency-designed form or an agency-approved automated format; or (3) if not prohibited by agency regulations, a purchase order form.

(c) Each purchase order modification shall identify the order it modifies and shall contain an appropriate modification number.

(d) Contracting officers need not obtain a contractor's written acceptance of a purchase order modification, unless the written acceptance is—

(1) Determined by the contracting officer to be necessary to ensure the contractor's compliance with the purchase order as revised; or

(2) Required by agency regulations.

13.504 Termination or cancellation of purchase orders.

(a) If a purchase order that has been accepted in writing by the contractor is to be terminated, the contracting officer shall process the termination action as prescribed by part 49.

(b) If a purchase order that has not been accepted in writing by the contractor is to be cancelled, the contracting officer shall notify the contractor in writing that the purchase order has been cancelled, request the contractor's written acceptance of the cancellation, and proceed as follows:

(1) If the contractor accepts the cancellation and does not claim that costs were incurred as a result of beginning performance under the purchase order, no further action is required; i.e., the purchase order shall be considered cancelled.

(2) If the contractor does not accept the cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, the contracting officer shall process the termination action as prescribed by part 49.

13.505 Purchase order and related forms.

13.505-1 Optional Form (OF) 347, Order for Supplies or Services, and Optional Form 348, Order for Supplies or Services Schedule-Continuation.

(a) *General.* (1) Optional Form 347 (illustrated in 53.302-347) and Optional Form 348 (illustrated in 53.302-348) are multipurpose forms designed for the following uses:

(i) Negotiated purchases of supplies or services not in excess of the small purchase limit.

(ii) A delivery order for ordering or scheduling deliveries against established contracts or from Government sources of supply.

(iii) A receiving and inspection report.

(iv) An invoice.

(2) Optional Forms 347 and 348, may be used when the agency concerned considers it economical and efficient to do so (also see 13.505-2).

(b) *Clauses.* (1) Clauses generally suitable for most small purchases are incorporated by reference on the reverse of Optional Form 347, (but see 13.507).

(2) Agencies may add (i) other clauses prescribed by the FAR, as appropriate, and (ii) agency clauses, if they do not conflict with clauses prescribed by the FAR and are designated as agency clauses.

13.505-2 Agency order forms in lieu of Optional Forms 347 and 348.

(a) Order forms used in lieu of Optional Forms 347 and 348 shall conform insofar as practicable with the forms illustrated in 53.302-347 and 53.302-348.

(b) Agencies using agency order forms in lieu of Optional Form 347 may print on those forms the clauses they consider to be generally suitable for most of their small purchases. The clauses, however, (1) should include the clauses incorporated by reference on the reverse of Optional Form 347, (2) may include clauses not listed on the reverse of Optional Form 347 that are prescribed by the FAR, and (3) may include agency clauses, if they do not conflict with clauses prescribed by the FAR and are designated as agency clauses (see 13.507).

13.505-3 Standard Form 44, Purchase Order-Invoice-Voucher.

(a) Standard Form 44, Purchase Order-Invoice-Voucher (illustrated in 53.301-44) is a pocket-size purchase order form designed primarily for on-the-spot, over-the-counter purchases of supplies and nonpersonal services while away from the purchasing office or at isolated activities. It is a multipurpose form that can be used as a purchase order, receiving report, invoice, and public voucher.

(b) Standard Form 44 may be used if all of the following conditions are satisfied:

(1) Except for purchases made under unusual and compelling urgency, the amount of the purchase is not over $2,500. Agencies may establish higher dollar limitations for specific activities or items.

(2) The supplies or services are immediately available.

(3) One delivery and one payment will be made.

(4) Its use is determined to be more economical and efficient than use of other small purchase methods.

(c) General procedural instructions governing the use of Standard Form 44 are printed on the form and on the inside front cover of each book of forms.

(d) Agencies shall provide adequate safeguards regarding the control of forms and accounting for purchases.

[48 FR 42163, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

13.506 Purchase orders via written telecommunications.

(a) A written telecommunicated purchase order is an order for supplies or services that is electrically transmitted to a supplier and is not signed by the contracting officer.

(b) A written telecommunicated purchase order may be used only when all of the following conditions are present:

(1) Its use is more advantageous to the Government than any other small purchase technique.

(2) An unsigned transmitted order is acceptable to the supplier.

(3) The order is approved by the contracting officer before its transmission.

(4) The order does not require written acceptance by the supplier.

(5) The purchasing office retains all contract administration functions.

(c) When a written telecommunicated purchase order is used—

(1) Clauses appropriate to the purchase order shall be incorporated by reference in the transmitted order;

(2) Administrative information that is not needed by the supplier should not be transmitted but should be placed only on copies intended for internal distribution;

(3) The same distribution shall be made of the transmitted order as is made of written purchase orders; and

(4) No purchase order form shall be issued.

(d) A written telecommunicated purchase order may be unpriced if it meets the conditions in 13.502.

13.507 Clauses.

(a) Except as provided in paragraph (b) below, each purchase order (and each purchase order modification (see 13.503)) shall incorporate all clauses required for or applicable to the particular acquisition. The clauses listed on Optional Form 347, are not necessarily all that are required.

(b) Since there is, for all practical purposes, simultaneous placing of purchase orders on Standard Form 44 and delivery of the items ordered, clauses are not required for purchases using this form.

(c) The contracting officer shall insert the clause at 52.213-2, Invoices, in purchase orders that authorize advance payments (see 31 U.S.C. 3324 (d)(2)) for subscriptions or other charges for newspapers, magazines, periodicals, or other publications (i.e., any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded for auditory or visual usage).

(d) The contracting officer shall insert the clause at 52.213-3, Notice to Supplier, in unpriced purchase orders.

[48 FR 42163, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986]

PART 14—SEALED BIDDING

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Subpart 14.5—Two Step Sealed Bidding

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42171, Sept. 19, 1983, unless otherwise noted.

14.000 Scope of part.

This part prescribes (a) the basic requirements of contracting for supplies and services (including construction) by sealed bidding, (b) the information to be included in the solicitation (invitation for bids), (c) procedures concerning the submission of bids, (d) requirements for opening and evaluating bids and awarding contracts, and (e) procedures for two-step sealed bidding.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

Subpart 14.1—Use of Sealed Bidding

14.101 Elements of sealed bidding.

Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards. The following steps are involved:

(a) *Preparation of invitations for bids.* Invitations must describe the requirements of the Government clearly, accurately, and completely. Unnecessarily restrictive specifications or requirements that might unduly limit the number of bidders are prohibited. The invitation includes all documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding.

(b) *Publicizing the invitation for bids.* Invitations must be publicized through distribution to prospective bidders, posting in public places, and such other means as may be appropriate. Publicizing must occur a sufficient time before public opening of bids to enable prospective bidders to prepare and submit bids.

(c) *Submission of bids.* Bidders must submit sealed bids to be opened at the time and place stated in the solicitation for the public opening of bids.

(d) *Evaluction of bids.* Bids shall be evaluated without discussions.

(e) *Contract award.* After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.102 [Reserved]

14.103 Policy.

14.103-1 General.

(a) Sealed bidding shall be used whenever the conditions in 6.401(a) are met. This requirement applies to any proposed contract action under part 6.

(b) Current lists of bidders shall be maintained in accordance with 14.205.

(c) Sealed bidding may be used for classified acquisitions (see 4.401) if its use does not violate agency security requirements.

(d) The policy for pricing modifications of sealed bid contracts appears in 15.804-2.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.103-2 Limitations.

No awards shall be made as a result of sealed bidding unless—

(a) Bids have been solicited as required by subpart 14.2;

(b) Bids have been submitted as required by subpart 14.3;

(c) The requirements of 1.602-1(b) and part 6 have been met; and

(d) An award is made to the responsible bidder (see 9.1) whose bid is responsive to the terms of the invitation for bids and is most advantageous to the Government, considering only price and the price-related factors included in the invitation, as provided in subpart 14.4.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.104 Types of contracts.

Firm-fixed-price contracts shall be used when the method of contracting is sealed bidding, except that fixed-price contracts with economic price adjustment clauses may be used if authorized in accordance with 16.203 when some flexibility is necessary and feasible. Such clauses must afford all bidders an equal opportunity to bid.

[48 FR 42171, Sept 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.105 Solicitations for informational or planning purposes.

See 15.405.

Subpart 14.2—Solicitation of Bids

14.201 Preparation of invitations for bids.

14.201-1 Uniform contract format.

(a) Contracting officers shall prepare invitations for bids and contracts using the uniform contract format outlined in Table 14-1 to the maximum practicable extent. The use of the format facilitates preparation of the solicitation and contract as well as reference to, and use of, those documents by bidders and contractors. It need not be used for acquisition of the following:

(1) Construction (see part 36).

(2) Shipbuilding (including design, construction, and conversion), ship overhaul, and ship repair.

(3) Subsistence items.

(4) Supplies or services requiring special contract forms prescribed elsewhere in this regulation that are inconsistent with the uniform contract format.

(5) Firm-fixed-price or fixed-price with economic price adjustment acquisitions that use the simplified contract format (see 14.201-9).

(b) Information suitable for inclusion in invitations for bids under the uniform contract format shall also be included in invitations for bids not subject to that format if applicable.

(c) Solicitations to which the uniform contract format applies shall include Parts I, II, III, and IV. If any section of the uniform contract format does not apply, the contracting officer should so mark that section in the solicitation. Upon award, the contracting officer shall not physically include Part IV in the resulting contract, but shall retain it in the contract file. Award by acceptance of a bid on the award portion of Standard Form 33, Solicitation Offer and Award (SF 33), Standard Form 26, Award/Contract (SF 26), or Standard Form 1447, Solicitation/Contract (SF 1447), incorporates Section K, Representations, certifications, and other statements of bidders, in the resultant contract even though not physically attached.

TABLE 14-1

Uniform Contract Format

Section	Title
	Part I—The Schedule
A	Solicitation/contract form
B	Supplies or services and prices
C	Description/specifications
D	Packaging and marking
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
	Part II—Contract Clauses
I	Contract clauses
	Part III—List of Documents, Exhibits, and Other Attachments
J	List of documents, exhibits, and other attachments
	Part IV—Representations and instructions
K	Representations, certifications, and other statements of bidders
L	Instructions, conditions, and notices to bidders
M	Evaluation factors for award

[48 FR 42171, Sept. 19, 1983, as amended at 54 FR 48982, Nov. 28, 1989]

14.201-2 Part I—The Schedule.

The contracting officer shall prepare the Schedule as follows:

(a) *Section A, Solicitation/contract form.* (1) Prepare the invitation for bids on SF 33, or the SF 1447, unless otherwise permitted by this regulation. The SF 33 is the first page of the solicitation and includes Section A of the uniform contract format. When the SF 1447 is used as the solicitation document, the information in subdivisions (a)(2)(i) and (a)(2)(iv) of this subsection shall be inserted in block 9 of the SF 1447.

(2) When the SF 33 or SF 1447 is not used, include the following on the first page of the invitation for bids:

(i) Name, address, and location of issuing activity, including room and building where bids must be submitted.

(ii) Invitation for bids number.

(iii) Date of issuance.

(iv) Time specified for receipt of bids.

(v) Number of pages.

(vi) Requisition or other purchase authority.

(vii) Requirement for bidder to provide its name and complete address, including street, city, county, State, and ZIP code.

(viii) A statement that bidders should include in the bid the address to which payment should be mailed, if that address is different from that of the bidder.

(b) *Section B, Supplies or services and prices.* Include a brief description of the supplies or services; e.g., item number, national stock number/part number if applicable, title or name identifying the supplies or services, and quantities (see part 10, Specifications, Standards, and Other Product Descriptions). The SF 33 and SF 1447 may be supplemented as necessary by the Optional Form 336 (OF 336), Continuation Sheet (53.302-336).

(c) *Section C, Description/specifications.* Include any description or specifications needed in addition to Section B to permit full and open competition (see part 10, Specifications, Standards, and Other Product Descriptions).

(d) *Section D, Packaging and marking.* Provide packaging, packing, preservation, and marking requirements, if any (see 10.004(e)).

(e) *Section E, Inspection and acceptance.* Include inspection, acceptance, quality assurance, and reliability requirements (see part 46, Quality Assurance).

(f) *Section F, Deliveries or performance.* Specify the requirements for time, place, and method of delivery or performance (see part 12, Contract Delivery or Performance).

(g) *Section G, Contract administration data.* Include any required accounting and appropriation data and any required contract administration information or instructions other than those on the solicitation form.

(h) *Section H, Special contract requirements.* Include a clear statement of any special contract requirements that are not included in Section I, Contract clauses, or in other sections of the uniform contract format.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 27119, July 29, 1986; 54 FR 48982, Nov. 28, 1989; 55 FR 38516, Sept. 18, 1990]

14.201-3 Part II—Contract clauses.

Section I, Contract clauses. The contracting officer shall include in this section the clauses required by law or by this regulation and any additional clauses expected to apply to any resulting contract, if these clauses are not required to be included in any other section of the uniform contract format.

[48 FR 42171, Sept. 19, 1983, as amended at 53 FR 17857, May 18, 1988]

14.201-4 Part III—Documents, exhibits, and other attachments.

Section J, List of documents, exhibits, and other attachments. The contracting officer shall list the title, date, and number of pages for each attached document.

14.201-5 Part IV—Representations and instructions.

The contracting officer shall prepare the representations and instructions as follows:

(a) *Section K, Representations, certifications, and other statements of bidders.* Include in this section those solicitation provisions that require representations, certifications, or the submission of other information by bidders.

(b) *Section L, Instructions, conditions, and notices to bidders.* Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide bidders. Invitations shall include the time and place for bid openings, and shall advise bidders that bids will be evaluated without discussions (see 52.214-10 and for construction contracts, 52.214-19).

(c) *Section M, Evaluation factors for award.* Identify the price-related factors other than the bid price that will be considered in evaluating bids and awarding the contract. (See 14.201-8.)

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 17857, May 18, 1988]

14.201-6 Solicitation provisions.

(a) The provisions prescribed in this subsection are limited to subjects that are general in nature, do not come under other subject areas of the FAR, and pertain to the preparation and submission of bids.

(b) The contracting officer shall insert in all invitations for bids the provisions at—

(1) 52.214-1, Solicitation Definitions—Sealed Bidding;

(2) 52.214-2, Type of Business Organization—Sealed Bidding;

(3) 52.214-3, Amendments to Invitations for Bids; and

(4) 52.214-4, False Statements in Bids.

(c) The contracting officer shall insert the following provisions in invitations for bids:

(1) 52.214-5, Submission of Bids.

(2) 52.214-6, Explanation to Prospective Bidders.

(3) 52.214-7, Late Submissions, Modifications, and Withdrawals of Bids, for solicitations issued in the United States and Canada for submission of bids to a contracting office in the United States or Canada.

(4) 52.214-32, Late Submissions, Modifications, and Withdrawals of Bids (Overseas), for solicitations under which bids are to be submitted to a contracting office outside the United States or Canada.

(d) [Reserved]

(e) The contracting officer shall insert in invitations for bids, except those for construction, the provisions at—

(1) 52.214-9, Failure to Submit Bid; and

(2) 52.214-10, Contract Award—Sealed Bidding.

(f) The contracting officer shall insert in invitations for bids to which the uniform contract format applies, the provision at 52.214-12, Preparation of Bids.

(g)(1) The contracting officer shall insert the provision at 52.214-13, Telegraphic Bids, in invitations for bids if the contracting officer decides to authorize telegraphic bids.

(2) The contracting officer shall insert the basic provision with its Alternate I in invitations for bids that are for perishable subsistence, and when the contracting officer considers that offerors will be unwilling to provide acceptance periods long enough to allow written confirmation.

(h) The contracting officer shall insert the provision at 52.214-14, Place of Performance—Sealed Bidding, in invitations for bids except those in which the place of performance is specified by the Government.

(i) The contracting officer shall insert the provision at 52.214-15, Period for Acceptance of Bids, in invitations for bids (IFB's) that are not issued on SF 33 or SF 1447 except IFB's (1) for construction work or (2) in which the Government specifies a minimum acceptance period.

(j) The contracting officer shall insert the provision at 52.214-16, Minimum Bid Acceptance Period, in invitations for bids, except for construction, if the contracting officer determines that a minimum acceptance period must be specified.

(k) The contracting officer shall insert the provision at 52.214-17, Affiliated Bidders, in invitations for bids if the contracting officer determines that disclosure of affiliated bidders is necessary to prevent practices prejudicial to full and open competition, such as improper multiple bidding.

(l) The contracting officer shall insert the provision at 52.214-18, Preparation of Bids—Construction, in invitations for bids for construction work.

(m) The contracting officer shall insert the provision at 52.214-19, Contract Award—Sealed Bidding—Construction, in all invitations for bids for construction work.

(n) Use of the provision at 52.215-4, Notice of Possible Standardization, may be appropriate in invitations for bids involving supplies that are likely to become standardized. See 15.407(b) regarding use of this provision in sealed bidding.

(o) (1) The contracting officer shall insert the provision at 52.214-20, Bid Samples, in invitations for bids if bid samples are required.

(2) If it appears that the conditions in 14.202-4(f)(1) will apply and the contracting officer anticipates granting waivers thereunder and—

(i) If the nature of the required product *does not* necessitate limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, the contracting officer shall use the provision with its Alternate I; or

(ii) If the nature of the required product necessitates limiting the grant of a waiver to a product produced at the same plant in which the product previously acquired or tested was produced, the contracting officer shall use the provision with its Alternate II.

(3) See 14.202-4(f)(2) regarding waiving the requirement for all bidders.

(p) (1) The contracting officer shall insert the provision at 52.214-21, Descriptive Literature, in invitations for bids if (i) descriptive literature is required to evaluate the technical acceptability of an offered product and (ii) the required information will not be readily available unless it is submitted by bidders.

(2) Use the basic clause with its Alternate I if the possibility exists that the contracting officer may waive the requirement for furnishing descriptive literature for a bidder offering a previously supplied product that meets specification requirements of the current solicitation.

(3) See 14.202-5(e)(2) regarding waiving the requirement for all bidders.

(q) The contracting officer shall insert the provision at 52.214-22, Evaluation of Bids for Multiple Awards, in invitations for bids if the contracting officer determines that multiple awards might be made if doing so is economically advantageous to the Government.

(r) The contracting officer shall insert the provision at 52.214-23, Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding, in solicitations for technical proposals in step one of two-step sealed bidding issued in the United States and Canada for submission of technical proposals to a contracting office in the United States or Canada.

(s) The contracting officer shall insert the provision at 52.214-24, Multiple Technical Proposals, in solicitations for technical proposals in step one of two-step sealed bidding if the contracting officer permits the submission of multiple technical proposals.

(t) The contracting officer shall insert the provision at 52.214-25, Step Two of Two-Step Sealed Bidding, in invitations for bids issued under step two of two-step sealed bidding.

(u) The contracting officer shall insert the provision at 52.214-30, Annual Representations and Certifications-Sealed Bidding, in invitations for bids if annual representations and certifications are used (see 14.213).

(v) The contracting officer shall insert the provision at 52.214-33, Late Submissions, Modifications, and Withdrawals of Technical Proposals under Two-Step Sealed Bidding (Overseas), in solicitations for technical proposals in step one of two-step sealed bidding under which technical proposals are to be submitted to a contracting office outside the United States or Canada.

(w) The contracting officer shall insert the provision at 52.214-31, Facsimile Bids, in solicitations if facsimile bids are authorized (see 14.202-7).

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1737, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2649, Jan. 17, 1986; 53 FR 43390, Oct. 26, 1988; 54 FR 5054, Jan. 31, 1989; 54 FR 48982, Nov. 28, 1989; 55 FR 25527, June 21, 1990]

14.201-7 Contract clauses.

(a) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-26, Audit—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed $100,000.

(b)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-27, Price Reduction for Defective Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed $100,000.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and the reasons for granting it shall be in writing.

(c)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-28, Subcontractor Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed $100,000.

(2) In exceptional cases, the head of the contracting activity may waive the requirement for inclusion of the clause in a contract with a foreign government or agency of that government. The authorizations for the waiver and

the reasons for granting it shall be in writing.

(d) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214-29, Order of Precedence—Sealed Bidding, in solicitations and contracts to which the uniform contract format applies.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2649, Jan. 17, 1986]

14.201-8 Price-related factors.

The factors set forth in paragraphs (a) through (e) below may be applicable in evaluation of bids for award and shall be included in the solicitation when applicable. (See 14.201-5(c).)

(a) Foreseeable costs or delays to the Government resulting from such factors as differences in inspection, locations of supplies, and transportation. If bids are on an f.o.b. origin basis (see 47.303 and 47.305), transportation costs to the designated points shall be considered in determining the lowest cost to the Government.

(b) Changes made, or requested by the bidder, in any of the provisions of the invitation for bids, if the change does not constitute a ground for rejection under 14.404.

(c) Advantages or disadvantages to the Government that might result from making more than one award (see 14.201-6(q)). The contracting officer shall assume, for the purpose of making multiple awards, that $500 would be the administrative cost to the Government for issuing and administering each contract awarded under a solicitation. Individual awards shall be for the items or combinations of items that result in the lowest aggregate cost to the Government, including the assumed administrative costs.

(d) Federal, State, and local taxes (see part 29).

(e) Origin of supplies, and, if foreign, the application of the Buy American Act or any other prohibition on foreign purchases (see part 25).

[50 FR 1738, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985; 55 FR 25527, June 21, 1990]

14.201-9 Simplified contract format.

Policy. For firm-fixed-price or fixed-price with economic price adjustment acquisitions of supplies and services, the contracting officer may use the simplified contract format in lieu of the uniform contract format (see 14.201-1). The contracting officer has flexibility in preparation and organization of the simplified contract format. However, the following format should be used to the maximum practical extent:

(a) *Solicitation/contract form.* Standard Form (SF) 1447, Solicitation/Contract, shall be used as the first page of the solicitation.

(b) *Contract schedule.* Include the following for each contract line item:

(1) Contract line item number.

(2) Description of supplies or services, or data sufficient to identify the requirement.

(3) Quantity and unit of issue.

(4) Unit price and amount.

(5) Packaging and marking requirements.

(6) Inspection and acceptance, quality assurance, and reliability requirements.

(7) Place of delivery, performance and delivery dates, period of performance, and F.o.b. point.

(8) Other item-peculiar information as necessary (e.g., individual fund citations).

(c) *Clauses.* Include the clauses required by this regulation. Additional clauses shall be incorporated only when considered absolutely necessary to the particular acquisition.

(d) *List of documents and attachments.* Include if necessary.

(e) *Representations and instructions*—(1) *Representations and certifications.* Insert those solicitation provisions that require representations, certifications, or the submission of other information by offerors.

(2) *Instructions, conditions, and notices.* Include the solicitation provisions required by 14.201-6. Include any other information/instructions necessary to guide offerors.

(3) *Evaluation factors for award.* Insert all necessary evaluation factors for award.

(4) Upon award, the contracting officer need not physically include the provisions in subparagraphs (e)(1), (2), and (3) of this subsection in the resulting contract, but shall retain them in the contract file. Award by acceptance of a bid on the award portion of SF 1447 incorporates the representations, certifications, and other statements of bidders in the resultant contract even though not physically attached.

[54 FR 48983, Nov. 28, 1989]

14.202 General rules for solicitation of bids.

14.202-1 Bidding time.

(a) *Policy.* A reasonable time for prospective bidders to prepare and submit bids shall be allowed in all invitations, consistent with the needs of the Government. (For construction contracts, see 36.303(a).) A bidding time (i.e., the time between issuance of the solicitation and opening of bids) of at least 30 calendar days shall be provided when synopsis is required by subpart 5.2.

(b) *Factors to be considered.* Because of unduly limited bidding time, some potential sources may be precluded from bidding and others may be forced to include amounts for contingencies that, with additional time, could be eliminated. To avoid unduly restricting competition or paying higher-than-necessary prices, consideration shall be given to such factors as the following in establishing a reasonable bidding time: (1) degree of urgency; (2) complexity of requirement; (3) anticipated extent of subcontracting; (4) whether use was made of presolicitation notices; (5) geographic distribution of bidders; and (6) normal mailing time for both invitations and bids.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.202-2 Telegraphic bids.

(a) Telegraphic bids and mailgrams shall be authorized only when—

(1) The date for the opening of bids will not allow bidders sufficient time to submit bids on the prescribed forms; or

(2) Prices are subject to frequent changes.

(b) If telegraphic bids are to be authorized, see 14.201-6(g). Unauthorized telegraphic bids shall not be considered (see 14.301(b)).

14.202-3 Bid envelopes.

(a) Postage or envelopes bearing *Postage and Fees Paid* indicia shall not be distributed with the invitation for bids or otherwise supplied to prospective bidders.

(b) To provide for ready identification and proper handling of bids, Optional Form 17, Sealed Bid Label, may be furnished with each bid set. The form may be obtained from the General Services Administration (see 53.107).

14.202-4 Bid samples.

(a) *Definition. Bid sample* means a sample to be furnished by a bidder to show the characteristics of the product offered in a bid.

(b) *Policy.* (1) Bidders shall not be required to furnish bid samples unless there are characteristics of the product that cannot be described adequately in the specification or purchase description.

(2) Bid samples will be used only to determine the responsiveness of the bid and will not be used to determine a bidder's ability to produce the required items.

(3) Bid samples may be examined for any required characteristic, whether or not such characteristic is adequately described in the specification, if listed in accordance with subdivision (e)(1)(ii) below.

(4) Bids will be rejected as nonresponsive if the sample fails to conform to each of the characteristics listed in the invitation.

(c) *When to use.* The use of bid samples would be appropriate for products that must be suitable from the standpoint of balance, facility of use, general "feel," color, pattern, or other characteristics that cannot be described adequately in the specification. However, when more than a minor portion of the characteristics of the product cannot be adequately described in the specification, products should be acquired by two-step sealed bidding or negotiation, as appropriate.

(d) *Justification.* The reasons why acceptable products cannot be acquired without the submission of bid samples shall be set forth in the contract file, except where the submission is required by the formal specifications (Federal, Military, or other) applicable to the acquisition.

(e) *Requirements for samples in invitations for bids.* (1) Invitations for bids shall—

(i) State the number and, if appropriate, the size of the samples to be submitted and otherwise fully describe the samples required; and

(ii) List all the characteristics for which the samples will be examined.

(2) If bid samples are required, see 14.201-6(o).

(f) *Waiver of requirement for bid samples.* (1) The requirement for furnishing bid samples may be waived when a bidder offers a product previously or currently being contracted for or tested by the Government and found to comply with specification requirements conforming in every material respect with those in the current invitation for bids. When the requirement may be waived, see 14.201-6(o)(2).

(2) Where samples required by a Federal, Military, or other formal specification are not considered necessary and a waiver of the sample requirements of the specification has been authorized, a statement shall be included in the invitation that notwithstanding the requirements of the specification, samples will not be required.

(g) *Unsolicited samples.* Bid samples furnished with a bid that are not required by the invitation generally will not be considered as qualifying the bid and will be disregarded. However, the bid sample will not be disregarded if it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid. (See 14.404-2(d) if the qualification does not conform to the solicitation.)

(h) *Handling of bid samples.* (1) Samples that are not destroyed in testing shall be returned to bidders at their request and expense, unless otherwise specified in the invitation.

(2) Disposition instructions shall be requested from bidders and samples disposed of accordingly.

(3) Samples ordinarily will be returned collect to the address from which received if disposition instructions are not received within 30 days. Small items may be returned by mail, postage prepaid.

(4) Samples that are to be retained for inspection purposes in connection with deliveries shall be transmitted to the inspecting activity concerned, with instructions to retain the sample until completion of the contract or until disposition instructions are furnished.

(5) Where samples are consumed or their usefulness is impaired by tests, they will be disposed of as scrap unless the bidder requests their return.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.202-5 Descriptive literature.

(a) *Definition. Descriptive literature* means information, such as cuts, illustrations, drawings, and brochures, which shows the characteristics or construction of a product or explains its operation. It is furnished by bidders as a part of their bids to describe the products offered. The term includes only information required to determine acceptability of the product. It excludes other information such as that furnished in connection with the qualifications of a bidder or for use in operating or maintaining equipment.

(b) *Policy.* Bidders shall not be required to furnish descriptive literature unless the contracting office needs it to determine before award whether the products offered meet the specification and to establish exactly what the bidder proposes to furnish.

(c) *Justification.* The reasons why product acceptability cannot be determined without the submission of descriptive literature shall be set forth in the contract file, except when such submission is required by formal specifications (Federal, Military, or other) applicable to the acquisition.

(d) *Requirements of invitation for bids.* (1) The invitation shall clearly state (i) what descriptive literature is to be furnished, (ii) the purpose for which it is required, (iii) the extent to which it will be considered in the evaluation of bids, and (iv) the rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature furnished does not comply with the requirements of the invitation.

(2) If bidders are to furnish descriptive literature, see 14.201-6(p).

(e) *Waiver of requirements for descriptive literature.* (1) The requirement for furnishing descriptive literature may be waived if—

(i) The bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the contracting activity; and

(ii) The contracting officer determines that the product offered by the bidder complies with the specification requirements of the current invitation for bids. When the requirement may be waived, see 14.201-6(p)(2).

(2) When descriptive literature is not considered necessary and a waiver of literature requirements of a Federal, Military, or other formal specification has been authorized, a statement shall be included in the invitation that, notwithstanding the requirements of the specifications, descriptive literature will not be required.

(3) If the solicitation provides for a waiver, a bidder may submit a bid on the basis of either the descriptive literature to be furnished or a previously furnished product. If the bid is submitted on one basis, the bidder is precluded from having it considered on the other basis after bids are opened.

(f) *Unsolicited descriptive literature.* If descriptive literature is furnished when not required by the invitation for bids, the procedures set forth in 14.202-4(g) shall be followed.

14.202-6 Final review of invitations for bids.

Each invitation for bids shall be thoroughly reviewed before issuance to detect and correct discrepancies or ambiguities that could limit competition or result in the receipt of nonresponsive bids. Contracting officers are responsible for the reviews.

14.202-7 Facsimile bids.

(a) Unless prohibited or otherwise restricted by agency procedures, contracting officers may authorize facsimile bids (see 14.201-6(w)). In determining whether or not to authorize facsimile bids, the contracting officer shall consider factors such as—

(1) Anticipated bid size and volume;

(2) Urgency of the requirement;

(3) Frequency of price changes;

(4) Availability, reliability, speed, and capacity of the receiving facsimile equipment; and

(5) Adequacy of administrative procedures and controls for receiving, identifying, recording, and safeguarding facsimile bids, and ensuring their timely delivery to the bids opening location.

(b) If facsimile bids are authorized, contracting officers may, after the date set for bid opening, request the apparently successful offeror to provide the complete original signed bid.

[54 FR 48983, Nov. 28, 1989]

14.203 Methods of soliciting bids.

14.203-1 Mailing or delivery to prospective bidders.

Invitations for bids or presolicitation notices shall be mailed or delivered to prospective bidders as specified in 14.205, and shall be provided to others in accordance with 5.102. When a contracting office is located in the United States, any solicitation sent to a prospective bidder located at a foreign address shall be sent by international air mail if security classification permits.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.203-2 Dissemination of information concerning invitations for bids.

(a) Procedures concerning display of invitations for bids in a public place, information releases to newspapers and trade journals, paid advertisements, and synopsizing in the Commerce Business Daily are set forth in 5.101 and 5.2.

(b) For procedures that apply to publishing notices in the Commerce Business Daily to determine whether commercial sources are available, as prescribed by OMB Circular A-76, see 5.205(d) and 7.303(b).

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 48983, Nov. 28, 1989]

14.203-3 Master solicitation.

(a) *Definition. Master solicitation,* as used in this subsection, means a document containing special clauses and provisions that have been identified as essential for the acquisition of a specific type of supply or service that is acquired repetitvely.

(b) *Use.* The master solicitation is provided to potential sources who are requested to retain it for continued and repetitive use. Individual solicitations shall reference the date of the current master solicitation and any changes thereto. Copies of the master solicitation shall be made available on request. Cognizant contract administration activities shall be provided a current copy of the master solicitation.

[54 FR 29280, July 11, 1989]

14.204 Records of invitations for bids and records of bids.

(a) Each contracting office shall retain a record of each invitation that it issues and each abstract or record of bids. Contracting officers shall review and utilize the information available in connection with subsequent acquisitions of the same or similar items.

(b) The file for each invitation shall show the distribution that was made and the date the invitation was issued. The names and addresses of prospective bidders who requested the invitation and were not included on the original solicitation list shall be added to the list and made a part of the record.

14.205 Solicitation mailing lists.

14.205-1 Establishment of lists.

(a) Solicitation mailing lists shall be established by contracting activities to assure access to adequate sources of supplies and services. This rule need not be followed, however, when the requirements of the contracting office can be obtained within the local trade area through use of the small purchase procedures (see part 13), or are nonrecurring. Lists may be established as (1) a central list for use by all contracting offices within the contracting activity or (2) local lists maintained by each contracting office.

(b) All eligible and qualified concerns that have submitted solicitation mailing list applications, or that the contracting office considers capable of filling the requirements of a particular acquisition, shall be placed on the appropriate solicitation mailing list. See also 5.403(b). Planned producers under the Industrial Preparedness Planning Program shall be included on lists for their planned items. Prospective bidders shall be notified that they have been added to solicitation mailing lists in accordance with agency procedures. The issuance of a solicitation within a reasonable time may be considered appropriate notification. Applicants shall be notified if they do not meet the criteria for placement on the list.

(c) The names of prospective bidders who are furnished invitations in response to their requests shall be added to the list of those initially mailed copies of a particular solicitation, so that they will be furnished copies of any solicitation amendments, etc. However, when it is known that the request was made by a person or an organization that is known not to be a prospective bidder, no entry shall be made on the list.

(d) (1) Standard Form 129, Solicitation Mailing List Application, shall be used for obtaining information needed to establish and maintain lists. Supplemental information, where required, may be obtained as specified in agency implementing regulations.

(2) The application shall be submitted and signed by the supplier (the manufacturer or regular dealer), as distinguished from an agent of the supplier. However, suppliers are not precluded from designating, in the Standard Form 129, their agents to receive solicitations.

(3) In order to enable suppliers to indicate readily the items on which they will generally desire to submit bids, there shall be attached to Standard Form 129 forwarded to suppliers for completion, a list of items, or item groups, or an index to such listing of

the items, acquired by the contracting activity maintaining the list, which are considered applicable to the supplier's type of business.

(e) Business concerns listed on solicitation mailing lists shall be identified by size in accordance with 19.102. Size status should be established before listing a business concern on a list. Disadvantaged business concern designations shall be shown on the list whenever noted on the Standard Form 129 submitted by a particular concern.

14.205-2 Removal of names from solicitation mailing lists.

(a) The name of each concern failing to either (1) submit a bid, (2) respond to a presolicitation notice (see 14.205-4(c)), or (3) otherwise respond to an invitation for bids may be removed from the solicitation mailing list without notice to the concern. However, the removal shall be limited to the items involved in the invitation or notice. When a concern fails to respond to two consecutive invitations or presolicitation notices, its name shall be removed from the list to the extent indicated in this paragraph. However, in individual cases, concerns failing to respond may be retained on a list if retention is in the best interest of the Government. Both actual bids and written requests for retention on the lists shall be deemed to be *responses* to invitations for bids or presolicitation notices. If this procedure results in limited solicitation mailing lists, the contracting officer should request an explanation from the concerns that did not respond.

(b) Concerns that have been debarred from Government contracts or otherwise determined to be ineligible to receive an award shall be removed from solicitation mailing lists to the extent required by the debarment, suspension, or other determination of ineligibility.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.205-3 Reinstatement on solicitation mailing lists.

Concerns that have been removed from solicitation mailing lists may be reinstated (a) upon written request, (b) by filing a new application on Standard Form 129, or (c) by the submission of a bid. Debarred or suspended firms shall not be reinstated during the period of a debarment or suspension.

14.205-4 Excessively long solicitation mailing lists.

(a) *General.* Solicitation mailing lists should be used to promote competition commensurate with the dollar value of the proposed contract. As much of the solicitation mailing list shall be used as is compatible with efficiency and economy in securing competition. Where the number of bidders on a mailing list is excessive in relation to a specific acquisition, the list may be reduced consistent with this paragraph and paragraphs (b) and (c) below. Nonetheless, solicitations should be furnished to others upon request, in accordance with 5.102. Also, bids shall not be disregarded merely because the bidder was not formally invited to bid.

(b) *Rotation of lists.* By using different portions of a list for separate acquisitions, solicitation mailing lists may be rotated. However, considerable judgment must be exercised in determining whether the size of the acquisiton justifies the rotation. The use of a presolicitation notice (see paragraph (c) below), time permitting, also should be considered. In rotating a list, the interests of small businesses (see 19.202-4) and labor surplus areas (see 20.104(e) and (f)) shall be considered. Whenever a list is rotated, bids shall be solicited from (1) the previously successful bidder, (2) prospective suppliers who have been added to the solicitation mailing list since the last solicitation, and (3) concerns on the segment of the list selected for use in a particular acquisition. However, the rule does not apply when such action would be precluded by use of a total set-aside (see parts 19 and 20).

(c) *Presolicitation notices.* In lieu of initially forwarding complete bid sets, the contracting officer may send presolicitation notices to concerns on the solicitation mailing list. The notice shall (1) specify the final date for receipt of requests for a complete bid set, (2) briefly describe the requirement and furnish other essential information to enable concerns to determine whether they have an interest in the invitation, and (3) notify concerns that, if no bid is to be submitted, they should advise the issuing office in writing if future invitations are desired for the type of supplies or services involved. Drawings, plans, and specifications normally will not be furnished with the presolicitation notice. The return date of the notice must be sufficiently in advance of the mailing date of the invitation for bids to permit an accurate estimate of the number of bid sets required. Bid sets shall be sent to concerns that request them in response to the notice. This procedure is particularly suitable when invitations for bids and solicitation mailing lists are lengthy.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.205-5 Release of solicitation mailing lists.

(a) Contracting activities shall make the central and local solicitation mailing lists established under this part available to the public in response to written requests made in accordance with agency regulations implementing subpart 24.2.

(b) When invitations for bids for construction contracts have been issued, trade journals, prospective subcontractors, material suppliers, bidders, and others having a bona fide interest will be supplied upon request with a list of all prospective bidders furnished copies of the plans and specifications. Contracting offices may require written requests and establish appropriate procedures.

[48 FR 42171, Sept. 19, 1983, as amended at 52 FR 38189, Oct. 14, 1987; 53 FR 661, Jan. 11, 1988; 53 FR 43390, Oct. 26, 1988]

14.206 Small business and labor surplus area set-asides.

See parts 19 and 20.

14.207 Pre-bid conference.

A pre-bid conference may be used, generally in a complex acquisition, as a means of briefing prospective bidders and explaining complicated specifications and requirements to them as early as possible after the invitation has been issued and before the bids are opened. It shall never be used as a substitute for amending a defective or ambiguous invitation. The conference shall be conducted in accordance with the procedure prescribed in 15.409.

14.208 Amendment of invitation for bids.

(a) If it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous invitation, such changes shall be accomplished by amendment of the invitation for bids using Standard Form 30, Amendment of Solicitation/Modification of Contract. The fact that a change was mentioned at a pre-bid conference does not relieve the necessity for issuing an amendment. Amendments shall be sent, before the time for bid opening, to everyone to whom invitations have been furnished and shall be displayed in the bid room.

(b) Before amending an invitation for bids, the period of time remaining until bid opening and the need to extend this period shall be considered. When only a short time remains before the time set for bid opening, consideration should be given to notifying bidders of an extension of time by telegrams or telephone. Such extension must be confirmed in the amendment.

(c) Any information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders as an amendment to the invitation (1) if such information is necessary for bidders to submit bids or (2) if the lack of such information would be prejudicial to uninformed bidders. The information shall be furnished even though a pre-bid conference is held. No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

14.209 Cancellation of invitations before opening.

(a) The cancellation of an invitation for bids usually involves a loss of time, effort, and money spent by the Government and bidders. Invitations should not be cancelled unless cancellation is clearly in the public interest; e.g., (1) where there is no longer a requirement for the supplies or services or (2) where amendments to the invitation would be of such magnitude that a new invitation is desirable.

(b) When an invitation is cancelled, bids that have been received shall be returned unopened to the bidders and a notice of cancellation shall be sent to all prospective bidders to whom invitations were issued.

(c) The notice of cancellation shall (1) identify the invitation for bids by number and short title or subject matter, (2) briefly explain the reason the invitation is being cancelled, and (3) where appropriate, assure prospective bidders that they will be given an opportunity to bid on any resolicitation of bids or any future requirements for the type of supplies or services involved. Cancellations shall be recorded in accordance with 14.403(d).

14.210 Qualified products.

See subpart 9.2.

14.211 Release of acquisition information.

(a) *Before solicitation.* Information concerning proposed acquisition shall not be released outside the Government before solicitation except for presolicitation notices in accordance with 14.205-4(c) or 36.302, or long-range acquisition estimates in accordance with 5.404, or synopses in accordance with 5.201. Within the Government, such information shall be restricted to those having a legitimate interest. Releases of information shall be made (1) to all prospective bidders, and (2) as nearly as possible at the same time, so that one prospective bidder shall not be given unfair advantage over another. See 3.104 regarding requirements for proprietary and source selection information including access to and disclosure thereof.

(b) *After solicitation.* Discussions with prospective bidders regarding a solicitation shall be conducted and technical or other information shall be transmitted only by the contracting officer or superiors having contractual authority or by others specifically authorized. Such personnel shall not furnish any information to a prospective bidder that alone or together with other information may afford an advantage over others. However, general information that would not be prejudicial to other prospective bidders may be furnished upon request; e.g., explanation of a particular contract clause or a particular condition of the schedule in the invitation for bids, and more specific information or clarifications may be furnished by amending the solicitation (see 14.208).

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 36795, Sept. 6, 1990]

14.212 Economic purchase quantities (supplies).

Contracting officers shall comply with the economic purchase quantity planning requirements for supplies in subpart 7.2. See 7.203 for instructions regarding use of the provision at 52.207-4, Economic Purchase Quantity—Supplies, and 7.204 for guidance on handling responses to that provision.

[50 FR 35479, Aug. 30, 1985]

14.213 Annual submission of representations and certifications.

(a) Submission of offeror representations and certifications on an annual basis, as an alternative to submission in each solicitation, may be authorized by agencies subject to the requirements of this section. The decision to use annual representations and certifications shall be made in accordance with agency procedures.

(b) In accordance with agency procedures, each contracting office utilizing annual representations and certifications shall establish procedures and assign responsibilities for centrally requesting, receiving, storing, verifying and updating offeror's annual submissions. Generally, the representations and certifications shall be effective for a period of 1 year from date of signature.

(c) The contracting officer shall not include in individual solicitations the full text of provisions that are contained in the annual representations and certifications.

(d) Offerors shall make changes that affect only one solicitation by completing the appropriate section of the provision at 52.214-30, Annual Representations and Certifications—Sealed Bidding.

[54 FR 48983, Nov. 28, 1989]

14.214 Commercial pricing certificates.

Sealed bid acquisitions of parts or components as defined in 15.813-2 are subject to the requirements of 15.813, Commercial pricing certificates, including the solicitation provision and contract clause prescription in 15.813-7, when conditions specified therein are applicable.

[55 FR 25527, June 21, 1990]

Subpart 14.3—Submission of Bids

14.301 Responsiveness of bids.

(a) To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.

(b) Telegraphic bids shall not be considered unless permitted by the invitation. The term *telegraphic bids* means bids submitted by telegram or by mailgram.

(c) Facsimile bids shall not be considered unless permitted by the solicitation (see 14.202-7).

(d) Bids should be filled out, executed, and submitted in accordance with the instructions in the invitation. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if (1) the bidder accepts all the terms and conditions of the invitation and (2) award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 48983, Nov. 28, 1989]

14.302 Bid submission.

(a) Bids shall be submitted so that they will be received in the office designated in the invitation for bids (referred to in paragraphs (b) and (c) below as the *designated office*) not later than the exact time set for opening of bids.

(b) Except as specified in paragraph (c) below, if telegraphic bids are authorized, a telegraphic bid that is communicated by means of a telephone call to the designated office shall be considered if—

(1) Agency regulations authorize such consideration;

(2) The telephone call is made by the telegraph office that received the telegraphic bid;

(3) The telephone call is received by the designated office not later than the time set for the bid opening;

(4) The telegraph office that received the telegraphic bid sends the designated office the telegram that formed the basis for the telephone call;

(5) The telegram indicates on its face that it was received in the telegraph office before the telephone call was received by the designated office; and

(6) The bid in the telegram is identical in all essential respects to the bid received in the telephone call from the telegraph office.

(c) If the conditions in paragraph (b) above apply and the bid received by telephone is the apparent low bid, award may not be made until the telegram is received by the designated office; however, if the telegram is not received by the designated office within 5 days after the bid opening date, the bid shall be rejected.

14.303 Modification or withdrawal of bids.

(a) Bids may be modified or withdrawn by written or telegraphic notice received in the office designated in the invitation for bids not later than the exact time set for opening of bids. Unless proscribed by agency regulations, a telegraphic modification or withdrawal of a bid received in such office by telephone from the receiving telegraph office shall be considered. However, the message shall be confirmed by the telegraph company by sending a copy of the written telegram that formed the basis for the telephone call. If the solicitation authorizes facsimile bids, bids may be modified or withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision prescribed in 14.201-6(w). Modifications received by telephone (including a record of those telephoned by the telegraph company) or facsimile shall be sealed in an envelope by a proper official. The official shall write on the envelope (1) the date and time of receipt and by whom, and (2) the number of the invitation for bids, and shall sign the envelope. No information contained in the envelope shall be disclosed before the time set for bid opening.

(b) A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for opening of bids, the identity of the persons requesting withdrawal is established and that person signs a receipt for the bid.

[48 FR 42171, Sept. 19, 1983, as amended at 54 FR 48983, Nov. 28, 1989]

14.304 Late bids, late modifications of bids, or late withdrawal of bids.

14.304-1 General.

Bids received in the office designated in the invitation for bids after the exact time set for opening are *late bids*.

(a) A late bid, modification of bid, or withdrawal of bid shall not be considered unless received before contract award, and either—

(1) It was sent to a contracting office in the United States or Canada by registered or certified mail not later than 5 calendar days before the bid receipt date specified;

(2) It was sent by mail (or, if authorized by the solicitation, was sent by telegram or via facsimile) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

(3) It was sent to a contracting office in the United States or Canada by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee not later than 5:00 PM at the place of mailing 2 working days prior to the date specified for receipt of bids. The term *working days* excludes weekends and Federal holidays.

(b) The only acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent to a contracting office in the United States or Canada either by registered or certified mail is a U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service. Both postmarks must show a legible date, or the bid, modification, or withdrawal shall be deemed to have been mailed late. (The term *postmark* means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. or Canadian Postal Service. Therefore, bidders should request the postal clerk to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.)

(c) The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

(d) The only acceptable evidence to establish the date of mailing of a late bid, modification, or withdrawal sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee is the date entered by the post office receiving clerk on the *Express Mail Next Day Service-Post Office to Addressee* label and the postmark on the envelope or wrapper and on the original receipt from the U.S. Postal Service. *Postmark* has the same meaning as defined in paragraph (b) of this subsection, excluding postmarks of the Canadian Postal Service. Therefore, bidders should request the postal clerks to place a legible hand cancellation bull's-eye postmark on both the receipt and the envelope or wrapper.

(e) Notwithstanding the above, a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

[48 FR 42171, Sept. 19, 1983, as amended at 54 FR 48984, Nov. 28, 1989]

14.304-2 Notification to late bidders.

When a bid, modification of bid, or withdrawal of bid is received late and it is clear from available information that it cannot be considered, the contracting officer shall promptly notify the bidder accordingly. However, when a late bid, modification of bid, or withdrawal of bid is transmitted to a contracting office in the United States or Canada by registered or certified mail or by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee and is received before award, the bidder shall be promptly notified substantially as follows: Your bid in response to Invitation for Bids Number —— dated —— for —— [*insert subject matter or short title*] was received after the time for opening specified in the Invitation. Accordingly, your bid will not be opened or considered for award unless there is received from you by —— [*insert date*] the original post office receipt for (*insert one of the following, as appropriate*):

(a) Registered or certified mail showing a date of mailing not later than the fifth calendar day before the date specified for opening (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier); or

(b) U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee showing a date of mailing not later than 5:00 PM two Federal working days prior to the date specified for opening.

[54 FR 48984, Nov. 28, 1989]

14.304-3 Disposition of late submissions.

Late bids, modification of bids, or withdrawal of bids that are not considered for award shall be held unopened, unless opened for identification, until after award and then retained with other unsuccessful bids. However, any bid bond or guarantee shall be returned.

14.304-4 Records.

The following shall, if available, be included in the contracting office files with respect to each late bid, modification of bid, or withdrawal of bid:

(a) A statement of the date and hour of mailing, filing, or delivery.

(b) A statement of the date and hour of receipt.

(c) The determination, with supporting facts, as to whether or not the late bid was considered for award.

(d) A statement of the disposition of the late bid.

(e) The envelope, or other covering, if the late bid was considered for award.

Subpart 14.4—Opening of Bids and Award of Contract

14.400 Scope of subpart.

This subpart contains procedures for the receipt, handling, opening, and disposition of bids including mistakes in bids, and subsequent award of contract.

14.401 Receipt and safeguarding of bids.

(a) All bids (including modifications) received before the time set for the opening of bids shall be kept secure. Except as provided in paragraph (b) below, the bids shall remain unopened in a locked bid box or safe. If an invitation for bids is cancelled, bids shall be returned to the bidders. Necessary precautions shall be taken to ensure the security of the bid box or safe. Before bid opening, information concerning the identity and number of bids received shall be made available only to Government employees. Such disclosure shall be only on a *need to know* basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening.

(b) Envelopes marked as bids but not identifying the bidder or the solicitation may be opened solely for the purpose of identification, and then only by an official designated for this purpose. If a sealed bid is opened by mistake (e.g., because it is not marked as being a bid), the envelope shall be signed by the opener, whose position shall also be written thereon, and delivered to the designated official. This official shall immediately write on the envelope (1) an explanation of the opening, (2) the date and time opened, and (3) the invitation for bids number, and shall sign the envelope. The official shall then immediately reseal the envelope.

14.402 Opening of bids.

14.402-1 Unclassified bids.

(a) The bid opening officer shall decide when the time set for opening bids has arrived and shall inform those present of that decision. The officer shall then (1) personally and publicly open all bids received before that time, (2) if practical, read the bids aloud to the persons present, and (3) have the bids recorded. The original of each bid shall be carefully safeguarded, particularly until the abstract of bids required by 14.403 has been made and its accuracy verified.

(b) Performance of the procedure in paragraph (a) above may be delegated to an assistant, but the bid opening officer remains fully responsible for the actions of the assistant.

(c) Examination of bids by interested persons shall be permitted if it does not interfere unduly with the conduct of Government business. Original bids shall not be allowed to pass out of the hands of a Government official unless a duplicate bid is not available for public inspection. The original bid may be examined by the public only under the immediate supervision of a Government official and under conditions that preclude possibility of a substitution, addition, deletion, or alteration in the bid.

14.402-2 Classified bids.

The opening of classified bids shall not be accessible to the general public. Openings may be witnessed and the results recorded by those bidder representatives (a) who have been previously cleared from a security standpoint and (b) who represent bidders who were invited to bid. Bids shall be made available to those persons authorized to attend the opening of bids. No public record shall be made of bids or bid prices received in response to classified invitations for bids.

14.402-3 Postponement of openings.

(a) A bid opening may be postponed even after the time scheduled for bid opening (but otherwise in accordance with 14.208) and—

(1) The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed in the mails for causes beyond their control and without their fault or negligence (e.g., flood, fire, accident, weather conditions, or strikes); or

(2) Emergency or unanticipated events interrupt normal governmental processes so that the conduct of bid openings as scheduled is impractical.

(b) At the time of a determination to postpone a bid opening under subparagraph (a)(1) above, an announcement of the determination shall be publicly posted. If practical before issuance of a formal amendment of the invitation, the determination shall be otherwise communicated to prospective bidders who are likely to attend the scheduled bid opening.

(c) In the case of subparagraph (a)(2) above, the contracting officer may proceed with the bid opening as soon as practical after the time scheduled without prior amendment to the invitation for bids or notice to bidders, whenever the delay incident to the amendment or notice is not in the Government's interest. In such cases, the time of actual bid opening shall be deemed to be the time set for bid opening for the purpose of determining *late bids* under 14.303. A note should be made on the abstract of bids or otherwise added to the file explaining the circumstances of the postponement.

14.403 Recording of bids.

(a) Standard Form 1409, Abstract of Offers, or Optional Form 1419, Abstract of Offers—Construction (or automated equivalent), shall be completed and certified as to its accuracy by the bid opening officer as soon after bid opening as practicable. Where bid items are too numerous to warrant complete recording of all bids, abstract entries for individual bids may be limited to item numbers and bid prices. In preparing these forms, the extra columns and SF 1410, Abstract of Offers—Continuation, and OF 1419A, Abstract of Offers—Construction, Continuation Sheet, may be used to label and record such information as the contracting activity deems necessary.

(b) Abstracts of offers for unclassified acquisitions shall be available for public inspection. Such abstracts shall not contain information regarding failure to meet minimum standards of responsibility, apparent collusion of bidders, or other notations properly exempt from disclosure to the public in accordance with agency regulations implementing subpart 24.2.

(c) The forms identified in paragraph (a) above need not be used by the Defense Fuel Supply Center for acquisitions of coal or petroleum products or by the Defense Personnel Support Center for perishable subsistence items.

(d) If an invitation for bids is cancelled before the time set for bid opening, this fact shall be recorded together with a statement of the number of bids invited and the number of bids received.

[48 FR 42171, Sept. 19, 1983, as amended at 54 FR 29280, July 11, 1989]

14.404 Rejection of bids.

14.404-1 Cancellation of invitations after opening.

(a) (1) Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

(2) Every effort shall be made to anticipate changes in a requirement before the date of opening and to notify all prospective bidders of any resulting modification or cancellation. This will permit bidders to change their bids and prevent unnecessary exposure of bid prices.

(3) As a general rule, after the opening of bids, an invitation should not be cancelled and resolicited due solely to increased requirements for the items being acquired. Award should be made on the initial invitation for bids and the additional quantity should be treated as a new acquisition.

(b) When it is determined before award but after opening that the requirements of 10.008 (relating to the availability and identification of specifications) have not been met, the invitation shall be cancelled.

(c) Invitations may be cancelled and all bids rejected before award but after opening when, consistent with paragraph (a)(1) above, the agency head determines in writing that—

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies or services being contracted for are no longer required;

(4) The invitation did not provide for consideration of all factors of cost to the Government, such as cost of transporting Government-furnished property to bidders' plants;

(5) Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that for which the bids were invited;

(6) All otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price, or no responsive bid has been received from a responsible bidder;

(7) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith (see subpart 3.3 for reports to be made to the Department of Justice);

(8) A cost comparison as prescribed in OMB Circular A-76 and subpart 7.3 shows that performance by the Government is more economical; or

(9) For other reasons, cancellation is clearly in the public's interest.

(d) Should administrative difficulties be encountered after bid opening that may delay award beyond bidders' acceptance periods, the several lowest bidders whose bids have not expired (irrespective of the acceptance period specified in the bid) should be requested, before expiration of their bids, to extend in writing the bid acceptance period (with consent of sureties, if any) in order to avoid the need for resoliciting.

(e) Under some circumstances, completion of the acquisition after cancellation of the invitation for bids may be appropriate.

(1) If the invitation for bids has been cancelled for the reasons specified in paragraphs (c) (6) or (7) above, and the agency head has authorized in the determination in (c) the completion of the acquisition through negotiation, the contracting officer shall proceed in accordance with 15.103.

(2) If the invitation for bids has been cancelled for the reasons specified in paragraphs (c) (1), (2), (4), (5), or (9), or for the reasons in (c) (6) or (7) and completion through negotiation is not authorized under paragraph (e)(1), the contracting officer shall proceed with a new acquisition.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.404-2 Rejection of individual bids.

(a) Any bid that fails to conform to the essential requirements of the invitation for bids shall be rejected.

(b) Any bid that does not conform to the applicable specifications shall be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

(c) Any bid that fails to conform to the delivery schedule or permissible alternates stated in the invitation shall be rejected.

(d) A bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids shall be rejected in which the bidder—

(1) Protects against future changes in conditions, such as increased costs, if total possible costs to the Government cannot be determined;

(2) Fails to state a price and indicates that price shall be *price in effect at time of delivery*;

(3) States a price but qualifies it as being subject to *price in effect at time of delivery*;

(4) When not authorized by the invitation, conditions or qualifies a bid by stipulating that it is to be considered only if, before date of award, the bidder receives (or does not receive) award under a separate solicitation;

(5) Requires that the Government is to determine that the bidder's product meets applicable Government specifications; or

(6) Limits rights of the Government under any contract clause.

(e) A low bidder may be requested to delete objectionable conditions from a bid provided the conditions do not go to the substance, as distinguished from the form, of the bid, or work an injustice on other bidders. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.

(f) Any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Unreasonableness of price includes not only the total price of the bid, but the prices for individual line items as well.

(g) Any bid may be rejected if the prices for any line items or subline items are materially unbalanced (see 15.814).

(h) Bids received from any person or concern that is suspended, debarred, or ineligible (see subpart 9.4) shall be rejected if the period of suspension, debarment, or ineligibility has not expired as of the bid opening date.

(i) Low bids received from concerns determined to be not responsible pursuant to subpart 9.1 shall be rejected (but if a bidder is a small business concern, see 19.6 with respect to certificates of competency).

(j) When a bid guarantee is required and a bidder fails to furnish the guarantee in accordance with the requirements of the invitation for bids, the bid shall be rejected, except as otherwise provided in 28.101-4.

(k) The originals of all rejected bids, and any written findings with respect to such rejections, shall be preserved with the papers relating to the acquisition.

(l) After submitting a bid, if all of a bidder's assets or that part related to the bid are transferred during the period between the bid opening and the award, the transferee may not be able to take over the bid. Accordingly, the contracting officer shall reject the bid unless the transfer is effected by merger, operation of law, or other means not barred by 41 U.S.C. 15 or 31 U.S.C. 3727.

(m) A bid shall be rendered nonresponsive and rejected if the bidder fails to submit the signed certificate (see 3.104-9) required by section 27 of the Office of Federal Procurement Policy Act, as amended (42 U.S.C. 423), with its bid.

[48 FR 42171, Sept. 19, 1983, as amended at 51 FR 2649, Jan. 17, 1986; 55 FR 25527, June 21, 1990; 55 FR 36795, Sept. 6, 1990]

14.404-3 Notice to bidders of rejection of all bids.

When it is determined necessary to reject all bids, the contracting officer shall notify each bidder that all bids have been rejected and shall state the reason for such action.

14.404-4 Restrictions on disclosure of descriptive literature.

When a bid is accompanied by descriptive literature (as defined in 14.202-5(a)), and the bidder imposes a restriction that prevents the public disclosure of such literature, the restriction may render the bid nonresponsive. The restriction renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered or those elements of the bid that relate to quantity, price, and delivery terms. The provisions of this paragraph do not apply to unsolicited descriptive literature submitted by a bidder if such literature does not qualify the bid (see 14.202-5(f)).

14.404-5 All or none qualifications.

Unless the solicitation provides otherwise, a bid may be responsive notwithstanding that the bidder specifies that award will be accepted only on all, or a specified group, of the items. Bidders shall not be permitted to withdraw or modify *all or none* qualifications after bid opening since such qualifications are substantive and affect the rights of other bidders.

14.405 Minor informalities or irregularities in bids.

A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government. Examples of minor informalities or irregularities include failure of a bidder to—

(a) Return the number of copies of signed bids required by the invitation;

(b) Furnish required information concerning the number of its employees;

(c) Sign its bid, but only if—

(1) The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself); or

(2) The firm submitting a bid has formally adopted or authorized, before the date set for opening of bids, the execution of documents by typewritten, printed, or stamped signature and submits evidence of such authorization and the bid carries such a signature;

(d) Acknowledge receipt of an amendment to an invitation for bids, but only if—

(1) The bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation and the bidder submitted a bid on the item; or

(2) The amendment involves only a matter of form or has either no effect or merely a negligible effect on price.

quantity, quality, or delivery of the item bid upon;

(e) Furnish affidavits concerning parent company and affiliates, if required pursuant to the clause at 52.214-17, Affiliated Bidders; and

(f) Execute the certifications with respect to Equal Opportunity and Affirmative Action Programs, as set forth in the clauses at 52.222-22, Previous Contracts and Compliance Reports, and 52.222-25, Affirmative Action Compliance.

[48 FR 42171, Sept. 19, 1983, as amended at 55 FR 25527, June 21, 1990]

14.406 Mistakes in bids.

14.406-1 General.

After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in accordance with this section 14.406. Such actions shall be taken before award.

14.406-2 Apparent clerical mistakes.

(a) Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are—

(1) Obvious misplacement of a decimal point;

(2) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);

(3) Obvious reversal of the price f.o.b. destination and price f.o.b. origin; and

(4) Obvious mistake in designation of unit.

(b) Correction of the bid shall be effected by attaching the verification to the original bid and a copy of the verification to the duplicate bid. Correction shall not be made on the face of the bid; however, it shall be reflected in the award document.

14.406-3 Other mistakes disclosed before award.

In order to minimize delays in contract awards, administrative determinations may be made as described in this 14.406-3 in connection with mistakes in bids alleged after opening of bids and before award. The authority to permit correction of bids is limited to bids that, as submitted, are responsive to the invitation and may not be used to permit correction of bids to make them responsive. This authority is in addition to that in 14.406-2 or that may be otherwise available.

(a) If a bidder requests permission to correct a mistake and clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, the agency head may make a determination permitting the bidder to correct the mistake; *provided*, that if this correction would result in displacing one or more lower bids, such a determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself.

(b) If (1) a bidder requests permission to withdraw a bid rather than correct it, (2) the evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended, and (3) the bid, both as uncorrected and as corrected, is the lowest received, the agency head may make a determination to correct the bid and not permit its withdrawal.

(c) If, under paragraph (a) or (b) of this subsection,

(1) The evidence of a mistake is clear and convincing only as to the mistake but not as to the intended bid, or

(2) The evidence reasonably supports the existence of a mistake but is not clear and convincing, an official above the contracting officer, unless otherwise provided by agency procedures, may make a determination permitting the bidder to withdraw the bid.

(d) If the evidence does not warrant a determination under paragraph (a), (b), or (c) above, the agency head may make a determination that the bid be neither withdrawn nor corrected.

(e) Heads of agencies may delegate their authority to make the determinations under paragraphs (a), (b), (c), and (d) of this 14.406-3 to a central authority, or a limited number of authorities as necessary, in their agencies, without power of redelegation.

(f) Each proposed determination shall have the concurrence of legal counsel within the agency concerned before issuance.

(g) Suspected or alleged mistakes in bids shall be processed as follows. A mere statement by the administrative officials that they are satisfied that an error was made is insufficient.

(1) The contracting officer shall immediately request the bidder to verify the bid. Action taken to verify bids must be sufficient to reasonably assure the contracting officer that the bid as confirmed is without error, or to elicit the allegation of a mistake by the bidder. To assure that the bidder will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised as appropriate—

(i) That its bid is so much lower than the other bids or the Government's estimate as to indicate a possibility of error;

(ii) Of important or unusual characteristics of the specifications;

(iii) Of changes in requirements from previous purchases of a similar item; or

(iv) Of any other information, proper for disclosure, that leads the contracting officer to believe that there is a mistake in bid.

(2) If the bid is verified, the contracting officer shall consider the bid as originally submitted. If the time for acceptance of bids is likely to expire before a decision can be made, the contracting officer shall request all bidders whose bids may become eligible for award to extend the time for acceptance of their bids in accordance with 14.404-1(d). If the bidder whose bid is believed erroneous does not (or cannot) grant an extension of time, the bid shall be considered as originally submitted (but see subparagraph (5) below). If the bidder alleges a mistake, the contracting officer shall advise the bidder to make a written request to withdraw or modify the bid. The request must be supported by statements (sworn statements, if possible) and shall include all pertinent evidence such as the bidder's file copy of the bid, the original worksheets and other data used in preparing the bid, subcontractors' quotations, if any, published price lists, and any other evidence that establishes the existence of the error, the manner in which it occurred, and the bid actually intended.

(3) When the bidder furnishes evidence supporting an alleged mistake, the contracting officer shall refer the case to the appropriate authority (see paragraph (e) above) together with the following data:

(i) A signed copy of the bid involved.

(ii) A copy of the invitation for bids and any specifications or drawings relevant to the alleged mistake.

(iii) An abstract or record of the bids received.

(iv) The written request by the bidder to withdraw or modify the bid, together with the bidder's written statement and supporting evidence.

(v) A written statement by the contracting officer setting forth—

(A) A description of the supplies or services involved;

(B) The expiration date of the bid in question and of the other bids submitted;

(C) Specific information as to how and when the mistake was alleged;

(D) A summary of the evidence submitted by the bidder;

(E) In the event only one bid was received, a quotation of the most recent contract price for the supplies or services involved or, in the absence of a recent comparable contract, the contracting officer's estimate of a fair price for the supplies or services;

(F) Any additional pertinent evidence; and

(G) A recommendation that either the bid be considered for award in the form submitted, or the bidder be authorized to withdraw or modify the bid.

(4) When time is of the essence because of the expiration of bids or otherwise, the contracting officer may refer the case by telegraph or telephone to the appropriate authority. Ordinarily, the contracting officer will

not refer mistake in bid cases by telegraph or telephone to the appropriate authority when the determination set forth in paragraphs (a) or (b) above is applicable, since actual examination is generally necessary to determine whether the evidence presented is clear and convincing.

(5) Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless (i) the amount of the bid is so far out of line with the amounts of other bids received, or with the amount estimated by the agency or determined by the contracting officer to be reasonable, or (ii) there are other indications of error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. Attempts made to obtain the information required and the action taken with respect to the bid shall be fully documented.

(h) Each agency shall maintain records of all determinations made in accordance with this subsection 14.406-3, the facts involved, and the action taken in each case. Copies of all such determinations shall be included in the file.

(i) Nothing contained in this subsection 14.406-3 prevents an agency from submitting doubtful cases to the Comptroller General for advance decision.

[48 FR 42171, Sept. 19, 1983, as amended at 53 FR 17857, May 18, 1988; 54 FR 13023, Mar. 29, 1989]

14.406-4 Mistakes after award.

If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed under the procedures of subpart 33.2 and the following:

(a) When a mistake in a contractor's bid is not discovered until after award, the mistake may be corrected by contract amendment if correcting the mistake would be favorable to the Government without changing the essential requirements of the specifications.

(b) In addition to the cases contemplated in paragraph (a) above or as otherwise authorized by law, agencies are authorized to make a determination—

(1) To rescind a contract;

(2) To reform a contract (i) to delete the items involved in the mistake or (ii) to increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids; or

(3) That no change shall be made in the contract as awarded, if the evidence does not warrant a determination under subparagraphs (1) or (2) above.

(c) Determinations under subparagraphs (b)(1) and (2) above may be made only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was (1) mutual, or (2) if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.

(d) Each proposed determination shall be coordinated with legal counsel in accordance with agency procedures.

(e) Mistakes alleged or disclosed after award shall be processed as follows:

(1) The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence, such as (i) the contractor's file copy of the bid, (ii) the contractor's original worksheets and other data used in preparing the bid, (iii) subcontractors' and suppliers' quotations, if any, (iv) published price lists, and (v) any other evidence that will serve to establish the mistake, the manner in which the mistake occurred, and the bid actually intended.

(2) The case file concerning an alleged mistake shall contain the following:

(i) All evidence furnished by the contractor in support of the alleged mistake.

(ii) A signed statement by the contracting officer—

(A) Describing the supplies or services involved;

(B) Specifying how and when the mistake was alleged or disclosed;

(C) Summarizing the evidence submitted by the contractor and any additional evidence considered pertinent;

(D) Quoting, in cases where only one bid was received, the most recent contract price for the supplies or services involved, or in the absence of a recent comparable contract, the contracting officer's estimate of a fair price for the supplies or services and the basis for the estimate;

(E) Setting forth the contracting officer's opinion whether a bona fide mistake was made and whether the contracting officer was, or should have been, on constructive notice of the mistake before the award, together with the reasons for, or data in support of, such opinion;

(F) Setting forth the course of action with respect to the alleged mistake that the contracting officer considers proper on the basis of the evidence, and if other than a change in contract price is recommended, the manner by which the supplies or services will otherwise be acquired; and

(G) Disclosing the status of performance and payments under the contract, including contemplated performance and payments.

(iii) A signed copy of the bid involved.

(iv) A copy of the invitation for bids and any specifications or drawings relevant to the alleged mistake.

(v) An abstract of written record of the bids received.

(vi) A written request by the contractor to reform or rescind the contract, and copies of all other relevant correspondence between the contracting officer and the contractor concerning the alleged mistake.

(vii) A copy of the contract and any related change orders or supplemental agreements.

(f) Each agency shall include in the contract file a record of (1) all determinations made in accordance with this 14.406-4, (2) the facts involved, and (3) the action taken in each case.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1738, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.407 Award.

14.407-1 General.

(a) The contracting officer shall make a contract award (1) by written notice, (2) within the time for acceptance specified in the bid or an extension (see 14.404-1(d)), and (3) to that responsible bidder whose bid, conforming to the invitation, will be most advantageous to the Government, considering only price and the price-related factors (see 14.201-8) included in the invitation. Award shall not be made until all required approvals have been obtained and the award otherwise conforms with 14.103-2.

(b) If less than three bids have been received, the contracting officer shall examine the situation to ascertain the reasons for the small number of responses. Award shall be made notwithstanding the limited number of bids. However, the contracting officer shall initiate, if appropriate, corrective action to increase competition in future solicitations for the same or similar items, and include a notation of such action in the records of the invitation for bids (see 14.204).

(c) (1) Award shall be made by mailing or otherwise furnishing a properly executed award document to the successful bidder.

(2) When a notice of award is issued, it shall be followed as soon as possible by the formal award.

(3) When more than one award results from any single invitation for bids, separate award documents shall be suitably numbered and executed.

(4) When an award is made to a bidder for less than all of the items that may be awarded to that bidder and additional items are being withheld for subsequent award, the award shall state that the Government may make subsequent awards on those additional items within the bid acceptance period.

(5) All provisions of the invitation for bids, including any acceptable additions or changes made by a bidder in the bid, shall be clearly and accurately set forth (either expressly or by reference) in the award document. The award is an acceptance of the bid, and

the bid and the award constitute the contract.

(d)(1) Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract (see 53.214). If an offer on an SF 33 leads to further changes, the resulting contract shall be prepared as a bilateral document on SF 26, Award/Contract.

(2) Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including telegrams, as notices of awards.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 48984, Nov. 28, 1989; 55 FR 3881, Feb. 5, 1990]

14.407-2 Responsible bidder—reasonableness of price.

(a) The contracting officer shall determine that a prospective contractor is responsible (see subpart 9.1) and that the prices offered are reasonable before awarding the contract. The price analysis techniques in 15.805-2 may be used as guidelines. In each case the determination shall be made in the light of all prevailing circumstances. Particular care must be taken in cases where only a single bid is received.

(b) The price analysis shall consider whether bids are materially unbalanced (see 15.814).

[48 FR 42171, Sept. 19, 1983, as amended at 55 FR 25527, June 21, 1990]

14.407-3 Prompt payment discounts.

(a) Prompt payment discounts shall not be considered in the evaluation of bids. However, any discount offered will form a part of the award, and will be taken by the payment center if payment is made within the discount period specified by the bidder. As an alternative to indicating a discount in conjunction with the offer, bidders may prefer to offer discounts on individual invoices.

(b) See 32.111(c)(1), which prescribes the contract clause at 52.232-8, Discounts for Prompt Payment.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

14.407-4 Economic price adjustment.

(a) *Bidder proposes economic price adjustment.*

(1) When a solicitation does not contain an economic price adjustment clause but a bidder proposes one with a ceiling that the price will not exceed, the bid shall be evaluated on the basis of the maximum possible economic price adjustment of the quoted base price.

(2) If the bid is eligible for award, the contracting officer shall request the bidder to agree to the inclusion in the award of an approved economic price adjustment clause (see 16.203) that is subject to the same ceiling. If the bidder will not agree to an approved clause, the award may be made on the basis of the bid as originally submitted.

(3) Bids that contain economic price adjustments with no ceiling shall be rejected unless a clear basis for evaluation exists.

(b) *Government proposes economic price adjustment.*

(1) When an invitation contains an economic price adjustment clause and no bidder takes exception to the provisions, bids shall be evaluated on the basis of the quoted prices without the allowable economic price adjustment being added.

(2) When a bidder increases the maximum percentage of economic price adjustment stipulated in the invitation or limits the downward economic price adjustment provisions of the invitation, the bid shall be rejected as nonresponsive.

(3) When a bid indicates deletion of the economic price adjustment clause, the bid shall be rejected as nonresponsive since the downward economic price adjustment provisions are thereby limited.

(4) When a bidder decreases the maximum percentage of economic price adjustment stipulated in the invitation, the bid shall be evaluated at the base price on an equal basis with bids that do not reduce the stipulated ceiling. However, after evaluation, if the bidder offering the lower ceiling is in a position to receive the award, the award shall reflect the lower ceiling.

14.407-5 [Reserved]

14.407-6 Equal low bids.

(a) Contracts shall be awarded in the following order of priority when two or more low bids are equal in all respects:

(1) Small business concerns that are also labor surplus area concerns.

(2) Other small business concerns.

(3) Other business concerns that are also labor surplus area concerns.

(4) Other business concerns.

(b) If two or more bidders still remain equally eligible after application of paragraph (a) above, award shall be made by a drawing by lot limited to those bidders. If time permits, the bidders involved shall be given an opportunity to attend the drawing. The drawing shall be witnessed by at least three persons, and the contract file shall contain the names and addresses of the witnesses and the person supervising the drawing.

(c) When an award is to be made by using the priorities under this 14.407-6, the contracting officer shall include a written agreement in the contract that the contractor will perform, or cause to be performed, the contract in accordance with the circumstances justifying the priority used to break the tie or select bids for a drawing by lot.

14.407-7 Documentation of award.

(a) The contracting officer shall document compliance with 14.103-2 in the contract file.

(b) The documentation shall either state that the accepted bid was the lowest bid received, or list all lower bids with reasons for their rejection in sufficient detail to justify the award.

(c) When an award is made after receipt of equal low bids, the documentation shall describe how the tie was broken.

14.407-8 Protests against award.

See subpart 33.1, Protests.

[50 FR 23606, June 4, 1985]

14.408 Information to bidders.

14.408-1 Award of unclassified contracts.

(a)(1) The contracting officer shall as a minimum (subject to any restrictions in subpart 9.4)—

(i) Notify unsuccessful bidders promptly that their bids were not accepted;

(ii) Extend appreciation for the interest the unsuccessful bidders have shown in submitting a bid; and

(iii) When award is made to other than a low bidder, state the reason for rejection in the notice to each of the unsuccessful low bidders.

(2) For acquisitions subject to the Trade Agreements Act (see 25.405(e)), within 7 working days after a contract award, agencies shall give unsuccessful offerors from designated countries written notice stating—

(i) That their offers were not accepted;

(ii) That a contract has been awarded;

(iii) The dollar amount of the successful offer; and

(iv) The name and address of the successful offeror.

(b) Notification to unsuccessful bidders may be oral or in writing through the use of a form postal card or other appropriate means.

(c) Should additional information be requested, the contracting officer shall provide the unsuccessful bidders with the name and address of the successful bidder, the contract price, and the location where a copy of the abstract of offers is available for inspection. However, when multiple awards have been made and furnishing information on the successful bids would require so much work as to interfere with normal operations of the contracting office, only information concerning location of the abstract of offers need be given.

(d) When a request is received concerning an unclassified invitation from an inquirer who is neither a bidder nor a representative of a bidder, the contracting officer should make every effort to furnish the names of successful bidders and, if requested, the prices at which awards were made. However, when such requests require so much work as to interfere with the normal operations of the contracting office, the inquirer will be advised where a copy of the abstract of offers may be seen.

(e) Requests for records shall be governed by agency regulations implementing subpart 24.2.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 27463, July 20, 1988]

14.408-2 Award of classified contracts.

In addition to 14.408-1, if classified information was furnished or created in connection with the solicitation, the contracting officer shall advise the unsuccessful bidders, including any who did not bid, to take disposition action in accordance with agency procedures. The name of the successful bidder and the contract price will be furnished to unsuccessful bidders only upon request. Information regarding a classified award shall not be furnished by telephone.

Subpart 14.5—Two-Step Sealed Bidding

14.501 General.

Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government's requirements, including an adequate technical data package, so that subsequent acquisitions may be made by conventional sealed bidding. This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items. It is conducted in two steps:

(a) Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word *technical* has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility as defined in 9.1.

(b) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with subparts 14.3 and 14.4.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.502 Conditions for use.

(a) Unless other factors require the use of sealed bidding, two-step sealed bidding may be used in preference to negotiation when all of the following conditions are present:

(1) Available specifications or purchase descriptions are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to ensure mutual understanding between each source and the Government.

(2) Definite criteria exist for evaluating technical proposals.

(3) More than one technically qualified source is expected to be available.

(4) Sufficient time will be available for use of the two-step method.

(5) A firm-fixed-price contract or a fixed-price contract with economic price adjustment will be used.

(b) None of the following precludes the use of two-step sealed bidding:

(1) Multi-year contracting.

(2) Government-owned facilities or special tooling to be made available to the successful bidder.

(3) A total small business and/or labor surplus area set-aside (see 19.502-2 and 20.201).

(4) A first or subsequent production quantity is being acquired under a performance specification.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

14.503 Procedures.

14.503-1 Step one.

(a) Requests for technical proposals shall be distributed in accordance with 14.203-1. In addition, requests shall be synopsized in accordance with part 5. The request must include, as a minimum, the following:

(1) A description of the supplies or services required.

(2) A statement of intent to use the two step method.

(3) The requirements of the technical proposal.

(4) The evaluation criteria.

(5) A statement that the technical proposals shall not include prices or pricing information.

(6) The date, or date and hour, by which the proposal must be received (see 14.201-6(r)).

(7) A statement that (i) in the second step, only bids based upon technical proposals determined to be acceptable, either initially or as a result of discussions, will be considered for awards and (ii) each bid in the second step must be based on the bidder's own technical proposals.

(8) A statement that (i) offerors should submit proposals that are acceptable without additional explanation or information, (ii) the Government may make a final determination regarding a proposal's acceptability solely on the basis of the proposal as submitted, and (iii) the Government may proceed with the second step without requesting further information from any offeror; however, the Government may request additional information from offerors of proposals that it considers reasonably susceptible of being made acceptable, and may discuss proposals with their offerors.

(9) A statement that a notice of unacceptability will be forwarded to the offeror upon completion of the proposal evaluation and final determination of unacceptability.

(10) A statement either that only one technical proposal may be submitted by each offeror or that multiple technical proposals may be submitted. When specifications permit different technical approaches, it is generally in the Government's interest to authorize multiple proposals. If multiple proposals are authorized, see 14.201-6(s).

(b) Information on delivery or performance requirements may be of assistance to bidders in determining whether or not to submit a proposal and may be included in the request. The request shall also indicate that the information is not binding on the Government and that the actual delivery or performance requirements will be contained in the invitation issued under step two.

(c) Upon receipt, the contracting officer shall—

(1) Safeguard proposals against disclosure to unauthorized persons;

(2) Accept and handle data marked in accordance with 15.413 as provided in that section; and

(3) Remove any reference to price or cost.

(d) The contracting officer shall establish a time period for evaluating technical proposals. The period may vary with the complexity and number of proposals involved. However, the evaluation should be completed quickly.

(e) (1) Evaluations shall be based on the criteria in the request for proposals but not consideration of responsibility as defined in 9.1. Proposals shall be categorized as—

(i) Acceptable;

(ii) Reasonably susceptible of being made acceptable; or

(iii) Unacceptable.

(2) Any proposal which modifies, or fails to conform to the essential requirements or specifications of, the request for technical proposals shall be considered nonresponsive and categorized as unacceptable.

(f) (1) The contracting officer may proceed directly with step two if there are sufficient acceptable proposals to ensure adequate price competition under step two, and if further time, effort and delay to make additional proposals acceptable and thereby increase competition would not be in Government's interest. If this is not the case, the contracting officer shall request bidders whose proposals may be made acceptable to submit additional clarifying or supplementing information. The contracting officer shall identify the nature of the deficiencies in the proposal or the nature of the additional information required. The contracting officer may also arrange discussions for this purpose. No proposal shall be discussed with any offeror other than the submitter.

(2) In initiating requests for additional information, the contracting officer shall fix an appropriate time for bidders to conclude discussions, if any, submit all additional information, and incorporate such additional information as part of their proposals submitted. Such time may be extended in the discretion of the contracting officer. If the additional information incorporated as part of a proposal within the final time fixed by the contracting officer establishes that the proposal is acceptable, it shall be so categorized. Otherwise, it shall be categorized as unacceptable.

(g) When a technical proposal is found unacceptable (either initially or after clarification), the contracting officer shall promptly notify the offeror of the basis of the determination and that a revision of the proposal will not be considered. Upon written request and as soon as possible after award, the contracting officer shall debrief unsuccessful offerors (see 15.1002).

(h) Late technical proposals are governed by 15.412.

(i) If it is necessary to discontinue two-step sealed bidding, the contracting officer shall include a statement of the facts and circumstances in the contract file. Each offeror shall be notified in writing. When step one results in no acceptable technical proposal or only one acceptable technical proposal, the acquisition may be continued by negotiation.

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2649, Jan. 17, 1986]

14.503-2 Step two.

(a) Sealed bidding procedures shall be followed except that invitations for bids shall—

(1) Be issued only to those offerors submitting acceptable technical proposals in step one;

(2) Include the provision prescribed in 14.201-6(t);

(3) Prominently state that the bidder shall comply with the specifications and the bidder's technical proposal; and

(4) Not be synopsized in the Commerce Business Daily as an acquisition opportunity nor publicly posted (see 5.101(a)).

(b) The names of firms that submitted acceptable proposals in step one will be listed in the Commerce Business Daily for the benefit of prospective subcontractors (see 5.206(a)(2)).

[48 FR 42171, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

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15.1002 Notification to successful offeror.
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15.1005 Discovery of mistakes.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42187, Sept. 19, 1983, unless otherwise noted.

15.000 Scope of part.

This part prescribes policies and procedures governing contracting for supplies and services by negotiation.

Subpart 15.1—General Requirements for Negotiation

15.100 Scope of subpart.

This subpart covers general requirements regarding negotiated contracts. Detailed and specific requirements appear throughout this regulation.

15.101 Definition.

Negotiation means contracting through the use of either competitive or other-than-competitive proposals and discussions. Any contract awarded without using sealed bidding procedures is a negotiated contract (see 14.101).

[50 FR 1739, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985]

15.102 General.

Negotiation is a procedure that includes the receipt of proposals from offerors, permits bargaining, and usually affords an opportunity to revise their offers before award of a contract. Bargaining—in the sense of discussion, persuasion, alteration of initial assumptions and positions, and give-and-take—may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.103 Converting from sealed bidding to negotiation procedures.

When the agency head has determined, in accordance with 14.404-1(e)(1), that an invitation for bids is to be cancelled and that use of negotiation is appropriate to complete the acquisition, the contracting officer may negotiate without issuing a new solicitation subject to the following conditions—

(a) Prior notice of intention to negotiate and a reasonable opportunity to negotiate have been given by the contracting officer to each responsible bidder that submitted a bid in response to the invitation for bids;

(b) The negotiated price is the lowest negotiated price offered by any responsible bidder; and

(c) The negotiated price is lower than the lowest rejected bid price of a responsible bidder that submitted a bid in response to the invitation for bids.

[50 FR 1739, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985]

15.104—15.105 [Reserved]

15.106 Contract clauses.

15.106-1 Examination of Records clause.

(a) This subsection implements 10 U.S.C. 2313(b) and (c) and 41 U.S.C. 254(c).

(b) When contracting by negotiation, the contracting officer shall insert the clause at 52.215-1, Examination of Records by Comptroller General, in solicitations and contracts, except when—

(1) Making small purchases (see part 13);

(2) Contracting for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge; or

(3) Making contracts with foreign contractors for which the agency head authorizes omission under subpart 25.9.

(c) In connection with administration of the clause in research and development contracts with nonprofit institutions, including subcontracts under these contracts, the Comptroller General does not require original documentation of transportation costs (exclusive of travel).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.106-2 Audit—Negotiation clause.

(a) This subsection implements 10 U.S.C. 2313(a), 41 U.S.C. 254(b), and 10 U.S.C. 2306(f).

(b) The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-2, Audit—Negotiation, in solicitations and contracts, unless the acquisition is a small purchase under part 13. In facilities contracts, the contracting officer shall use the clause with its Alternate I.

Subparts 15.2—15.3 [Reserved]

Subpart 15.4—Solicitation and Receipt of Proposals and Quotations

15.400 Scope of subpart.

This subpart prescribes policies and procedures for (a) preparing and issuing requests for proposals (RFP's) and requests for quotations (RFQ's) and (b) receiving proposals and quotations.

15.401 Applicability.

This subpart applies to solicitations issued when contracting by negotiation, except—

(a) Small purchases (see part 13); and

(b) Two-step sealed bidding (see subpart 14.5).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.402 General.

(a) Requests for proposals (RFP's) or requests for quotations (RFQ's) are used in negotiated acquisitions to communicate Government requirements to prospective contractors and to solicit proposals or quotations from them. Except as permitted by paragraph (f) below, contracting officers shall issue written solicitations. Solicitations shall contain the information necessary to enable prospective contractors to prepare proposals or quotations properly. Solicitation provisions and contract clauses may be incorporated into solicitations and contracts by reference, when authorized by subpart 52.1.

(b) Contracting officers shall furnish identical information concerning a proposed acquisition to all prospective contractors. Government personnel shall not provide the advantage of advance knowledge concerning a future solicitation to any prospective contractor (but see 5.404, 15.404, and 15.405).

(c) Except for solicitations for information or planning purposes (see subparagraph (e)(1) below and 15.405), contracting officers shall solicit proposals or quotations only when there is a definite intention to award a contract. Subpart 7.3 provides additional instructions for solicitations involving cost comparisons between Government and contractor performance.

(d) A proposal received in response to an RFP is an offer that can be accepted by the Government to create a binding contract, either following negotiations or, when authorized by 15.610, without discussion. Contracting officers should normally issue RFP's when they consider it reasonable to expect prospective contractors to respond with offers, even though they anticipate negotiations after receipt of offers. An RFP shall not be used for a solicitation for information or planning purposes. Solicitations involving cost comparisons between Government and contractor performance (see 7.302(b)) are not for information or planning purposes.

(e) A quotation received in response to an RFQ is not an offer and cannot be accepted by the Government to create a binding contract. It is informational in character. An RFQ may be used when the Government does not intend to award a contract on the basis of the solicitation but wishes to obtain price, delivery, or other market information for planning purposes (see 15.405).

(f) Oral solicitations are authorized for perishable subsistence. An oral solicitation may also be used when processing a written solicitation would delay the acquisition of supplies or services to the detriment of the Government. Use of an oral solicitation does not relieve the contracting officer from complying with other requirements of this regulation. In addition to other applicable documentation requirements (see subpart 4.1), documentation of oral solicitations shall include—

(1) A justification for use of an oral solicitation;

(2) Item description, quantity, and delivery schedule;

(3) Sources solicited, including the date, time, name of individual contacted, and prices quoted; and

(4) The solicitation number provided to the prospective contractors.

(g) Unless prohibited by agency regulations, letter RFP's may be used for acquisitions conducted under 6.302, Circumstances permitting other than full and open competition. When this technique is used, contracting officers must still comply with other portions of this regulation, such as subparts 5.2, Synopses of Proposed Contract Actions, and 15.8, Price Negotiation. Letter RFP's should be as clear and concise as possible; exclude any unnecessary verbiage or notices; and, as a minimum, contain the following:

(1) RFP number and date.

(2) Name and address of contracting office.

(3) Type of contract contemplated.

(4) Quantity, description, and required delivery for the item.

(5) Applicable certifications and representations.

(6) Contract terms and conditions (reference to prior contract or updates should be provided, as applicable).

(7) Offer due date.

(8) Other relevant information; e.g., incentives, variations in delivery schedule, any peculiar or different requirements, cost proposal support, and different data requirements.

(h) If, after considering any responses to a proper notice of proposed sole source contract action (see 5.207(d)(3)), the contracting officer determines that more than one source can meet the Government's needs, the contracting officer shall solicit offers using competitive procedures. The contracting officer shall proceed in accordance with 5.203 for publicizing and response times.

(i) Unless prohibited or otherwise restricted by agency procedures, contracting officers may authorize facsimile proposals (see 15.407(j)). In determining whether or not to authorize facsimile proposals, the contracting officer shall consider such factors as—

(1) Anticipated proposal size and volume;

(2) Urgency of the requirement;

(3) Frequency of price changes;

(4) Availability, reliability, speed, and capacity of the receiving facsimile equipment; and

(5) Adequacy of administrative procedures and controls for receiving, identifying, recording, and safeguarding facsimile proposals, and ensuring their timely delivery to the proposal opening location.

(j) If facsimile proposals are authorized, contracting officers may, after the date set for receipt of proposal, request offeror(s) to provide the complete original signed proposal.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 17857, May 18, 1988; 54 FR 48984, Nov. 28, 1989; 55 FR 25527, June 21, 1990]

15.403 Solicitation mailing lists.

Contracting offices shall establish, maintain, and use lists of potential sources in accordance with 14.205.

15.404 Presolicitation notices and conferences.

(a) *General.* Presolicitation notices and conferences may be used as preliminary steps in negotiated acquisitions in order to—

(1) Develop or identify interested sources;

(2) Request preliminary information based on a general description of the supplies or services involved;

(3) Explain complicated specifications and requirements to interested sources; and

(4) Aid prospective contractors in later submitting proposals without undue expenditure of effort, time, and money.

(b) *Presolicitation notices.* (1) When presolicitation notices are used, the contracting officer shall prepare and issue the notice to potential sources and shall synopsize the notice in accordance with subpart 5.2.

(2) Each presolicitation notice shall—

(i) Define as explicitly as possible the information to be furnished in the response;

(ii) Indicate whether it is contemplated that the presolicitation notice will be followed by a conference and a formal solicitation; and

(iii) Request an expression of interest in the contemplated acquisition by a specified date.

(3) In complex acquisitions, the presolicitation notice may also request information pertaining to management, engineering, and production capabilities. Detailed drawings, specifications, or plans will not normally be included with a presolicitation notice.

(4) The contracting officer shall furnish copies of the solicitation to (i) all those responding affirmatively to the presolicitation notice and (ii) other prospective contractors upon their request (but see subpart 9.4, Debarment, Suspension, and Ineligibility).

(c) *Presolicitation conferences.* (1) The presolicitation conference may be used only when approved at a level higher than the contracting officer. It shall not be used as a method for prequalification of offerors.

(2) The contracting officer shall—

(i) Advise all organizations responding to the presolicitation notice of the details of any pending presolicitation conference;

(ii) Conduct the conference and arrange for technical and legal personnel to attend, as appropriate; and

(iii) Furnish copies of the solicitation to all organizations attending the conference, unless they decline to participate in the acquisition.

15.405 Solicitations for information or planning purposes.

15.405-1 General.

When information necessary for planning purposes cannot be obtained from potential sources by more economical and less formal means, the contracting officer may determine in writing that a solicitation for information or planning purposes is justified. If this determination is approved, in accordance with agency procedures, at a level higher than that of the contracting officer, the contracting officer shall then issue the solicitation.

15.405-2 Solicitation provision.

The contracting officer shall insert on the face of each solicitation (other than those excluded by 15.401) issued for information or planning purposes the provision at 52.215-3, Solicitation for Information or Planning Purposes.

15.406 Preparing requests for proposals (RFP's) and requests for quotations (RFQ's).

15.406-1 Uniform contract format.

(a) Contracting officers shall prepare solicitations and resulting contracts using the uniform contract format outlined in Table 15-1. The format facilitates preparation of the solicitation and contract, as well as reference to and use of those documents by offerors and contractors. The uniform contract format is optional for acquisitions outside the United States, its possessions, its territories, and Puerto Rico. It does not apply to the following:

(1) Basic agreements (see 16.702).

(2) Construction and architect-engineer contracts (see part 36).

(3) Shipbuilding (including design, construction, and conversion), ship overhauls, and ship repairs.

(4) Subsistence.

(5) Contracts requiring special contract forms prescribed elsewhere in this regulation that are inconsistent with the uniform contract format.

(6) Letter Request for Proposals (see 15.402).

(7) Contracts exempted by the agency head or a designee.

(8) Contracts utilizing the simplified contract format (see 15.416).

(b) Solicitations to which the uniform contract format applies shall include Parts I, II, III, and IV (see 15.406-2 through 15.406-5). Upon award, contracting officers shall not physically include Part IV in the resulting contract, but shall retain in their contract file Section K, Representations, certifications, and other statements of offerors, as completed by the contractor. Award by acceptance of a proposal on the award portion of SF 33, SF 26, or SF 1447 incorporates Section K by reference in the resultant contract. Contracts requiring a bilateral document shall incorporate Section K by reference in the signed contract.

TABLE 15-1

Uniform Contract Format

Section	Title
	Part I—The Schedule
A	Solicitation/contract form
B	Supplies or services and prices/costs
C	Description/specifications/ work statement
D	Packaging and marking
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
	Part II—Contract Clauses
I	Contract clauses
	Part III—List of Documents, Exhibits, and Other Attachments
J	List of attachments
	Part IV—Representations and Instructions
K	Representations, certifications, and other statements of offerors or quoters
L	Instructions, conditions, and notices to offerors or quoters
M	Evaluation factors for award

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1739, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 17857, May 16, 1988; 54 FR 48984, Nov. 28, 1989]

15.406-2 Part I—The Schedule.

The contracting officer shall prepare the contract Schedule as follows:

(a) *Section A, Solicitation/contract form.*

(1) Prepare RFP's on Standard Form 33, Solicitation, Offer and Award (53.301-33) or Standard Form 1447, Solicitation/Contract (53.301-1447), unless otherwise permitted by this regulation. The first page of the SF 33 or SF 1447 is the first page of the solicitation. The first page of the SF 33 includes section A of the uniform contract format. When the SF 1447 is used as the solicitation document, ensure the information in subdivisions (a)(3)(i) and (a)(3)(iv) of this subsection are inserted in block 9 of the SF 1447.

(2) Prepare RFQ's on Standard Form 18, Request for Quotations (53.301-18). Agencies may overprint the SF 18 to provide for Section A of the uniform contract format.

(3) When other than SF 33, SF 18, or SF 1447 is used, include the following on the first page of the solicitation:

(i) Name, address, and location of issuing activity, including room and building where proposals or quotations must be submitted.

(ii) Solicitation number.

(iii) Date of issuance.

(iv) Closing date and time.

(v) Number of pages.

(vi) Requisition or other purchase authority.

(vii) Brief description of item or service.

(viii) Requirement for the offeror or quoter to provide its name and complete address, including street, city, county, State, and Zip Code.

(ix) A statement that offerors or quoters should include in the offer or quotation the address to which payment should be mailed, if that address is different from that shown for the offeror or quoter.

(b) *Section B, Supplies or services and prices/costs.* Include on the second page of the solicitation brief descriptions of the supplies or services; e.g., item number, national stock number/part number if applicable, nouns, and quantities. (This includes incidental deliverables such as manuals and reports.) The second page may be supplemented as necessary by Optional Form 336, Continuation Sheet (53.302-336).

(c) *Section C, Description/specifications/work statement.* Include any description or specifications needed in addition to Section B (see part 10, Specifications, Standards, and Other Product Descriptions).

(d) *Section D, Packaging and marking.* Provide packaging, packing, preservation, and marking requirements, if any (see 10.004(e)).

(e) *Section E, Inspection and acceptance.* Include inspection, acceptance, quality assurance, and reliability requirements (see part 46, Quality Assurance).

(f) *Section F, Deliveries or performance.* Specify the requirements for time, place, and method of delivery or performance (see part 12, Contract

Delivery or Performance, and 47.301-1).

(g) *Section G, Contract administration data.* Include any required accounting and appropriation data and any required contract administration information or instructions other than those on the solicitation form.

(h) *Section H, Special contract requirements.* Include a clear statement of any special contract requirements that are not included in Section I, Contract clauses, or in other sections of the uniform contract format.

[48 FR 42187, Sept. 19, 1983, as amended at 51 FR 27119, July 29, 1986; 53 FR 17857, May 18, 1988; 54 FR 29281, July 11, 1989; 54 FR 48985, Nov. 28, 1989; 55 FR 38516, Sept. 18, 1990]

15.406-3 Part II—Contract clauses.

(a) *Section I, Contract clauses.* The contracting officer shall include in this section the clauses required by law or by this regulation and any additional clauses expected to be included in any resulting contract, if these clauses are not required in any other section of the uniform contract format.

(b) When contracting by negotiation, the contracting officer shall insert the clause at 52.215-33, Order of Precedence, in solicitations and contracts to which the uniform contract format applies.

(c) Any alteration pertaining to the contract shall be included in this section as part of the clause at 52.252-4, Alterations in Contract. See part 52, Solicitation Provisions and Contract Clauses.

[51 FR 2649, Jan. 17, 1986, as amended at 53 FR 17858, May 18, 1988]

15.406-4 Part III—List of Documents, exhibits, and other attachments.

Section J, List of attachments. The contracting officer shall list the title, date, and number of pages for each attached document, exhibit, and other attachment.

15.406-5 Part IV—Representations and instructions.

The contracting officer shall prepare the representations and instructions as follows:

(a) *Section K, Representations, certifications, and other statements of offerors or quoters.* Include in this section those solicitation provisions that require representations, certifications, or the submission of other information by offerors or quoters.

(b) *Section L, Instructions, conditions, and notices to offerors or quoters.* Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offerors or quoters in preparing proposals or quotations. Any alteration pertaining to the solicitation shall be included in this section as part of the provision at 52.252-3, Alterations in Solicitation. Prospective offerors or quoters may be instructed to submit technical proposals in severable parts to meet agency requirements. The severable parts should provide for separation of technical and cost or pricing data. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technical, and (4) cost or pricing data.

(c) *Section M, Evaluation factors for award.* Identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract (see 15.605(e) and (f) and the multiple award provision at 52.215-34) and state the relative importance the Government places on those evaluation factors and subfactors.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 19715, May 30, 1986; 53 FR 17858, May 18, 1988]

15.407 Solicitation provisions.

(a) *Solicitations,* as used in this section, means requests for proposals (RFP's) and requests for quotations (RFQ's) other than those excluded by 15.401 and those for information or planning purposes. See 15.405-2 for the solicitation provision used with solicitations for information or planning purposes.

(b) The contracting officer may, upon the approval of the chief of the contracting office, insert the provision at 52.215-4, Notice of Possible Standardization, in solicitations for supplies that subsequently might be standardized. See 14.201-6(n) regarding use of the provision in invitations for bids.

(c) The contracting officer shall insert in solicitations the provisions at—

(1) 52.215-5, Solicitation Definitions;

(2) 52.215-6, Type of Business Organization;

(3) 52.215-7, Unnecessarily Elaborate Proposals or Quotations;

(4) 52.215-8, Amendments to Solicitations;

(5) 52.215-9, Submission of Offers;

(6) 52.215-10, Late Submissions, Modifications, and Withdrawals of Proposals, for solicitations issued in the United States and Canada for submission of offers to a contracting office in the United States or Canada;

(7) 52.215-11, Authorized Negotiators; and

(8) 52.215-12, Restriction on Disclosure and Use of Data; and

(9) 52.215-36, Late Submissions, Modifications, and Withdrawals of Proposals (Overseas), for solicitations under which offers are to be submitted to a contracting office outside the United States or Canada.

(d) The contracting officer shall insert in RFP's the provisions at—

(1) 52.215-13, Preparation of Offers;

(2) 52.215-14, Explanation to Prospective Offerors;

(3) 52.215-15, Failure to Submit Offer; and

(4) 52.215-16, Contract Award.

(e)(1) The contracting officer shall insert the provision at 52.215-17, Telegraphic Proposals, in solicitations that authorize telegraphic proposals or quotations.

(2) The contracting officer shall insert the basic provision with its Alternate 1 in solicitations that are for perishable subsistence and when the contracting officer considers that offerors will be unwilling to provide acceptance periods long enough to allow written confirmation.

(f) The contracting officer shall insert the provision at 52.215-19, Period for Acceptance of Offer, in RFP's that are not issued on SF 33 or SF 1447 except those (1) for construction work or (2) in which the Government specifies a minimum acceptance period.

(g) The contracting officer shall insert the provision at 52.215-20, Place of Performance, in solicitations except those in which the place of performance is specified by the Government.

(h) The contracting officer shall insert the provision at 52.215-34, Evaluation of Offers for Multiple Awards, in requests for proposals if the contracting officer determines that multiple awards might be made if doing so is economically advantageous to the Government.

(i) The contracting officer shall insert the provision at 52.215-35, Annual Representations and Certifications—Negotiation, in requests for proposals if annual representations and certifications are utilized (see 14.213).

(j) The contracting officer shall insert the provision at 52.215-18, Facsimile Proposals, in solicitations if facsimile proposals are authorized (see 15.402(i)).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2650, Jan. 17, 1986; 51 FR 19715, May 30, 1986; 53 FR 43390, Oct. 26, 1988; 54 FR 5054, Jan. 31, 1989; 54 FR 48985, Nov. 28, 1989]

15.408 Issuing solicitations.

(a) The contracting officer shall issue unclassified solicitations to potential sources in conformance with the policy and procedures in parts 5 and 6.

(b) Solicitations involving classified information shall be handled as prescribed by agency regulations.

(c) If the contracting office is located in the United States and the security classification permits, any solicitation or related correspondence sent to a foreign address shall be sent by international air mail. Similarly, if the security classification permits, contracting offices located outside the United States shall use international air mail in appropriate circumstances.

(d) A master solicitation may be used for negotiated acquisitions, subject to the criteria and procedures in 14.203-3.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 29281, July 11, 1989]

15.409 Pre-proposal conferences.

(a) A pre-proposal conference may be held to brief prospective offerors after a solicitation has been issued but before offers are submitted. Generally, the Government uses these conferences in complex negotiated acquisitions to explain or clarify complicated specifications and requirements.

(b) The contracting officer shall decide if a pre-proposal conference is required and make the necessary arrangements, including the following:

(1) If notice was not in the solicitation, give all prospective offerors who received the solicitation adequate notice of the time, place, nature, and scope of the conference.

(2) If time allows, request prospective offerors to submit written questions in advance. Prepared answers can then be delivered during the conference.

(3) Arrange for technical and legal personnel to attend the conference, if appropriate.

(c) The contracting officer or a designated representative shall conduct the pre-proposal conference, furnish all prospective offerors identical information concerning the proposed acquisition, make a complete record of the conference, and promptly furnish a copy of that record to all prospective offerors. Conferees shall be advised that—

(1) Remarks and explanations at the conference shall not qualify the terms of the solicitation; and

(2) Terms of the solicitation and specifications remain unchanged unless the solicitation is amended in writing.

15.410 Amendment of solicitations before closing date.

(a) After issuance of a solicitation, but before the date set for receipt of proposals, it may be necessary to (1) make changes to the solicitation, including, but not limited to, significant changes in quantity, specifications, or delivery schedules, (2) correct defects or ambiguities, or (3) change the closing date for receipt of proposals. Standard Form 30, Amendment of Solicitation/Modification of Contrac (53.301-30), shall be used for amendin a request for proposals (RFP).

(b) The contracting officer shall determine if the closing date needs to b changed when amending a solicitation If the time available before closing i insufficient, prospective offerors o quoters shall be notified by telegram or telephone of an extension of th closing date, and the notification shal be confirmed in the written amendment to the solicitation. The contracting officer shall not award a contrac unless any amendments made to an RFP have been issued in sufficient time to be considered by prospective offerors.

(c) Any information given to a prospective offeror or quoter shall be furnished promptly to all other prospective offerors or quoters as a solicitation amendment if (1) the information is necessary in submitting proposals o quotations or (2) the lack of such information would be prejudicial to prospective offeror or quoter.

15.411 Receipt of proposals and quotations.

(a) The procedures for receipt an handling of proposals and quotation in negotiated acquisitions should b similar to the receipt and safeguardin of bids in sealed bidding (see 14.401) Proposals and quotations shall b marked with the date and time of receipt.

(b) After receipt, proposals and quotations shall be safeguarded from unauthorized disclosure. Classified proposals and quotations shall be handle in accordance with agency regulation Also see OMB Circular No. A-76, th supplemental Handbook, and subpar 7.3, Contractor Versus Governmen Performance, for safeguarding cost comparison information.

[48 FR 42187, Sept. 19, 1983, as amended a 50 FR 1740, Jan. 11, 1985; 50 FR 52429, De 23, 1985]

15.412 Late proposals and modifications.

(a) *Modification*, as used in this section, means a modification of a proposal, including a final modification in response to the contracting officer's request for *best and final* offers. The term does not include normal revisions of offers made during the conduct of negotiations by offerors selected for discussion.

(b) Offerors are responsible for submitting offers, and any modifications to them, so as to reach the Government office designated in the solicitation on time. Unless the solicitation states a specific time, the time for receipt is 4:30 p.m., local time for the designated Government office on the date that proposals are due.

(c) Proposals, and modifications to them, that are received in the designated Government office after the exact time specified are *late* and shall be considered only if (1) they are received before award is made, and (2) the circumstances, including acceptable evidence of date of mailing or receipt at the Government installation, meet the specific requirements of the provision at 52.215-10, Late Submissions, Modifications, and Withdrawals of Proposals.

(d) When a late proposal or modification is received and it is clear from available information that it cannot be considered for award, the contracting officer shall promptly notify the offeror that it was received late and will not be considered. The notice need not be given when the proposed contract is to be awarded within a few days and the notice prescribed in 15.1001(c)(1) would suffice.

(e) When a late proposal or modification is transmitted to a contracting officer in the United States or Canada by registered or certified mail or by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee and is received before award, the offeror shall be promptly notified substantially in accordance with the notice in 14.304-2, appropriately modified to relate to proposals.

(f) Late proposals and modifications that are not considered shall be held unopened, unless opened for identification, until after award and then retained with other unsuccessful proposals.

(g) The following shall, if available, be included in the contracting office files for each late proposal, quotation, or modification:

(1) The date of mailing, filing, or delivery.

(2) The date and hour of receipt.

(3) Whether or not considered for award.

(4) The envelope, wrapper, or other evidence of date of submission.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 23606, June 4, 1985; 54 FR 48985, Nov. 28, 1989]

15.413 Disclosure and use of information before award.

See 3.104 for statutory and regulatory requirements related to the disclosure of proprietary and source selection information.

[55 FR 36795, Sept. 6, 1990]

15.413-1 Alternate I.

(a) After receipt of proposals, none of the information contained in them or concerning the number or identity of offerors shall be made available to the public or to anyone in the Government except as otherwise authorized in accordance with 3.104 (for procedures regarding requests for information from Members of Congress, see 5.403).

(b) During the preaward or preacceptance period of a negotiated acquisition, only the contracting officer, the contracting officer's superiors having contractual authority, and others specifically authorized shall transmit technical or other information and conduct discussions with prospective contractors. Information shall not be furnished to a prospective contractor if, alone or together with other information, it may afford the prospective contractor an advantage over others (see 15.610, Written and oral discussion). However, general information that is not prejudicial to others may be furnished upon request.

(c) Prospective contractors and subcontractors may place restrictions on the disclosure and use of data in proposals and quotations (see 3.104 and the provision at 52.215-12, Restriction on Disclosure and Use of Data). Contracting officers shall not exclude proposals from consideration merely because they restrict disclosure and use of data, nor shall they be prejudiced by that restriction. The portions of the proposal that are so restricted (except for information that is also obtained from another source without restriction) shall be used only for evaluation and shall not be disclosed outside the Government without permission of the prospective contractor (but see subpart 24.2, Freedom of Information Act).

[48 FR 42187, Sept. 19, 1983, as amended at 55 FR 36795, Sept. 6, 1990]

15.413-2 Alternate II.

Agency regulations may provide that the following alternate procedures may be used instead of those specified in 15.413-1.

(a) Proposals furnished to the Government are to be used for evaluation purposes only. Disclosure outside the Government for evaluation is permitted only to the extent authorized by, and in accordance with the procedures in, 15.413-2(f).

(b) While the Government's limited use of proposals does not require that the proposal bear a restrictive notice, proposers should, if they desire to maximize protection of their trade secrets or confidential or privileged commercial and financial information contained in them, apply the restrictive notice prescribed in the provision at 52.215-12, Restriction on Disclosure and Use of Data, to such information (also see 15.407(c)(8)). In any event, information contained in proposals will be protected to the extent permitted by law, but the Government assumes no liability for the use or disclosure of information (data) not made subject to such notice in accordance with the provision at 52.215-12.

(c) If proposals are received with more restrictive conditions than those in the provision at 52.215-12, the contracting officer or coordinating officer shall inquire whether the submitter is willing to accept the conditions of the provision of 52.215-12. If the submitter does not, the contracting officer or coordinating officer shall, after consultation with counsel, either return the proposal or accept it as marked. Contracting officers shall not exclude from consideration any proposals merely because they contain an authorized or agreed-to notice, nor shall they be prejudiced by such notice.

(d) Release of proposal information (data) before decision as to the award of a contract, or the transfer of valuable and sensitive information between competing offerors during the competitive phase of the acquisition process, would seriously disrupt the Government's decision-making process and undermine the integrity of the competitive acquisition process, thus adversely affecting the Government's ability to solicit competitive proposals and award a contract which would best meet the Government's needs and serve the public interest. Therefore, to the extent permitted by law, none of the information (data) contained in proposals (except as authorized in agency regulations) is to be disclosed outside the Government before the Government's decision as to the award of a contract. In the event an outside evaluation is to be obtained, it shall be only to the extent authorized by, and in accordance with the procedures of, 15.413-2(f).

(e) In order to assure that solicited proposals (whether bearing a restrictive notice or not) are properly handled, agency implementing regulations may require the following Government notice to be placed on the cover sheet upon their receipt. (This notice is required for all unsolicited proposals, see 15.508.) This is a Government notice for internal handling purposes and does not affect any obligations or rights the Government may have with regard to the use or disclosure of any information (data) contained in the proposal or quotation.

GOVERNMENT NOTICE FOR HANDLING PROPOSALS

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, the procedures in (cite agency regulations implementing 15.413-2(f)).

If agency implementing regulations do not authorize release of proposals outside the Government for evaluation purposes, the last sentence of the foregoing Government notice is to be deleted.

(f) If authorized in agency implementing regulations, agencies may release proposals outside the Government for evaluation, consistent with the following:

(1) Decisions to release proposals outside the Government for evaluation purposes shall be made by the agency head or designee;

(2) Written agreement must be obtained from the evaluator that the information (data) contained in the proposal will be used only for evaluation purposes and will not be further disclosed;

(3) Any authorized restrictive legends placed on the proposal by the prospective contractor or subcontractor or by the Government shall be applied to any reproduction or abstracted information made by the evaluator;

(4) Upon completing the evaluation, all copies of the proposal, as well as any abstracts thereof, shall be returned to the Government office which initially furnished them for evaluation; and

(5) All determinations to release the proposal outside the Government take into consideration requirements for avoiding organizational conflicts of interest and the competitive relationship, if any, between the prospective contractor or subcontractor and the prospective outside evaluator.

(6) Prior to release of a proposal, the contracting officer obtains from the evaluator the certificate(s) required by 3.104-12.

(g) The submitter of any proposal shall be provided notice adequate to afford an opportunity to take appropriate action before release of any information (data) contained therein pursuant to a request under the Freedom of Information Act (5 U.S.C. 552); and, time permitting, the submitter should be consulted to obtain assistance in determining the eligibility of the information (data) in question as an exemption under the Act. (See also subpart 24.2, Freedom of Information Act.)

[48 FR 42187, Sept. 19, 1983, as amended at 55 FR 36795, Sept. 6, 1990]

15.414 Forms.

(a) Standard Form 33 (SF 33), Solicitation, Offer and Award (see 53.301-33), shall be used in connection with the solicitation and award of negotiated contracts. Award may be made using the Award portion of SF 33, except as provided in paragraph (b) of this section.

(b) Standard Form 26 (SF 26), Award/Contract (see 53.301-26), shall be used when entering into negotiated contracts when the prospective contractor has amended its offer, unless—

(1) The contract is for the construction, alteration, or repair of buildings, bridges, roads, or other real property;

(2) The acquisition is one for which the FAR prescribes special contract forms; or

(3) Use of a purchase order is appropriate.

(c) Standard Form 1447 (SF 1447), Solicitation/Contract (see 53.301-1447), shall be used in connection with negotiated acquisitions that use the simplified contract format and may be used in lieu of the SF 26 or SF 33 for other acquisitions. Award is generally made using the award portion of the SF 1447 (see 53.215-1).

[54 FR 48985, Nov. 28, 1989]

15.415 Economic purchase quantities (supplies).

Contracting officers shall comply with the economic purchase quantity planning requirements for supplies in subpart 7.2. See 7.203 for instructions regarding use of the provision at 52.207-4, Economic Purchase Quantity—Supplies, and 7.204 for guidance on handling responses to that provision.

[50 FR 35479, Aug. 30, 1985]

15.416 Simplified contract format.

For firm-fixed-price or fixed-price with economic price adjustment acquisitions of supplies and services, the contracting officer may use the simplified contract format in lieu of the uniform contract format (see 14.201-1).

[54 FR 48985, Nov. 28, 1989]

Subpart 15.5—Unsolicited Proposals

15.500 Scope of subpart.

This subpart prescribes policies and procedures for submission, receipt, evaluation, and acceptance of unsolicited proposals. It does not govern the competitive selection of basic research proposals (see 6.102(d)(2)).

[50 FR 52433, Dec. 23, 1985]

15.501 Definitions.

Advertising material, as used in this subpart, means material designed to acquaint the Government with a prospective contractor's present products or potential capabilities, or to determine the Government's interest in buying these products.

Commercial product offer means an offer of a commercial product that is usually sold to the general public and that the vendor wishes to see introduced in the Government's supply system as an alternate or replacement for an existing supply item.

Contribution, as used in this subpart, means a concept, suggestion, or idea presented to the Government for its use with no indication that the source intends to devote any further effort to it on the Government's behalf.

Coordinating office, as used in this subpart, means a point of contact established within the agency to coordinate the receipt, evaluation, and disposition of unsolicited proposals.

Technical correspondence, as used in this subpart, means written requests for information regarding Government interest in research areas, submissions of research descriptions, preproposal explorations, and other written technical inquiries.

Unsolicited proposal means a written proposal that is submitted to an agency on the initative of the submitter for the purpose of obtaining a contract with the Government and which is not in response to a formal or informal request (other than an agency request constituting a publicized general statement of needs).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.502 Policy.

Agencies may accept unsolicited proposals in accordance with 15.507. To award a contract based on an unsolicited proposal without providing for full and open competition requires that appropriate authority exists in subpart 6.3. In this connection, 6.302-1(a)(2)(i) provides special authority for unsolicited research proposals.

[50 FR 52433, Dec. 23, 1985]

15.503 General.

(a) Unsolicited proposals are a valuable means for Government agencies to obtain innovative or unique methods or approaches to accomplishing their missions from sources outside the Government.

(b) Advertising material, commercial product offers, contributions, or technical correspondence as defined in 15.501 are not unsolicited proposals.

(c) A valid unsolicited proposal must—

(1) Be innovative and unique;

(2) Be independently originated and developed by the offeror;

(3) Be prepared without Government supervision;

(4) Include sufficient detail to permit a determination that Government support could be worthwhile and the proposed work could benefit the agency's research and development or other mission responsibilities; and

(5) Not be an advance proposal for a known agency requirement that can be acquired by competitive methods.

(d) Unsolicited proposals in response to a publicized general statement of agency needs are considered to be independently originated.

(e) Agencies that receive unique and innovative unsolicited proposals not related to their missions may identify for the offeror other agencies whose missions bear a reasonable relationship to the proposal's subject matter.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 51 FR 52433, Dec. 23, 1985]

15.504 Advance guidance.

(a) Agencies shall encourage potential offerors to make preliminary contacts with appropriate agency personnel before expending extensive effort on a detailed unsolicited proposal or submitting proprietary data to the Government. These preliminary contacts should include—

(1) Inquiries as to the general need for the type of effort contemplated; and

(2) Contacts with agency technical personnel for the limited purpose of obtaining an understanding of the agency mission and responsibilities relative to the type of effort contemplated.

(b) Agencies shall make available to potential offerors of unsolicited proposals at least the following free written information:

(1) Definition (see 15.501), and content (see 15.505), of an unsolicited proposal acceptable for formal evaluation.

(2) Requirements concerning responsible prospective contractors (see subpart 9.1), and organizational conflicts of interest (see subpart 9.5).

(3) Role of technical correspondence before proposal preparation.

(4) Agency contact points for information regarding advertising, contributions, solicitation mailing lists, and other types of transactions frequently mistaken for unsolicited proposals.

(5) Procedures for submission and evaluation of unsolicited proposals.

(6) Information sources on agency objectives and areas of potential interest.

(7) Instructions for identifying and marking proprietary information so that restrictive legends conform to 15.509.

(c) Agency personnel shall conduct personal contacts without making any agency commitments concerning the acceptance of unsolicited proposals.

15.505 Content of unsolicited proposals.

Unsolicited proposals should contain the following information to permit consideration in an objective and timely manner:

(a) Basic information including—

(1) Offeror's name and address and type of organization; e.g., profit, nonprofit, educational, small business;

(2) Names and telephone numbers of technical and business personnel to be contacted for evaluation or negotiation purposes;

(3) Identity of proprietary data to be used only for evaluation purposes;

(4) Names of other Federal, State, local agencies, or parties receiving the proposal or funding the proposed effort;

(5) Date of submission; and

(6) Signature of a person authorized to represent and contractually obligate the offeror.

(b) Technical information including—

(1) Concise title and abstract (approximately 200 words) of the proposed effort;

(2) A reasonably complete discussion stating the objectives of the effort or activity, the method of approach and extent of effort to be employed, the nature and extent of the anticipated results, and the manner in which the work will help to support accomplishment of the agency's mission;

(3) Names and biographical information on the offeror's key personnel who would be involved, including alternates; and

(4) Type of support needed from the agency; e.g., facilities, equipment, materials, or personnel resources.

(c) Supporting information including—

(1) Proposed price or total estimated cost for the effort in sufficient detail for meaningful evaluation;

(2) Period of time for which the proposal is valid (a six month minimum is suggested);

(3) Type of contract preferred;

(4) Proposed duration of effort;

(5) Brief description of the organization, previous experience in the field, and facilities to be used; and

(6) Required statements, if applicable, about organizational conflicts of interest, security clearances, and environmental impacts.

15.506 Agency procedures.

(a) Agencies shall establish procedures, including assurance of accountability, for controlling the receipt, evaluation, and timely disposition of proposals consistent with the requirements of this subpart. The procedures shall include controls on the reproduction and disposition of proposal material, particularly data identified by the offeror as subject to duplication, use, or disclosure restrictions.

(b) Agencies shall establish contact points (see 15.504) to coordinate the receipt and handling of unsolicited proposals. Contact points outside agency contracting offices shall coordinate with qualified contracting personnel.

[48 FR 42187, Sept. 19, 1983, as amended at 55 FR 38516, Sept. 18, 1990]

15.506-1 Receipt and initial review.

(a) Before initiating a comprehensive evaluation, the agency contact point shall determine if the unsolicited proposal—

(1) Contains sufficient technical and cost information;

(2) Has been approved by a responsible official or other representative authorized to contractually obligate the offeror; and

(3) Complies with the marking requirements of 15.509.

(b) If the proposal meets these requirements, the contact point shall promptly acknowledge and process the proposal. If it does not, the contact point shall provide the offeror an opportunity to submit the required data.

(c) Agencies are not required to perform comprehensive evaluations of unsolicited proposals not related to their missions. If such proposals are received, the agency contact point shall promptly reply to the offeror, state how the agency interprets the proposal, and why it is not being evaluated.

15.506-2 Evaluation.

(a) Comprehensive evaluations shall be coordinated by the agency contact point, who shall attach or imprint on each unsolicited proposal circulated for evaluation the legend required by 15.509(d). When performing a comprehensive evaluation of an unsolicited proposal, evaluators shall consider the following factors, in addition to any others appropriate for the particular proposal:

(1) Unique and innovative methods, approaches, or concepts demonstrated by the proposal.

(2) Overall scientific, technical, or socio-economic merits of the proposal.

(3) Potential contribution of the effort to the agency's specific mission.

(4) The offeror's capabilities, related experience, facilities, techniques, or unique combinations of these which are integral factors for achieving the proposal objectives.

(5) The qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel who are critical in achieving the proposal objectives.

(b) The evaluators shall notify the coordinating office of their conclusions and recommendations when the evaluation is completed.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.507 Contracting methods.

(a) A favorable comprehensive evaluation of an unsolicited proposal does not, in itself, justify awarding a contract without providing for full and open competition. Agency contact points shall return an unsolicited proposal to the offeror, citing reasons, when its substance—

(1) Is available to the Government without restriction from another source;

(2) Closely resembles a pending competitive acquisition requirement; or

(3) Does not demonstrate an innovative and unique method, approach, or concept.

(b) The contracting officer may commence negotiation only when—

(1) The unsolicited proposal has received a favorable comprehensive evaluation;

(2) The unsolicited proposal is not of the character described in 15.507(a);

(3) The agency technical office sponsoring the contract supports its recommendation with facts and circumstances that preclude competition, including consideration of the evaluation factors in 15.506-2(a), furnishes the necessary funds, and provides the certification required by 6.303-2(b);

(4) The contracting officer has complied with the synopsis requirements of subpart 5.2; and

(5) The contracting officer has executed any justification and obtained any approval or determination and findings that is required by subpart 6.3. (For unsolicited research propos-

als, see 6.302-1(a)(2)(i). A valid unsolicited proposal for other than research may be accepted only if otherwise permissible under other provisions of subpart 6.3.)

(c) If the unsolicited proposal is acceptable for award without competition, the agency and offeror shall use the proposal as the basis for negotiation.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52433, Dec. 23, 1985]

15.508 Prohibitions.

(a) Government personnel shall not use any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a solicitation or in negotiations with any other firm unless the offeror is notified of and agrees to the intended use. However, this prohibition does not preclude using any data, concept, or idea available to the Government from other sources without restriction.

(b) Government personnel shall not disclose restrictively marked information (see 15.509 and 3.104) included in an unsolicited proposal. The disclosure of such information concerning trade secrets, processes, operations, style of work, apparatus, and other matters, except as authorized by law, may result in criminal penalties under 18 U.S.C. 1905.

[48 FR 42187, Sept. 19, 1983, as amended at 55 FR 36795, Sept. 6, 1990]

15.509 Limited use of data.

(a) An unsolicited proposal may include data that the offeror does not want disclosed for any purpose other than evaluation. If the offeror wishes to restrict the proposal, the title page must be marked with the following legend:

USE AND DISCLOSURE OF DATA

The data in this proposal shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; *provided*, that if a contract is awarded to this offeror as a result of or in connection with the submission of these data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtainable from another source without restriction. The data subject to this restriction are contained in Sheets ———————.

(b) The offeror shall also mark each restricted sheet with the following legend:

Use or disclosure of proposal data is subject to the restriction on the title page of this Proposal.

(c) The coordinating office shall return to the offeror any unsolicited proposal marked with a legend different from that provided in 15.509(a). The return letter will state that the proposal cannot be considered because it is impracticable for the Government to comply with the legend and that the agency will consider the proposal if it is resubmitted with the proper legend.

(d) The coordinating office shall place a cover sheet on the proposal or clearly mark it as follows, unless the offeror clearly states in writing that no restrictions are imposed on the disclosure or use of the data contained in the proposal:

UNSOLICITED PROPOSAL
USE OF DATA LIMITED

All Government personnel must exercise extreme care to ensure that the information in this proposal is not disclosed to an individual who has not been authorized access to such data in accordance with 3.104, and is not duplicated, used, or disclosed in whole or in part for any pupose other than evaluation of the proposal, without the written permission of the offeror. If a contract is awarded on the basis of this proposal, the terms of the contract shall control disclosure and use.

This notice does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction.

This is a Government notice, and shall not by itself be construed to impose any liability upon the Government or Government personnel for disclosure or use of data contained in this proposal.

(e) The above notice is used solely as a manner of handling unsolicited proposals that will be compatible with this subpart. However, the use of this notice shall not be used to justify the withholding of a record nor to improperly deny the public access to a record where an obligation is imposed on an agency by the Freedom of Information Act, 5 U.S.C. 552, as amended. A prospective offeror should identify trade secrets, commercial or financial information, and privileged or confidential information to the Government (see 15.509(a)).

(f) When an agency receives an unsolicited proposal without any restrictive legend from an educational or nonprofit organization or institution, and an evaluation outside the Government is necessary, the coordinating office shall—

(1) Attach a cover sheet clearly marked with the legend in 15.509(d);

(2) Change the beginning of this legend to read *"All Government and non-Government personnel...."*;

(3) Delete the words *"is not disclosed outside the Government and"*; and

(4) Require any non-Government evaluator to give a written agreement stating that data in the proposal will not be disclosed to others outside the Government, and to complete the certification required by 3.104-9.

(g) If the proposal is received with the restrictive legend (15.509(a)), the modified cover sheet shall also be used and permission shall be obtained from the offeror before release of the proposal for outside evaluation.

(h) When an agency receives an unsolicited proposal with or without a restrictive legend from other than an educational or nonprofit organization or institution, and evaluation by Government personnel outside the agency or by experts outside of the Government is necessary, written permission must be obtained from the offeror before release of the proposal for evaluation. The coordinating office shall—

(1) Clearly mark the cover sheet with the legend in 15.509(d) or as modified in 15.509(f);

(2) Obtain a written agreement from any non-Government evaluator stating that data in the proposal will not be disclosed to persons outside the Government; and

(3) Obtain the certifications required by 3.104-9 and a listing of all persons authorized access to proprietary information by the activity performing the evaluation.

[48 FR 42187, Sept. 19, 1983, as amended at 55 FR 36795, Sept. 6, 1990]

Subpart 15.6—Source Selection

15.600 Scope of subpart.

This subpart prescribes policies and procedures for selection of a source or sources in competitive negotiated acquisitions. Formal source selection procedures, involving boards, councils, or other groups for proposal evaluation, are in 15.612. Alternative procedures that limit discussions with offerors during the competition are discussed in 15.613.

15.601 Definitions.

Clarification, as used in this subpart, means communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal. It is achieved by explanation or substantiation, either in response to Government inquiry or as initiated by the offeror. Unlike discussion (see definition below), clarification does not give the offeror an opportunity to revise or modify its proposal, except to the extent that correction of apparent clerical mistakes results in a revision.

Deficiency, as used in this subpart, means any part of a proposal that fails to satisfy the Government's requirements.

Discussion, as used in this subpart, means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal.

Source selection authority means the Government official in charge of selecting the source. This title is most often used when the selection process is formal and the official is someone other than the contracting officer.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.602 Applicability.

(a) This subpart applies to negotiated contracting when source selection is based on—

(1) Cost or price competition between proposals that meet the Government's minimum requirements stated in the solicitation; or

(2) Competition involving an evaluation and comparison of cost or price and other factors.

(b) This subpart does not apply to small purchases under part 13.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.603 Purpose.

Source selection procedures are designed to—

(a) Maximize competition;

(b) Minimize the complexity of the solicitation, evaluation, and the selection decision;

(c) Ensure impartial and comprehensive evaluation of offerors' proposals; and

(d) Ensure selection of the source whose proposal has the highest degree of realism and whose performance is expected to best meet stated Government requirements.

15.604 Responsibilities.

(a) Agency heads or their designees are responsible for source selection.

(b) The cognizant technical official is responsible for the technical requirements related to the source selection process.

(c) The contracting officer is responsible for contractual actions related to the source selection process, including—

(1) Issuing solicitations to which this subpart applies in accordance with subpart 15.4 and this subpart;

(2) Conducting or coordinating cost or price analyses as prescribed in subpart 15.8;

(3) Conducting or controlling all negotiations concerning cost or price, technical requirements, and other terms and conditions; and

(4) Selecting the source for contract award, unless another official is designated as the source selection authority.

15.605 Evaluation factors.

(a) The factors that will be considered in evaluating proposals should be tailored to each acquisition and include only those factors that will have an impact on the source selection decision.

(b) The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials. However, price or cost to the Government shall be included as an evaluation factor in every source selection. Quality also shall be addressed in every source selection. In evaluation factors, quality may be expressed in terms of technical excellence management capability, personnel qualifications, prior experience, past performance, and schedule compliance. Any other relevant factors, such as cost realism, may also be included.

(c) While the lowest price or lowest total cost to the Government is properly the deciding factor in many source selections, in certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services, or when cost-reimbursement contracting is anticipated.

(d) In awarding a cost-reimbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria.

(e) The solicitation shall clearly state the evaluation factors, including price or cost and any significant subfactors, that will be considered in making the source selection and their relative importance (see 15.406-5(c)). Numerical weights, which may be employed in the evaluation of proposals, need not be disclosed in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

(f) In addition to other factors, offers will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award (see 15.407(h)). The contracting officer shall assume for the purpose of making multiple awards that $500 would be the administrative cost to the Government for issuing and administering each contract awarded under a solicitation. Individual awards shall be for the items or combination of items that result in the lowest aggregate cost to the Government, including the assumed administrative costs.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 19715, May 30, 1986; 52 FR 21886, June 9, 1987; 52 FR 28225, July 28, 1987; 53 FR 27462, July 20, 1988; 55 FR 38516, Sept. 18, 1990]

15.606 Changes in Government requirements.

(a) When, either before or after receipt of proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting officer shall issue a written amendment to the solicitation. When time is of the essence, oral advice of changes may be given if the changes involved are not complex and all firms to be notified (see paragraph (b) below) are notified as near to the same time as possible. The contracting officer shall make a record of the oral advice and promptly confirm that advice in writing (see 15.410).

(b) In deciding which firms to notify of a change, the contracting officer shall consider the stage in the acquisition cycle at which the change occurs and the magnitude of the change, as follows:

(1) If proposals are not yet due, the amendment shall be sent to all firms that have received a solicitation.

(2) If the time for receipt of proposals has passed but proposals have not yet been evaluated, the amendment should normally be sent only to the responding offerors.

(3) If the competitive range (see 15.609(a)) has been established, only those offerors within the competitive range shall be sent the amendment.

(4) If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. The new solicitation shall be issued to all firms originally solicited and to any firms added to the original list.

(c) If the proposal considered to be most advantageous to the Government (as determined according to the established evaluation criteria) involves a departure from the stated requirements, the contracting officer shall provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements; *provided*, that this can be done without revealing to the other offerors the solution proposed in the original departure or any other information that is entitled to protection (see 15.407(c)(8) and 15.610(d)).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.607 Disclosure of mistakes before award.

(a) Contracting officers shall examine all proposals for minor informalities or irregularities and apparent clerical mistakes (see 14.405 and 14.406). Communication with offerors to resolve these matters is clarification, not discussion within the meaning of 15.610. However, if the resulting communication prejudices the interest of other offerors, the contracting officer shall not make award without discussions with all offerors within the competitive range.

(b) Except as indicated in paragraph (c) below, mistakes not covered in paragraph (a) above are usually resolved during discussion (see 15.610).

(c) When award without discussion is contemplated, the contracting officer shall comply with the following procedure:

(1) If a mistake in a proposal is suspected, the contracting officer shall advise the offeror (pointing out the suspected mistake or otherwise identifying the area of the proposal where the suspected mistake is) and request verification. If the offeror verifies its proposal, award may be made.

(2) If an offeror alleges a mistake in its proposal, the contracting officer shall advise the offeror that it may withdraw the proposal or seek correction in accordance with subparagraph (3) below.

(3) If an offeror requests permission to correct a mistake in its proposal, the agency head (or a designee not below the level of chief of the contracting office) may make a written determination permitting the correction; *provided*, that (i) both the existence of the mistake and the proposal actually intended are established by clear and convincing evidence from the solicitation and the proposal and (ii) legal review is obtained before making the determination.

(4) If the determination under subparagraph (3) above cannot be made, and the contracting officer still contemplates award without discussion, the offeror shall be given a final opportunity to withdraw or to verify its proposal.

(5) Verification, withdrawal, or correction under subparagraphs (c)(1) through (4) above is not considered discussion within the meaning of 15.610. If, however, correction of a mistake requires reference to documents, worksheets, or other data outside the solicitation and proposal in order to establish the existence of the mistake, the proposal intended, or both, the mistake may be corrected only through discussions under 15.610.

15.608 Proposal evaluation.

(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability (as conveyed by the proposal) to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation.

(1) *Cost or price evaluation.* The contracting officer shall use cost or price analysis (see subpart 15.8) to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract. The contracting officer shall document the cost or price evaluation.

(2) *Technical evaluation.* If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation, the cognizant technical official, in documenting the technical evaluation, shall include—

(i) The basis for evaluation;

(ii) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements;

(iii) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and

(iv) A summary of findings.

(b) All proposals received in response to a solicitation may be rejected if the agency head determines in writing that—

(1) All otherwise acceptable proposals received are at unreasonably prices;

(2) The proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith (see subpart 3.3 for reports to be made to the Department of Justice);

(3) A cost comparison as prescribed in OMB Circular A-76 and subpart 7.3 shows that performance by the Government is more economical; or

(4) For other reasons, cancellation is clearly in the Government's interest.

(5) A violation or possible violation of section 27 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), has occurred (see 3.104).

(c) The requirements of 14.407-3, Prompt payment discounts, are applicable to negotiated acquisitions.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1740, Jan. 11, 1985; 50 FR 26903, June 28, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 36795, Sept. 6, 1990]

15.609 Competitive range.

(a) The contracting officer shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion (see 15.610(b)). The competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is in the competitive range, the proposal should be included.

(b) If the contracting officer, after complying with 15.610(b), determines that a proposal no longer has a reasonable chance of being selected for contract award, it may no longer be considered for selection.

(c) The contracting officer shall notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award (see 15.1001(b)).

(d) If the contracting officer initially solicits unpriced technical proposals, they shall be evaluated to determine which are acceptable to the Government or could, after discussion, be made acceptable. After necessary discussion of these technical proposals is completed, the contracting officer shall (1) solicit price proposals for all the acceptable technical proposals which offer the greatest value to the Government in terms of performance and other factors and (2) make award to the low responsible offeror, either without or following discussion, as appropriate. Except in acquisition of architect-engineer services (see subpart 36.6), a competitive range determination must include cost or price proposals.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.610 Written or oral discussion.

(a) The requirement in paragraph (b) below for written or oral discussion need not be applied in acquisitions—

(1) In which prices are fixed by law or regulation;

(2) Of the set-aside portion of a partial set-aside; or

(3) In which it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in the lowest overall cost to the Government at a fair and reasonable price; *provided,* That—

(i) The solicitation notified all offerors of the possibility that award might be made without discussion; and

(ii) The award is in fact made without any written or oral discussion with any offeror.

(b) Except as provided in paragraph (a) above, the contracting officer shall conduct written or oral discussion with all responsible offerors who submit proposals within the competitive range. The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition (but see paragraphs (c) and (d) below).

(c) The contracting officer shall—

(1) Control all discussions;

(2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;

(3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;

(4) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process (see 15.607 and part 24); and

(5) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the discussions.

(d) The contracting officer and other Government personnel involved shall not engage in technical leveling (i.e., helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal).

(e) The following conduct may constitute prohibited conduct under section 27 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), and subpart 3.104 to which civil and criminal penalties and administrative remedies apply.

(1) Technical transfusion (i.e., Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal); or

(2) Auction techniques, such as—

(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;

(ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic); and

(iii) Otherwise furnishing information about other offerors' prices.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 36795, Sept. 6, 1990]

15.611 Best and final offers.

(a) Upon completion of discussions, the contracting officer shall issue to all offerors still within the competitive range a request for best and final offers. Oral requests for best and final offers shall be confirmed in writing.

(b) The request shall include—

(1) Notice that discussions are concluded;

(2) Notice that this is the opportunity to submit a best and final offer;

(3) A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers; and

(4) Notice that if any modification is submitted, it must be received by the date and time specified and is subject to the Late Submissions, Modifications, and Withdrawals of Proposals provision of the solicitation (see 15.412).

(c) After receipt of best and final offers, the contracting officer should not reopen discussions unless it is clearly in the Government's interest to do so (e.g., it is clear that information available at that time is inadequate to reasonably justify contractor selection and award based on the best and final offers received). If discussions are reopened, the contracting officer shall issue an additional request for best and final offers to all offerors still within the competitive range.

(d) Following evaluation of the best and final offers, the contracting officer (or other designated source selection authority) shall select that source whose best and final offer is most advantageous to the Government, considering price and the other factors included in the solicitation (but see 15.608(b)).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 19715, May 30, 1986; 55 FR 38516, Sept. 18, 1990]

15.612 Formal source selection.

(a) *General.* A source selection process is considered *formal* when a specific evaluation group structure is established to evaluate proposals and select the source for contract award. This approach is generally used in high-dollar-value acquisitions and may be used in other acquisitions as prescribed in agency regulations. The source selection organization typically consists of an evaluation board, advisory council, and designated source selection authority at a management level above that of the contracting officer.

(b) *Responsibilities.* When using formal source selection, the agency head or a designee shall ensure that—

(1) The official to be responsible for the source selection is formally designated as the source selection authority;

(2) The source selection authority formally establishes an evaluation group structure appropriate to the requirements of the particular solicitation; and

(3) Before conducting any presolicitation conferences (see 15.404) or issu-

ing the solicitation, the source selection authority approves a source selection plan.

(c) *Source Selection Plan.* As a minimum, the plan shall include—

(1) A description of the organization structure;

(2) Proposed presolicitation activities;

(3) A summary of the acquisition strategy;

(4) A statement of the proposed evaluation factors and their relative importance;

(5) A description of the evaluation process, methodology, and techniques to be used; and

(6) A schedule of significant milestones.

(d) *Source Selection Decision.* The source selection authority shall use the factors established in the solicitation (see 15.605) to make the source selection decision.

(1) The source selection authority shall consider any rankings and ratings, and, if requested, any recommendations prepared by evaluation and advisory groups.

(2) The supporting documentation prepared for the selection decision shall show the relative differences among proposals and their strengths, weaknesses, and risks in terms of the evaluation factors. The supporting documentation shall include the basis and reasons for the decision.

(e) *Safeguarding information.* Consistent with part 24 and subpart 3.104, agencies shall exercise particular care to protect source selection information.

(1) During the source selection process, disclosure of proprietary or source selection information shall be governed by 3.104-5 and applicable agency regulations. After the source selection, releasing authority shall be as prescribed in agency procedures. In all cases, agency procedures should prescribe the releasing authority.

(2) Government personnel shall not contact or visit a contractor regarding a proposal under source selection evaluation, without the prior approval of the source selection authority (see 3.104 for additional restrictions).

(f) *Postaward notices and debriefings.* See 15.1001(c) and 15.1003.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 36795, Sept. 6, 1990]

15.613 Alternative source selection procedures.

(a) The National Aeronautics and Space Administration (NASA) and the Department of Defense (DoD) have developed, and use in appropriate situations, source selection procedures that limit discussions with offerors during the competition, and that differ from other procedures prescribed in subpart 15.6. The procedures are the NASA Source Evaluation Board procedures and the DoD *Four-Step* Source Selection Procedures. Detailed coverage of these procedures is in the respective agency acquisition regulations.

(b) Other agencies may use either the NASA or DoD procedure as a model in developing their own procedures, including applicability criteria, consistent with mission needs.

Subpart 15.7—Make-or-Buy Programs

15.700 Scope of subpart.

This subpart prescribes policies and procedures for obtaining, evaluating, negotiating, and agreeing to prime contractors' proposed make-or-buy programs and for incorporating make-or-buy programs into contracts. Consent to subcontracts and review of contractors' purchasing systems are separate actions covered in part 44, Subcontracting Policies and Procedures.

15.701 Definitions.

Buy item means an item or work effort to be produced or performed by a subcontractor.

Make item means an item or work effort to be produced or performed by the prime contractor or its affiliates, subsidiaries, or divisions.

Make-or-buy program means that part of a contractor's written plan for a contract identifying (a) those major items to be produced or work efforts to be performed in the prime contractor's facilities and (b) those to be subcontracted.

15.702 General.

The prime contractor is responsible for managing contract performance, including planning, placing, and administering subcontracts as necessary to ensure the lowest overall cost and technical risk to the Government. Although the Government does not expect to participate in every management decision, it may reserve the right to review and agree on the contractor's make-or-buy program when necessary to ensure (a) negotiation of reasonable contract prices, (b) satisfactory performance, or (c) implementation of socioeconomic policies.

15.703 Acquisitions requiring make-or-buy programs.

(a) Contracting officers shall require prospective contractors to submit make-or-buy programs for all negotiated acquisitions whose estimated value is $5 million or more, except when the proposed contract—

(1) Is for research or development and—if prototypes or hardware are involved—no significant follow-on production under the same contract is anticipated;

(2) Is priced on the basis of (i) adequate price competition or (ii) established catalog or market prices of commercial items sold in substantial quantities to the general public, or has only prices set by law or regulation (see 15.804-3); or

(3) Involves only work that the contracting officer determines is not complex.

(b) Contracting officers may require prospective contractors to submit make-or-buy programs for negotiated acquisitions whose estimated value is under $5 million only if the contracting officer (1) determines that the information is necessary and (2) documents the reasons in the contract file.

[48 FR 42187, Sept. 19, 1983, as amended at 54 FR 34753, Aug. 21, 1989]

15.704 Items and work included.

The information required from a prospective contractor in a make-or-buy program shall be confined to those major items or work efforts that would normally require company management review of the make-or-buy decision because they are complex, costly, needed in large quantities, or require additional facilities to produce. Raw materials, commercial products (see 11.001), and off-the-shelf items (see 46.101) shall not be included, unless their potential impact on contract cost or schedule is critical. As a rule, make-or-buy programs should not include items or work efforts estimated to cost less than (a) 1 percent of the total estimated contract price or (b) any minimum dollar amount set by the agency, whichever is less.

[48 FR 42187, Sept. 19, 1983, as amended at 51 FR 27119, July 29, 1986; 52 FR 9038, Mar. 20, 1987]

15.705 Solicitation requirements.

When prospective contractors are required to submit proposed make-or-buy programs (see 15.703), the solicitation shall include—

(a) A statement that the program and required supporting information must accompany the offer;

(b) A description of factors to be used in evaluating the proposed program, such as capability, capacity, availability of small business and labor surplus area concerns for subcontracting, establishment of new facilities in or near labor surplus areas, delivery or performance schedules, control of technical and schedule interfaces, proprietary processes, technical superiority or exclusiveness, and technical risks involved; and

(c) A requirement that the offeror's program include or be supported by the following information:

(1) A description of each major item or work effort (see 15.704).

(2) Categorization of each major item or work effort as *must make*, *must buy*, or *can either make or buy*.

(3) For each item or work effort categorized as *can either make or buy*, a proposal either to *make* or to *buy*.

(4) Reasons for (i) categorizing items and work efforts as *must make* or *must buy* and (ii) proposing to *make* or to *buy* those categorized as *can either make or buy*. The reasons must include the consideration given to the evaluation factors described in the solicitation and be in sufficient detail to permit the contracting officer to

evaluate the categorization or proposal.

(5) Designation of the plant or division proposed to make each item or perform each work effort and a statement as to whether the existing or proposed new facility is in or near a labor surplus area.

(6) Identification of proposed subcontractors, if known, and their location and size status (see also subpart 19.7 for subcontracting plan requirements).

(7) Any recommendations to defer make-or-buy decisions when categorization of some items or work efforts is impracticable at the time of submission.

(8) Any other information the contracting officer requires in order to evaluate the program.

15.706 Evaluation, negotiation, and agreement.

(a) Contracting officers shall evaluate and negotiate proposed make-or-buy programs as soon as practicable after their receipt and before contract award. When the program is to be incorporated in the contract (see 15.707) and the design status of the product being acquired does not permit accurate precontract identification of major items or work efforts, the contracting officer shall notify the prospective contractor in writing that these items or efforts, when identifiable, shall be added under the clause at 52.215-21, Changes or Additions to Make-or-Buy Program.

(b) In preparing to evaluate and negotiate prospective contractors' make-or-buy programs, the contracting officer shall request the recommendations of appropriate personnel, including technical and program management personnel, and the activity small and disadvantaged business utilization specialist. The proposed program shall also be made available to the Small Business Administration representative, if any, for review and recommendation. The contracting officer shall request these recommendations early enough to consider them fully before (1) agreeing to a make-or-buy program or (2) consenting to a change in a make-or-buy program already incorporated in a contract.

(c) The contractor has the basic responsibility for make-or-buy decisions. Therefore, its recommendations should be accepted unless they are inconsistent with Government interests or policy.

(d) Contracting officers shall give primary consideration to the effect of the proposed make-or-buy program on price, quality, delivery, and performance, including technical or financial risk involved. The evaluation of *must make* and *must buy* items should normally be confined to ensuring that they are properly categorized. The effect of the following factors on the Government's interests shall also be considered:

(1) Whether the contractor has justified performing work in plant that differs significantly from its normal operations.

(2) Whether the contractor's recommended program requires Government investment in new or other facilities in order for the contractor to perform the work in plant. (This additional cost to the Government would not be reflected in the contract price.)

(3) The impact of the contractor's projected plant work loading on indirect costs.

(4) The contractor's consideration of the competence, ability, experience, and capacity available in other firms, especially small business, small disadvantaged business, or labor surplus area concerns.

(5) The projected location of any required additional facilities in or near labor surplus areas.

(6) The contractor's make-or-buy history regarding the type of item concerned.

(7) The scope of proposed subcontracts, including the type and level of technical effort involved.

(8) Other factors such as future requirements, engineering, tooling, starting load costs, market conditions, technical superiority, and the availability of personnel and materials.

(e) Contracting officers shall not normally agree to proposed *make items* when the products or services are (1) not regularly manufactured or provided by the contractor and are available—quality, quantity, delivery, and other essential factors considered—from another firm at equal or lower prices or when they are (2) regularly manufactured or provided by the contractor, but available—quality, quantity, delivery, and other essential factors considered— from another firm at lower prices. However, the contracting officer may agree to these as *make items* if their categorization as *buy items* would increase the Government's overall cost for the contract or acquisition program.

15.707 Incorporating make-or-buy programs in contracts.

(a) After agreement is reached, the contracting officer may incorporate the make-or-buy program in negotiated contracts for—

(1) Major systems (see part 34) or their subsystems or components, regardless of contract type; or

(2) Other supplies and services if (i) the contract is a cost-reimbursable contract, or a cost-sharing contract in which the contractor's share of the cost is less than 25 percent, and (ii) the contracting officer determines that technical or cost risks justify Government review and approval of changes or additions to the make-or-buy program.

(b) It may be necessary to incorporate some items of significant value in the make-or-buy program as *make* or, alternatively, as *buy* even though the opposite categorization would result in greater economy for the Government. If this situation occurs in any fixed-price incentive or cost-plus-incentive-fee contract, the contracting officer shall specify these items in the contract and state that they are subject to paragraph (d) of the clause at 52.215-21, Changes or Additions to Make-or-Buy Program (see 15.708 below). If the contractor proposes to reverse the categorization of such items during contract performance, the contract price shall be subject to equitable reduction.

15.708 Contract clause.

The contracting officer shall insert the clause at 52.215-21, Changes or Additions to Make-or-Buy Program, in solicitations and contracts when it is contemplated that a make-or-buy program will be incorporated in the contract. If a less economical *make* or *buy* categorization is selected for one or more items of significant value, the contracting officer shall use the clause with (a) its Alternate I, if a fixed-price incentive contract is contemplated, or (b) its Alternate II, if a cost-plus-incentive-fee contract is contemplated.

Subpart 15.8—Price Negotiation

15.800 Scope of subpart.

This subpart prescribes the cost and price negotiation policies and procedures applicable to initial and revised pricing of (a) negotiated prime contracts (including subcontract pricing under them when required) and (b) contract modifications (including modifications to contracts awarded by sealed bidding).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.801 Definitions.

Cost analysis means the review and evaluation of the separate cost elements and proposed profit of (a) an offeror's or contractor's cost or pricing data and (b) the judgmental factors applied in projecting from the data to the estimated costs in order to form an opinion on the degree to which the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

Cost or pricing data means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include such factors as (a) vendor quotations; (b) nonrecurring costs; (c) information on changes in production methods and in production or purchasing volume; (d) data supporting projections of business prospects and objectives and related operations costs; (e) unit-cost trends such as those associated with labor efficiency; (f) make-or-buy decisions; (g) estimated resources to attain business goals; and (h) information on management decisions that could have a significant bearing on costs.

Field pricing support means a review and evaluation of the contractor's or subcontractor's proposal by any or all field pricing support personnel (see 15.805-5(a)(2)).

Forward pricing rate agreement means a written agreement negotiated between a contractor and the Government to make certain rates available during a specified period for use in pricing contracts or modifications. Such rates represent reasonable projections of specific costs that are not easily estimated for, identified with, or generated by a specific contract, contract end item, or task. These projections may include rates for labor, indirect costs, material obsolescence and usage, spare parts provisioning, and material handling.

Price, as used in this subpart, means cost plus any fee or profit applicable to the contract type.

Price analysis means the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit.

Technical analysis, as used in this subpart, means the examination and evaluation by personnel having specialized knowledge, skills, experience, or capability in engineering, science, or management of proposed quantities and kinds of materials, labor, processes, special tooling, facilities, and associated factors set forth in a proposal in order to determine and report on the need for and reasonableness of the proposed resources assuming reasonable economy and efficiency.

[48 FR 42187, Sept. 1983, as amended at 51 FR 36971, Oct. 16, 1986; 53 FR 10829, Apr. 1, 1988]

15.802 Policy.

(a) 10 U.S.C. 2306a and 41 U.S.C. 254(d) provide that all executive agencies shall require a prime contractor or any subcontractor to submit and certify cost or pricing data under certain circumstances. The Acts also require inclusion of contract clauses that provide for reduction of the contract price by any significant amounts that such price was increased because of submission of contractor or subcontractor defective cost or pricing data.

(b) Contracting officers shall—

(1) Purchase supplies and services from responsible sources at fair and reasonable prices;

(2) Price each contract separately and independently and not (i) use proposed price reductions under other contracts as an evaluation factor or (ii) consider losses or profits realized or anticipated under other contracts; and

(3) Not include in a contract price any amount for a specified contingency to the extent that the contract provides for price adjustment based upon the occurrence of that contingency.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 10829, Apr. 1, 1988]

15.803 General.

(a) Since information from sources other than an offeror's or contractor's records may significantly affect the Government's negotiating position, Government personnel shall not disclose to an offeror or contractor any conclusions, recommendations, or portions of administrative contracting officer or auditor reports regarding the offeror's or contractor's proposal without the concurrence of the contracting officer responsible for negotiation. This prohibition does not preclude disclosing discrepancies or mistakes of fact (such as duplications, omissions, and errors in computation) contained in the cost or pricing data supporting the proposal.

(b) Before issuing a solicitation, the contracting officer shall (when it is feasible to do so) develop an estimate of the proper price level or value of the supplies or services to be purchased. Estimates can range from simple budgetary estimates to complex estimates based on inspection of the product itself and review of such items as drawings, specifications, and prior data.

(c) Price negotiation is intended to permit the contracting officer and the offeror to agree on a fair and reasonable price. Price negotiation does not require that agreement be reached on every element of cost. Reasonable compromises may be necessary, and it may not be possible to negotiate a price that is in accord with all the contributing specialists' opinions or with the contracting officer's prenegotiation objective. The contracting officer is responsible for exercising the requisite judgment and is solely responsible for the final pricing decision. The recommendations and counsel of contributing specialists, including auditors, are advisory only. However, the contracting officer should include comments in the price negotiation memorandum when significant audit or other specialist recommendations are not adopted.

(d) The contracting officer's primary concern is the price the Government actually pays; the contractor's eventual cost and profit or fee should be a secondary concern. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the Government. Therefore the contracting officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result and price fair and reasonable to both the Government and the contractor. If, however, the contractor insists on a price or demands a profit or fee that the contracting officer considers unreasonable and the contracting officer has taken all authorized actions (including determining the feasibility of developing an alternative source) without success, the contracting officer shall then refer the contract action to higher authority. Disposition of the action by higher authority should be documented.

15.804 9Cost or pricing data.

15.804-1 General.

(a) Cost or pricing data submitted by an offeror or contractor enable the Government to perform cost or price analysis and ultimately enable the Government and the contractor to negotiate fair and reasonable prices. Cost or pricing data may be submitted actually or by specific identification in writing.

(b) The Armed Services Procurement Manual for Contract Pricing (ASPM No. 1) was issued by the Department of Defense to guide pricing and negotiating personnel. It provides detailed discussions and examples applying pricing policies to pricing problems. ASPM No. 1 is available for use for instruction and professional guidance. However, it is not directive, and its references to Department of Defense forms and regulations should be considered informational only. Copies of ASPM No. 1 (Stock No. 008-000-00221-5) may be purchased from the Superintendent of Documents, Attn: Mail List Section, U.S. Government Printing Office, Washington, DC 20402.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.804-2 Requiring certified cost or pricing data.

(a) (1) Except as provided in 15.804-3, certified cost or pricing data are required before accomplishing any of the following actions:

(i) The award of any negotiated contract (except for unpriced actions such as letter contracts) expected to exceed $100,000.

(ii) The modification of any sealed bid or negotiated contract (whether or not cost or pricing data were initially required) when the modification involves a price adjustment expected to exceed $100,000. (For example, a $30,000 modification resulting from a reduction of $70,000 and an increase of $40,000 is a pricing adjustment exceeding $100,000.) This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for adminstrative convenience in the same modification.

(iii) The award of a subcontract at any tier, if the contractor and each higher tier subcontractor have been required to furnish certified cost or pricing data, when the subcontract is expected to exceed $100,000. (But see 15.804-3(i).)

(iv) The modification of any subcontract covered by subdivision (iii) above, when the price adjustment (see subdivision (ii) above) is expected to exceed $100,000.

(2) If certified cost or pricing data are needed for pricing actions over $25,000 and not in excess of $100,000, they may be obtained. There should be relatively few instances where certified cost or pricing data and inclusion of defective pricing clauses would be justified in awards between $25,000 and $100,000. The data which the contracting officer requires to be submitted shall be limited to that data necessary to determine the reasonableness of the price. Whenever certified cost or pricing data are required for pricing actions of $100,000 or less, the contracting officer shall document the file to justify the requirement. When awarding a contract of $25,000 or less, the contracting officer shall not require certified cost or pricing data.

(b) When certified cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:

(1) The cost or pricing data.

(2) A certificate of current cost or pricing data, in the format specified in 15.804-4, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of final agreement on price.

(c) The requirements of this section also apply to contracts entered into by the head of an agency on behalf of a foreign government.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 10829, Apr. 1, 1988]

15.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

(a) *General.* Except as provided in paragraphs (b) and (c) below, the contracting officer shall not require submission or certification of cost or pricing data when the contracting officer determines that prices are—

(1) Based on adequate price competition (see paragraph (b) below);

(2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public (see paragraph (c) below); or

(3) Set by law or regulation (see paragraph (d) below).

(b) *Adequate price competition.* (1) Price competition exists if—

(i) Offers are solicited;

(ii) Two or more responsible offerors that can satisfy the Government's requirements submit priced offers responsive to the solicitation's expressed requirements; and

(iii) These offerors compete independently for a contract to be awarded to the responsible offeror submitting the lowest evaluated price.

(2) If price competition exists, the contracting officer shall presume that it is adequate unless—

(i) The solicitation is made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete;

(ii) The low offeror has such a decided advantage that it is practically immune from competition; or

(iii) There is a finding, supported by a statement of the facts and approved at a level above the contracting officer, that the lowest price is unreasonable.

(3) A price is *based on* adequate price competition if it results directly from price competition or if price analysis alone clearly demonstrates that the proposed price is reasonable in comparison with current or recent prices for the same or substantially the same items purchased in comparable quantities, terms, and conditions under contracts that resulted from adequate price competition.

(c) *Established catalog or market prices.* A proposal is exempt from the requirement for submission of certified cost or pricing data if the prices are, or are based on, established catalog or established market prices of commercial items sold in substantial quantities to the general public. In order to qualify for this exemption, the terms of the proposed purchase, such as quantity and delivery requirements, should be sufficiently similar to those of the commercial sales that the catalog or market price will be fair and reasonable.

(1) *Established catalog prices* must be recorded in a form regularly maintained by the manufacturer or vendor. This form may be a catalog, price list, schedule, or other verifiable and established record. The record must (i) be published or otherwise available for customer inspection and (ii) state current or last sales price to a significant number of buyers constituting the general public (see subparagraph (5) below).

(2) *Established market prices* are current prices that (i) are established in the course of ordinary and usual trade between buyers and sellers free to bargain and (ii) can be substantiated by data from sources independent of the manufacturer or vendor.

(3) *Commercial items* are supplies or services regularly used for other than Government purposes and sold or traded to the general public in the course of normal business operations.

(4) An item is *sold in substantial quantities* only when the quantities regularly sold are sufficient to constitute a real commercial market. Nominal quantities, such as models, samples, prototypes, or experimental units, do not meet this requirement. For services to be sold in substantial quantities, they must be customarily provided by the offeror, using personnel regularly employed and equipment (if any is necessary) regularly maintained solely or principally to provide the services.

(5) The *general public* is a significant number of buyers other than the Government or affiliates of the offeror; the item involved must not be for Government end use. For the purpose of this subsection 15.804-3, items acquired for *Government end use* include items acquired for foreign military sales.

(6) A price is *based on* a catalog or market price only if the item being purchased is sufficiently similar to the catalog- or market-priced commercial item to ensure that any difference in prices can be identified and justified without resort to cost analysis.

(7) If an item is substantially similar to a commercial item for which there is an established catalog or market price at which substantial quantities are sold to the general public, but the price proposed is not *based on* this catalog or market price (see subparagraph (6) above), the contracting officer may, if doing so will result in a fair and reasonable price, limit any requirement for cost or pricing data to those data that pertain to the differences between the items. When the difference between the catalog or market price of an item or items and the proposed total contract price is $100,000 or more, the contracting officer shall require submission of certified cost or pricing data to identify and justify that difference unless an exemption or waiver is granted.

(8) Even though there is an established catalog or market price of commercial items sold in substantial quantities to the general public, the contracting officer may require cost or pricing data if (i) the contracting officer makes a written finding that the price is not reasonable, including the facts upon which the finding is based, and (ii) the finding is approved at a level above the contracting officer.

(d) *Prices set by law or regulation.* A price set by law or regulation is exempt from the requirement for submission of certified cost or pricing data. Pronouncements in the form of periodic rulings, reviews, or similar actions of a governmental body, or embodied in the laws, are sufficient to establish the price.

(e) *Claiming and granting exemption.* To receive an exemption under paragraph (c) or (d) above, the offeror must ordinarily claim it on Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, when the total proposed amount exceeds $100,000 and more than one catalog item for which an exemption is claimed exceeds $25,000. When an exemption is claimed for more than one item in a proposal, a separate SF 1412 is required for each such item exceeding $25,000 except as otherwise provided in the solicitation. The contracting officer may grant an exemption and need not require the submission of SF 1412 when—

(1) The Government has acted favorably on an exemption claim for the same item or similar items within the past year. In that case, except as otherwise directed by the contracting officer, the offeror may furnish a copy of the prior claim and related Government action. The offeror must also submit a statement to the effect that to its knowledge since the prior submission, except as expressly set forth in the statement, there have been no changes in the catalog price or discounts, volume of actual sales, or the ratio of sales for Government end use to sales in other categories which would cause a cumulative change in price exceeding $25,000;

(2) Special arrangements for the submission of exemption claims have been made in anticipation of repetitive acquisitions of catalog items; or

(3) There is evidence, before solicitation, that the item has an acceptable established catalog or market price or a price set by law or regulation. Evidence may include (i) recent submissions by offerors or (ii) the contracting officer's knowledge of market conditions, prevailing prices, or sources.

(f) *Verification.* (1) When a prospective contractor requests exemption from submission of certified cost or pricing data, the contracting officer shall ensure that applicable criteria in either paragraph (c) or (d) above, as appropriate, are satisfied before issuing the exemption.

(2) SF 1412 lists three categories of sales related to the established catalog price of a commercial item sold in substantial quantities to the general public: A, Sales to the U.S. Government or to contractors for U.S. Government use; B, Sales at catalog price to the general public; and C, Sales to the general public at other than catalog price. Although *substantial quantities* cannot be precisely defined (see subparagraph (c)(4) above), the following guidelines are provided for determining whether exemption claims submitted under the catalog price provision of SF 1412 meet the *substantial quantities* criterion:

(i) Sales to the general public are normally regarded as substantial if (A) Category B and C sales are not negligible in themselves and comprise at least 55 percent of total sales of the item and (B) Category B sales comprise at least 75 percent of the total of Category B and C sales.

(ii) Sales to the general public are rarely considered substantial enough to grant an exemption if (A) Category B and C sales comprise less than 35 percent of total sales of the item or (B) Category B sales comprise less than 55 percent of the total of Category B and C sales.

(iii) When percentages fall between those above, the contracting officer should analyze the individual situation in order to determine whether or not an exemption is justified.

(3) The contracting officer may verify or obtain verification (including audit or contract administration assistance) of the submitted data pertaining to catalog or market prices or prices set by law or regulation. Access to the prospective contractor's records is limited to access to the facts bearing directly on the exemption claimed. It does not extend to cost, profit, or other data relevant solely to the reasonableness of the catalog or proposed price.

(g) *Individual or class exemptions.* The chief of the contracting office may authorize individual or class exemptions for exceptional cases when the contracting officer recommends that an exemption should be made even though the case does not strictly meet all the criteria for catalog- or market-price exemption. The quantity and prices of actual commercial sales compared with prices offered to the Government, and price relationships as influenced by prevailing trade practices, are the important factors for consideration. The Government's need and the prospective contractor's resistance are not appropriate considerations.

(h) *Price analysis.* Even though an item qualifies for exemption from the requirement for submission of certified cost or pricing data, the contracting officer shall make a price analysis to determine the reasonableness of the price and any need for further negotiation. Unless information is available from Government sources, it may be necessary to obtain from the prospective contractor information such as that regarding—

(1) The supplier's marketing system (e.g., use of jobbers, brokers, sales agencies, or distributors);

(2) The services normally provided commercial purchasers (e.g., engineering, financing, or advertising or promotion);

(3) Normal quantity per order; and

(4) Annual volume of sales to largest customers.

(i) *Waiver for exceptional cases.* The agency head (or, if the contract is with a foreign government or agency, the head of the contracting activity) may, in exceptional cases, waive the requirement for submission of certified cost or pricing data. The authorization for the waiver and the reasons for granting it shall be in writing. The agency head may delegate this authority. When the agency head or designee has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates shall be considered as having been required to make available cost or pricing data for purposes of 15.804-2(a)(1)(iii). Consequently, award of any lower-tier subcontract expected to exceed $100,000 requires the submission of certified cost or pricing data unless exempt or waived under this subsection 15.804-3.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2650, Jan. 17, 1986; 53 FR 10829, Apr. 1, 1988]

15.804-4 Certificate of Current Cost or Pricing Data.

(a) When certified cost or pricing data are required under 15.804-2, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data, shown below, and shall include the executed certificate in the contract file. The certificate states that the cost or pricing data are accurate, complete, and current as of the date the contractor and the Government agreed on a price. Only one certificate shall be required; the contractor shall submit it as soon as practicable after price agreement is reached.

CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15.801 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.804-2) submitted, either actually or by specific identification in writing, to the contracting officer or to the contracting officer's representative in support of ————* are accurate, complete, and current as of ————**. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm ————————————————
Name ————————————————
Title ————————————————
Date of execution*** ————————

*Identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No.).

**Insert the day, month, and year when price negotiations were concluded and price agreement was reached.

***Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

(End of certificate)

(b) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections. It does apply to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(c) Closing or cutoff dates should be included as part of the data submitted with the proposal. Certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Before agreement on price, the contractor shall update all data as of the latest dates for which information is reasonably available. Data within the contractor's or a subcontractor's organization on matters significant to contractor management and to the Government will be treated as reasonably available. What is significant depends upon the circumstances of each acquisition.

(d) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the contractor's proposal.

(e) Even though the solicitation may have requested cost or pricing data, the contracting officer shall not require a Certificate of Current Cost or Pricing Data when the resulting award is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation (see 15.804-3(a) through (d)).

(f) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification.

(g) Contracting officers shall not require certification at the time of agreement for data supplied in support of forward pricing rate agreements (see 15.809) or other advance agreements. When a forward pricing rate agreement or other advance agreement is used in partial support of a later contractual action that requires a certificate, the price proposal certificate shall cover (1) the data originally supplied to support the forward pricing rate agreement or other advance agreement and (2) all data required to update the price proposal to the time of agreement on contract price.

(h) Negotiated final pricing actions (such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring certified cost or pricing data if (1) the total final price agreement for such settlements or agreements exceeds $100,000 or (2) the partial termination settlement plus the estimate to complete the continued portion of the contract exceeds $100,000 (see 49.105(c)(15)).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.804-5 [Reserved]

15.804-6 Procedural requirements.

(a) The contracting officer shall specify (1) whether or not cost or pricing data are required, (2) whether or not certification will be required, (3) the extent of cost or pricing data required if complete data are not necessary, and (4) the form (see paragraph (b) below) in which the cost or pricing data shall be submitted. Even if the solicitation does not so specify, however, the contracting officer is not precluded from requesting such data if they are later found necessary.

(b) (1) Cost or pricing data shall be submitted on Standard Form 1411 (SF 1411), Contract Pricing Proposal Cover Sheet, unless required to be submitted on one of the termination forms specified in subpart 49.6. Data supporting forward pricing rate agreements or final indirect cost proposals shall be submitted in a format acceptable to the contracting officer.

(2) Contract pricing proposals submitted on SF 1411 with supporting attachments shall be prepared to satisfy the instructions and appropriate format of Table 15-2.

TABLE 15-2 INSTRUCTIONS FOR SUBMISSION OF A CONTRACT PRICING PROPOSAL

1. SF 1411 provides a vehicle for the offeror to submit to the Government a pricing proposal of estimated and/or incurred costs by contract line item with supporting information, adequately cross-referenced, suitable for detailed analysis. A cost-element breakdown, using the applicable format prescribed in 7A, B, or C below, shall be attached for each proposed

line item and must reflect any specific requirements established by the contracting officer. Supporting breakdowns must be furnished for each cost element, consistent with offeror's cost accounting system. When more than one contract line item is proposed, summary total amounts covering all line items must be furnished for each cost element. If agreement has been reached with Government representatives on use of forward pricing rates/factors, identify the agreement, include a copy, and describe its nature. Depending on offeror's system, breakdowns shall be provided for the following basic elements of cost, as applicable:

Materials—Provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc.). Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price.

Competitive Methods—For those acquisitions (e.g. subcontracts, purchase orders, material orders, etc.) over $100,000 priced on a competitive basis, also provide data showing degree of competition, and the basis for establishing the source and reasonableness of price. For interorganizational transfers priced at other than cost of the comparable competitive commercial work of the division, subsidiary, or affiliate of the contractor, explain the pricing method (see 31.205-26(e)).

Established Catalog or Market Prices/Prices Set by Law or Regulation—When an exemption from the requirement to submit cost or pricing data is claimed, whether the item was produced by others or by the offeror, provide justification for the exemption as required by 15.804-3(e).

Noncompetitive Methods—For those acquisitions (e.g. subcontracts, purchase orders, material orders, etc.) over $100,000 priced on a noncompetitive basis, also provide data showing the basis for establishing source and reasonableness of price. For standard commercial items fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown if priced based on cost. For interorganizational transfers priced at cost, provide a separate breakdown of cost by elements. As required by 15.806-2(a), provide a copy of cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is either: (i) $1,000,000 or more, or (ii) both more than $100,000 and more than 10 percent of the prime contractor's proposed price. The contracting officer may require submission of cost or pricing data in support of proposals in lower amounts. Submit the results of the analysis of the prospective source's proposal as required by 15.806. When the submission of a prospective source's cost or pricing data is required as described above, it shall be included as part of the offeror's initial pricing proposal.

Direct Labor—Provide a time-phased (e.g., monthly, quarterly, etc.) breakdown of labor hours, rates, and cost by appropriate category, and furnish bases for estimates.

Indirect Costs—Indicate how offeror has computed and applied offeror's indirect costs, including cost breakdowns, and showing trends and budgetary data, to provide a basis for evaluating the reasonableness of proposed rates. Indicate the rates used and provide an appropriate explanation.

Other Costs—List all other costs not otherwise included in the categories described above (e.g., special tooling, travel, computer and consultant services, preservation, packaging and packing, spoilage and rework, and Federal excise tax on finished articles) and provide bases for pricing.

Royalties—If more than $250, provide the following information on a separate page for each separate royalty or license fee: name and address of licensor; date of license agreement; patent numbers, patent application serial numbers, or other basis on which the royalty is payable; brief description (including any part or model numbers of each contract item or component on which the royalty is payable); percentage or dollar rate of royalty per unit; unit price of contract item; number of units; and total dollar amount of royalties. In addition, if specifically requested by the contracting officer, provide a copy of the current license agreement and identification of applicable claims of specific patents. (See FAR 27.204 and 31.205-37).

Facilities Capital Cost of Money—When the offeror elects to claim facilities capital cost of money as an allowable cost, the offeror must submit Form CASB-CMF and show the calculation of the proposed amount (see FAR 31.205-10).

2. As part of the specific information required, the offeror must submit with offeror's proposal, and clearly identify as such, cost or pricing data (that is, data that are verifiable and factual and otherwise as defined at FAR 15.801). In addition, submit with offeror's proposal any information reasonably required to explain offeror's estimating process, including—

a. The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

b. The nature and amount of any contingencies included in the proposed price.

3. There is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of cost or pricing data is met when all accurate cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the contracting officer or an authorized representative. As later information comes into the offeror's possession, it should be promptly submitted to the contracting officer. The requirement for submission of cost or pricing data continues up to the time of final agreement on price.

4. In submitting offeror's proposal, offeror must include an index, appropriately referenced, of all the cost or pricing data and information accompanying or identified in the proposal. In addition, any future additions and/or revisions, up to the date of agreement on price, must be annotated on a supplemental index.

5. By submitting offeror's proposal, the offeror, if selected for negotiation, grants the contracting officer or an authorized representative the right to examine, at any time before award, those books, records, documents, and other types of factual information, regardless of form or whether such supporting information is specifically referenced or included in the proposal as the basis for pricing, that will permit an adequate evaluation of the proposed price.

6. As soon as practicable after final agreement on price, but before the award resulting from the proposal, the offeror shall, under the conditions stated in FAR 15.804-4, submit a Certificate of Current Cost or Pricing Data.

7. HEADINGS FOR SUBMISSION OF LINE-ITEM SUMMARIES:

A. New Contracts (including Letter contracts).

COST ELEMENTS (1)	PROPOSED CONTRACT ESTIMATE—TOTAL COST (2)	PROPOSED CONTRACT ESTIMATE—UNIT COST (3)	REFERENCE (4)

Under Column (1)—Enter appropriate cost elements.

Under Column (2)—Enter those necessary and reasonable costs that in offeror's judgment will properly be incurred in efficient contract performance. When any of the costs in this column have already been incurred (e.g., under a letter contract or unpriced order), describe them on an attached supporting schedule. When preproduction or startup costs are significant, or when specifically requested to do so by the contracting officer, provide a full identification and explanation of them.

Under Column (3)—Optional, unless required by the contracting officer.

Under Column (4)—Identify the attachment in which the information supporting the specific cost element may be found. Attach separate pages as necessary.

B. Change Orders (modifications).

COST ELEMENTS (1)	ESTIMATED COST OF ALL WORK DELETED (2)	COST OF DELETED WORK ALREADY PERFORMED (3)	NET COST TO BE DELETED (4)	COST OF WORK ADDED (5)	NET COST OF CHANGE (6)	REFERENCE (7)

Under Column (1)—Enter appropriate cost elements.

Under Column (2)—Include (i) current estimates of what the cost would have been to complete deleted work not yet performed, and (ii) the cost of deleted work already performed.

Under Column (3)—Include the incurred cost of deleted work already performed, actually computed if possible, or estimated in the contractor's accounting records. Attach a detailed inventory of work, materials, parts, components, and hardware already purchased, manufactured, or performed and deleted by the change, indicating the cost and proposed disposition of each line item. Also, if offeror desires to retain these items or any portion of them, indicate the amount offered for them.

Under Column (4)—Enter the net cost to be deleted which is the estimated cost of all deleted work less the cost of deleted work already performed. Column (2) less Column (3) = Column (4).

Under Column (5)—Enter the offeror's estimate for cost of work added by the change. When nonrecurring costs are significant, or when specifically requested to do so by the contracting officer, provide a full identification and explanation of them.

Under Column (6)—Enter the net cost of change which is the cost of work added, less the net cost to be deleted. When the result is negative, place the amount in parentheses. Column (4) less Column (5) = Column (6).

Under Column (7)—Identify the attachment in which the information supporting the specific cost element may be found. Attach separate pages as necessary.

C. Price Revision/Redetermination.

CUTOFF DATE (1)	NUMBER OF UNITS COMPLETED (2)	NUMBER OF UNITS TO BE COMPLETED (3)	CONTRACT AMOUNT (4)	REDETERMINATION PROPOSAL AMOUNT (5)	DIFFERENCE (6)

COST ELEMENTS (7)	INCURRED COST—PREPRODUCTION (8)	INCURRED COST—COMPLETED UNITS (9)	INCURRED COST—WORK IN PROCESS (10)	TOTAL INCURRED COST (11)	ESTIMATED COST TO COMPLETE (12)	ESTIMATED TOTAL COST (13)	REFERENCE (14)

Under Column (1)—Enter the cutoff date required by the contract, if applicable.

Under Column (2)—Enter the number of units completed during the period for which experienced costs of production are being submitted.

Under Column (3)—Enter the number of units remaining to be completed under the contract.

Under Column (4)—Enter the cumulative contract amount.

Under Column (5)—Enter the offeror's redetermination proposal amount.

Under Column (6)—Enter the difference between the contract amount and the redetermination proposal amount. When this result is negative, place the amount in parentheses. Column (4) less Column (5) = Column (6).

Under Column (7)—Enter appropriate cost elements. When residual inventory exists, the final costs established under fixed-price-incentive and fixed-price-redeterminable arrangements should be net of the fair market value of such inventory. In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status.

Under Column (8)—Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from offeror's books and records as of the cutoff date. These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc. In the event the amounts are not segregated in or otherwise available from offeror's records, enter in this column offeror's best estimates. Explain the basis for each estimate and how the costs are charged on offeror's accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing overhead, etc.). Also show how the costs would be allocated to the units at their various stages of contract completion.

Under Columns (9) and (10)—Enter in Column (9) the production costs from offeror's books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date. Enter in Column (10) the costs of work in process as determined from offeror's records or inventories at the cutoff date. When the amounts for work in process are not available in contractor's records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates. Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc. Furnish experienced unit or lot costs (or labor hours) from inception of contract to the cutoff date, improvement curves, and any other available production cost history pertaining to the item(s) to which offeror's proposal relates.

Under Column (11)—Enter total incurred costs (Total of Columns (8), (9), and (10)).

Under Column (12)—Enter those necessary and reasonable costs that in contractor's judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which contractor's proposal relates.

Under Column (13)—Enter total estimated cost (Total of Columns (11) and (12)).

Under Column (14)—Identify the attachment in which the information supporting the specific cost element may be found. Attach separate pages as necessary.

(c) Closing or cutoff dates should be included as part of the data submitted with the proposal. If possible, the contracting officer and offeror should reach a prior understanding on criteria for establishing closing or cutoff dates (see 15.804-4(c)).

(d) The requirement for submission of cost or pricing data is met if all cost or pricing data reasonably available to the offeror are either submitted or identified in writing by the time of agreement on price. However, there is a clear distinction between submitting cost or pricing data and merely making available books, records, and other documents without identification. The latter does not constitute *submission* of cost or pricing data.

(e) If cost or pricing data and information required to explain the estimating process are required and the offeror initially refuses to provide necessary data, or the contracting officer determines that the data provided is so deficient as to preclude adequate analysis and evaluation, the contracting officer shall again attempt to secure the data and/or elicit corrective action. If the offeror still persists in refusing to provide the needed data or to take corrective action, the contracting officer shall withhold the award or price adjustment and refer the contract action to higher authority, including details of the attempts made to resolve the matter and a statement of the practicability of obtaining the supplies or services from another source.

(f) Preproduction and startup costs include costs such as preproduction engineering, special tooling, special plant rearrangement, training programs, and such nonrecurring costs as initial rework, initial spoilage, and pilot runs. When these costs may be a significant cost factor in an acquisition, the contracting officer shall require in the solicitation that the offeror provide (1) an estimate of total preproduction and startup costs, (2) the extent to which these costs are included in the proposed price, and (3) the intent to absorb, or plan for recovery of, any remaining costs. If a successful offeror has indicated an intent to absorb any portion of these costs, the contract shall expressly provide that such portion will not be charged to the Government in any future noncompetitive pricing action.

(g) The requirements for contractors to obtain cost or pricing data from prospective subcontractors, to analyze these data and to submit the results of the analyses are prescribed in 15.806.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 27119, July 29, 1986; 53 FR 17858, May 18, 1988; 54 FR 34753, Aug. 21, 1989]

15.804-7 Defective cost or pricing data.

(a) If, before agreement on price, the contracting officer learns that any cost or pricing data submitted are inaccurate, incomplete, or noncurrent, the contracting officer shall immediately bring the matter to the attention of the prospective contractor, whether the defective data increase or decrease the contract price. The contracting officer shall negotiate, using any new data submitted or making satisfactory allowance for the incorrect data. The price negotiation memorandum shall reflect the revised facts.

(b)(1) If, after award, cost or pricing data are found to be inaccurate, incomplete, or noncurrent as of the date of final agreement on price given on the contractor's or subcontractor's Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data. This entitlement is ensured by including in the contract one of the clauses prescribed in 15.804-8 and set forth at 52.215-22, Price Reduction for Defective Cost or Pricing Data, and 52.215-23, Price Reduction for Defective Cost or Pricing Data—Modifications. The clauses give the Government the right to a price adjustment for defects in cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor.

(2) In arriving at a price adjustment, the contracting officer shall consider (i) the time by which the cost or pricing data became reasonably available to the contractor and (ii) the extent to which the Government relied upon the defective data.

(3) The clauses referred to in paragraph (b)(1) of this section recognize that the Government's right to a price adjustment is not affected by any of the following circumstances:

(i) The contractor or subcontractor was a sole source supplier or otherwise was in a superior bargaining position;

(ii) The contracting officer should have known that the cost or pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each such item procured under such contract; or

(iv) The prime contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data relating to the contract.

(4) Subject to paragraphs (b)(5) and (b)(6) of this section, the contracting officer shall allow an offset for any understated cost or pricing data submitted in support of price negotia-

tions, up to the amount of the Government's claim for overstated pricing data arising out of the same pricing action (for example, the initial pricing of the same contract or the pricing of the same change order).

(5) An offset shall be allowed only in an amount supported by the facts and if the contractor (i) certifies to the contracting officer that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset in the amount requested, and (ii) proves that the cost or pricing data were available before the date of agreement on price but were not submitted. Such offsets need not be in the same cost groupings (e.g., material, direct labor, or indirect costs).

(6) An offset shall not be allowed if (i) the understated data was known by the contractor to be understated when the Certificate of Current Cost or Pricing Data was signed, or (ii) the Government proves that the facts demonstrate that the price would not have increased in the amount to be offset even if the available data had been submitted before the date of agreement on price.

(c) If, after award, the contracting officer learns or suspects that the data furnished were not accurate, complete, and current, or were not adequately verified by the contractor as of the time of negotiation, the contracting officer shall request an audit to evaluate the accuracy, completeness, and currency of the data. Only if the audit reveals that the data certified by the contractor were defective may the Government evaluate the profit-cost relationships. The contracting officer shall not reprice the contract solely because the profit was greater than forecast or because some contingency specified in the submission failed to materialize.

(d) For each advisory audit received based on a postaward review which indicates defective pricing, the contracting officer shall make a determination as to whether or not the data submitted were defective and relied upon. Before making such a determination, the contracting officer should give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question. The contracting officer shall prepare a memorandum indicating (1) the contracting officer determination as to whether or not the submitted data were accurate, complete, and current as of the certified date and whether or not the Government relied on the data, and (2) the results of any contractual action taken. The contracting officer shall send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the administrative contracting officer (ACO). The contracting officer shall notify the contractor by copy of this memorandum, or otherwise, of the determination.

(e) If (1) both contractor and subcontractor submitted and (2) the contractor certified, or should have certified, cost or pricing data, the Government has the right, under the clauses at 52.215-22, Price Reduction for Defective Cost or Pricing Data, and 52.215-23, Price Reduction for Defective Cost or Pricing Data—Modifications, to reduce the prime contract price if it was significantly increased because a subcontractor submitted defective data. This right applies whether these data supported subcontract cost estimates or supported firm agreements between subcontractor and contractor.

(f) If Government audit discloses defective subcontractor cost or pricing data, the information necesssary to support a reduction in prime contract and subcontract prices may be available only from the Government. To the extent necessary to secure a prime contract price reduction, the contracting officer should make this information available to the prime contractor or appropriate subcontractors upon request. If release of the information would compromise Government security or disclose trade secrets or confidential business information, the contracting officer shall release it only under conditions that will protect it from improper disclosure. Information made available under this paragraph shall be limited to that used as the basis for the prime contract price reduction. In order to afford an opportunity for corrective action, the contracting officer should give the prime contractor reasonable advance notice before determining to reduce the prime contract price.

(1) When a prime contractor includes defective subcontract data in arriving at the price but later awards the subcontract to a lower priced subcontractor (or does not subcontract for the work), any adjustment in the prime contract price due to defective subcontract data is limited to the difference (plus applicable indirect cost and profit markups) between (i) the subcontract price used for pricing the prime contract and (ii) either the actual subcontract price or the actual cost to the contractor, if not subcontracted, provided the data on which the actual subcontract price is based are not themselves defective.

(2) Under cost-reimbursement contracts and under all fixed-price contracts except (i) firm-fixed-price contracts and (ii) contracts with economic price adjustment, payments to subcontractors that are higher than they would be had there been no defective subcontractor cost or pricing data shall be the basis for disallowance or nonrecognition of costs under the clauses prescribed in 15.804-8. The Government has a continuing and direct financial interest in such payments that is unaffected by the initial agreement on prime contract price.

[48 FR 42187, Sept. 19, 1983, as amended at 53 FR 10829, Apr. 1, 1988]

15.804-8 Contract clauses.

(a) *Price reduction for defective cost or pricing data.* The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-22, Price Reduction for Defective Cost or Pricing Data, in solicitations and contracts when it is contemplated that cost or pricing data will be required from the contractor or any subcontractor (see 15.804-2).

(b) *Price reduction for defective cost or pricing data—modifications.* The contracting officer shall, when contracting by negotiation, insert the clause at 52.215-23, Price Reduction for Defective Cost or Pricing Data—Modifications, in solicitations and contracts when (1) it is contemplated that cost or pricing data will be required from the contractor or any subcontractor (see 15.804-2) for the pricing of contract modifications, and (2) the clause prescribed in paragraph (a) of this subsection has not been included.

(c) *Subcontractor cost or pricing data.* The contracting officer shall insert the clause at 52.215-24, Subcontractor Cost or Pricing Data, in solicitations and contracts when the clause prescribed in paragraph (a) above is included.

(d) *Subcontractor cost or pricing data—modifications.* The contracting officer shall insert the clause at 52.215-25, Subcontractor Cost or Pricing Data—Modifications, in solicitations and contracts when the clause prescribed in paragraph (b) above is included.

(e) *Termination of Defined Benefit Pension Plans.* The contracting officer shall insert the clause at 523.215-27, Termination of Defined Benefit Pension Plans, in all solicitations and contracts for which it is anticipated that certified cost or pricing data will be required and for which any preaward or post-award cost determinations will be subject to subpart 31.2.

[48 FR 42187, Sept. 19, 1983, as amended at 53 FR 10830, Apr. 1, 1988; 54 FR 34753, Aug. 21, 1989]

15.805 Proposal analysis.

15.805-1 General.

(a) The contracting officer, exercising sole responsibility for the final pricing decision, shall, as appropriate, coordinate a team of experts and request and evaluate the advice of specialists in such fields as contracting, finance, law, contract audit, packaging, quality control, engineering traffic management, and contract pricing. The contracting officer should have appropriate specialists attend the negotiations when complex problems involving significant matters will be addressed. The contracting officer may assign responsibility to a negotiator or price analyst for (1) determining the extent of specialists' advice needed and evaluating that advice, (2) coordinating a team of experts, (3) consolidating pricing data and developing a prenegotiation objective (see 15.807), and (4) conducting negotiations.

(b) When cost or pricing data are required, the contracting officer shall make a cost analysis to evaluate the reasonableness of individual cost elements. In addition, the contracting officer should make a price analysis to ensure that the overall price offered is fair and reasonable. When cost or pricing data are not required, the contracting officer shall make a price analysis to ensure that the overall price offered is fair and reasonable.

(c) The contracting officer shall require prospective contractors to perform (1) price analysis for all significant proposed subcontracts and purchase orders and (2) cost analysis when the prospective subcontractor is required to submit cost or pricing data or the contractor is unable to perform an adequate price analysis (see 15.806(a)).

15.805-2 Price analysis.

The contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. One or more of the following techniques may be used to perform price analysis:

(a) Comparison of proposed prices received in response to the solicitation.

(b) Comparison of prior proposed prices and contract prices with current proposed prices for the same or similar end items.

(c) Application of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that warrant additional pricing inquiry.

(d) Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

(e) Comparison of proposed prices with independent Government cost estimates (see 15.803(b)).

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.805-3 Cost analysis.

The contracting officer shall, as appropriate, use the techniques and procedures outlined in paragraphs (a) through (f) below to perform cost analysis:

(a) Verification of cost or pricing data and evaluation of cost elements, including—

(1) The necessity for and reasonableness of proposed costs, including allowances for contingencies;

(2) Projection of the offeror's cost trends, on the basis of current and historical cost or pricing data;

(3) A technical appraisal of the estimated labor, material, tooling, and facilities requirements and of the reasonableness of scrap and spoilage factors; and

(4) The application of audited or negotiated indirect cost rates (see subpart 42.7), labor rates, and cost of money or other factors.

(b) Evaluating the effect of the offeror's current practices on future costs. In conducting this evaluation, the contracting officer shall ensure that the effects of inefficient or uneconomical past practices are not projected into the future. In pricing production of recently developed, complex equipment, the contracting officer should make a trend analysis of basic labor and materials even in periods of relative price stability.

(c) Comparison of costs proposed by the offeror for individual cost elements with—

(1) Actual costs previously incurred by the same offeror;

(2) Previous cost estimates from the offeror or from other offerors for the same or similar items;

(3) Other cost estimates received in response to the Government's request;

(4) Independent Government cost estimates by technical personnel; and

(5) Forecasts or planned expenditures.

(d) Verification that the offeror's cost submissions are in accordance with the contract cost principles and procedures in part 31 and, when applicable, the requirements and procedures in part 30, Cost Accounting Standards.

(e) Review to determine whether any cost or pricing data necessary to make the contractor's proposal accurate, complete, and current have not been either submitted or identified in writing by the contractor. If there are such data, the contracting officer shall attempt to obtain them and negotiate, using them or making satisfactory allowance for the incomplete data.

(f) Analysis of the results of any make-or-buy program reviews, in evaluating subcontract costs.

15.805-4 Technical analysis.

When cost or pricing data are required, the contracting officer should generally request a technical analysis of proposals, asking that requirements, logistics, or other appropriate qualified personnel review and assess, as a minimum—

(a) The quantities and kinds of material proposed;

(b) The need for the number and kinds of labor hours and the labor mix;

(c) The special tooling and facilities proposed;

(d) The reasonableness of proposed scrap and spoilage factors; and

(e) Any other data that may be pertinent to the cost or price analysis.

15.805-5 Field pricing support.

(a)(1) When cost or pricing data are required, contracting officers shall request a field pricing report (which may include an audit review by the cognizant contract audit activity) before negotiating any contract or modification resulting from a proposal in excess of $500,000, except as otherwise authorized under agency procedures, unless information available to the contracting officer is considered adequate to determine the reasonableness of the proposed cost or price. When available data are considered adequate for a reasonableness determination, the contracting officer shall document the contract file to reflect the basis of the determination.

(2) Field pricing reports are intended to give the contracting officer a detailed analysis of the proposal, for use in contract negotiations. Field pricing support personnel include, but are not limited to, administrative contracting officers, contract auditors, price analysts, quality assurance personnel, engineers, and small business and legal specialists.

(b) Contracting officers should not request field pricing support for proposed contracts or modifications of an amount less than that specified in subparagraph (a)(1) above. An exception may be made when a reasonable pricing result cannot be established, because of (1) lack of knowledge of the particular contractor, (2) sensitive conditions, or (3) an inability to evaluate the price reasonableness through price analysis or cost analysis of existing data.

(c)(1) When initiating field pricing support, the contracting officer shall do so by sending a request to the cognizant administrative contracting officer (ACO). When field pricing support is not available, or is exempted by agency regulations, the contracting officer may initiate an audit by sending the request directly to the cognizant audit office. In both cases, the contracting officer shall, in the request, (i) prescribe the extent of the support needed, (ii) state the specific areas for which input is required, (iii) include the information necessary to perform the review (such as the offeror's proposal and the applicable portions of the solicitation, particularly those describing requirements and delivery schedules), and (iv) assign a realistic deadline for receipt of the report.

(2) Assignment of unrealistically short deadlines may reduce the quality of the audit and field pricing reports and may make it impossible to establish the fairness and reasonableness of the price.

(3) Agency field pricing procedures shall not preclude free and open communication among the contracting officer, ACO, and auditor.

(d) Only the auditor shall have general access to the offeror's books and financial records. This limitation does not preclude the contracting officer, the ACO, or their representatives from requesting any data from or reviewing offeror records necessary to the discharge of their responsibilities. The duties of auditors and those of other specialists may require both to evaluate the same elements of estimated costs. They shall review the data jointly or concurrently when possible, the auditor rendering services within the audit area of responsibility and the other specialists rendering services within their own areas of responsibility. The ACO or auditor, as appropriate, shall orally notify the contracting officer immediately of data provided that is so deficient as to preclude review and any denial of access to records or to cost or pricing data considered essential to the performance of satisfactory review. The oral notification shall be promptly confirmed in writing to the contracting officer describing the deficient or denied data or records, with copies of the deficient data if requested by the contracting officer, the need for the evidence, and the costs unsupported as a result of the denial. The contracting officer shall review the written notification and shall take immediate action to obtain the data needed. If the offeror persists in refusing to provide the data, and the contracting officer determines that the data is essential for a fair and reasonable price determination, then the contracting officer shall proceed with the action outlined in 15.804-6(e).

(e) The auditor shall begin the audit as soon as possible after receiving the contracting officer's request. The auditor is responsible for the scope and depth of the audit. As a minimum, the audit report shall include the following:

(1) The findings on specific areas listed in the contracting officer's request.

(2) An explanation of the basis and method used by the offeror in proposal preparation.

(3) An identification of the original proposal and of all subsequent written formal and other identifiable submissions by which cost or pricing data were either submitted or identified.

(4) A description of cost or pricing data coming to the attention of the auditor that were not submitted but that may have a significant effect on the proposed cost or price.

(5) A list of any cost or pricing data submitted that are not accurate, complete and current and of any cost representations that are unsupported. When the result of deficiencies is so great that the auditor cannot perform an audit or considers the proposal unacceptable as a basis for negotiation, the contracting officer shall be orally notified so that prompt corrective action may be taken, as provided by 15.805-5(d). The auditor will immediately confirm the notification in writing, explaining the deficiencies and the cost impact on the proposal.

(6) The originals of all technical analyses received by the auditor and a quantification of the dollar effect of the technical analysis findings.

(7) If the auditor believes that the offeror's estimating methods or accounting system are inadequate to support the proposal or to permit satisfactory administration of the contract contemplated, a statement to that effect.

(8) A statement of the extent to which the auditor has discussed discrepancies or mistakes of fact in the proposal with the offeror.

(f) The auditor shall not discuss auditor conclusions or recommendations on the offeror's estimated or projected costs with the offeror unless specifically requested to do so by the contracting officer.

(g) If field pricing support was not requested, the auditor shall send the completed audit report directly to the contracting officer. If field pricing support was requested, the auditor shall send the completed audit report to the ACO for forwarding, without change, with the field pricing report. The ACO shall consolidate the field pricing report inputs and send a field pricing report, accompanied by the original copy of the audit report, to the contracting officer by the assigned date. The ACO shall send the auditor a copy of the field pricing report (without the audit report and technical analysis). Audit and field pricing reports shall be made a part of the official contract file.

(h) If any information is disclosed after submission of a proposal that may significantly affect the audit findings, the contracting officer shall require the offeror to provide concurrent copies to the appropriate field pricing office (ACO and audit offices). In that case, the ACO or auditor, as appropriate, will be requested to immediately review the disclosed information and orally report the findings to the contracting officer, followed by a supplemental report when considered necessary.

(i) The requirements for field pricing support reports for subcontracts are prescribed in 15.806.

(j) Field pricing reports, including audit and technical reports, may contain proprietary and/or source selection information (see 3.104–4 (j) and (k)), and the cover page and all pages containing such information should be marked with the appropriate legend and protected accordingly.

(k) For contracts and contract modifications expected to exceed $100,000, activities submitting field pricing reports, including audit and technical reports, shall furnish with each report a list of all persons, or classes of persons, and, to the maximum extent practicable, the names of the individuals within the class, who have been provided access to the proprietary or source selection information (see 3.104–5(d)) at or by the activity.

[48 FR 42187, Sept. 19, 1983, as amended at 51 FR 27119, July 29, 1986; 51 FR 36971, Oct. 16, 1986; 54 FR 20496, May 11, 1989; 54 FR 34753, Aug. 21, 1989; 55 FR 36796, Sept. 6, 1990]

Effective Date Note: At 54 FR 50718, Dec. 8, 1989, paragraph (j) in section 15.805–5 was suspended for the period December 1, 1989, through November 30, 1990.

15.806 Subcontract pricing considerations.

[48 FR 42187, Sept. 19, 1983, as amended at 54 FR 34753, Aug. 21, 1989]

15.806–1 General.

(a)(1) The contracting officer is responsible for the determination of price reasonableness for the prime contract. In order to make this determination, it is required that an analysis be conducted of all the relevant facts and data including subcontractor cost or pricing data required to be submitted, results of the prime or higher tier subcontractor's analyses of subcontractor proposals, the field pricing support (if any), and historical pricing data. The fact that a contractor or higher tier subcontractor has an approved purchasing system or performs an analysis of subcontractor cost or pricing data does not in any way relieve the contracting officer or field pricing support team from the responsibility to analyze the prime contractor's submission, including the subcontractor cost or pricing data. However, the prime contractor or higher tier subcontractor is responsible for conducting appropriate price and cost analysis before awarding any subcontract.

(2) Subcontractors must submit to the contractor or higher tier subcontractor, cost or pricing data or claims for exemption from the requirement to submit them. The contractor and the higher tier subcontractor shall:

(i) Conduct price analyses and, when the subcontractor is required to submit cost or pricing data, or if the contractor or higher tier subcontractor is unable to perform an adequate price analysis, cost analyses for all subcontracts,

(ii) Include the results of these analyses as part of their own cost or pricing data submission, and

(iii) When required, in accordance with 15.806–2(a), submit the subcontractor cost or pricing data as part of their own cost or pricing data submission.

(b) Except when the subcontract prices are based on adequate price competition, on established catalog or market prices of commercial items sold in substantial quantities to the general public, or are set by law or regulation, any contractor required to submit certified cost or pricing data also shall obtain certified cost or pricing data before awarding any subcontract or purchase order expected to exceed $100,000, or issuing any modification involving a price adjustment expected to exceed $100,000 (see example of pricing adjustment at 15.804–2(a)(1)(ii)). To waive subcontractor cost or pricing data, follow the procedures at 15.804–3(i).

(c) The requirements in paragraphs (a) and (b) of this subsection, modified to relate to higher tier subcontractors rather than to the prime contractor, shall apply to lower tier subcontracts for which subcontractor cost or pricing data are required.

(d) If the prime contractor negotiates subcontract prices before negotiating the prime contract, such subcontract prices must nevertheless be reviewed and analyzed by the Government. In no instance should such negotiated subcontract prices be accepted as the sole evidence that these prices are fair and reasonable.

[54 FR 34754, Aug. 21, 1989]

15.806-2 Prospective subcontractor cost or pricing data.

(a) The contracting officer shall require a contractor that is required to submit certified cost or pricing data also to submit to the Government (or cause the submission of) accurate, complete, and current cost or pricing data from prospective subcontractors in support of each subcontract cost estimate that is:

(1) $1,000,000 or more,

(2) Both more than $100,000 and more than 10 percent of the prime contractor's proposed price, or

(3) Considered to be necessary for adequately pricing the prime contract. These subcontract cost or pricing data may be submitted using a Standard Form 1411 (SF 1411), Contract Pricing Proposal Cover Sheet.

(b) The contracting officer shall require the prospective contractor to support subcontractor cost estimates below the threshold in 15.806-1(b) with any data or information (including other subcontractor quotations) needed to establish a reasonable price.

(c) If the prospective contractor satisfies the contracting officer that a subcontract will be priced on the basis of one of the exemptions in 15.804-3, the contracting officer normally shall not require submission of subcontractor cost or pricing data to the Government in that case. If the subcontract estimate is based upon the cost or pricing data of the prospective subcontractor most likely to be awarded the subcontract, the contracting officer shall not require submission to the Government of data from more than one proposed subcontractor for that subcontract.

(d) Subcontractor cost or pricing data shall be accurate, complete, and current as of the date of final price agreement given on the contractor's Certificate of Current Cost or Pricing Data. The prospective contractor shall be responsible for updating a prospective subcontractor's data.

(e) In exceptional cases, the contracting officer may, with the approval of the chief of the contracting office, excuse a prospective contractor from submitting subcontractor cost or pricing data and the required related analyses before completion of negotiations of the prime contract. The prime contractor must, however, obtain this cost or pricing data before award of the subcontract in question. Any request from a prospective contractor to be excused from submitting subcontractor data before completion of negotiations of the prime contract must be supported by an explanation as to why the data and analyses cannot be submitted in a timely manner. If excusing the prospective contractor appears to be appropriate, the contracting officer shall provide the chief of the contracting office with the prospective contractor's explanation, the contracting officer's supporting rationale, and a discussion of how the subcontract price will be determined to be fair and reasonable or what steps will be taken to protect the interest of the Government, e.g., include a contract clause that provides for negotiating an adjustment to the prime contract amount after award.

[54 FR 34754, Aug. 21, 1989]

15.806-3 Field pricing reports.

(a) When obtaining field pricing support on a prime contractor proposal in accordance with 15.805-5, the contracting officer should request audit or field pricing support to analyze and evaluate the proposal of a subcontractor at any tier (notwithstanding availability of data or analyses performed by the prime contractor) if the contracting officer believes that such support is necessary to ensure reasonableness of the total proposed price. This step may be appropriate when, for example—

(1) There is a business relationship between the contractor and subcontractor not conducive to independence and objectivity;

(2) The contractor is a sole source and the subcontract costs represent a substantial part of the contract cost;

(3) The contractor has been denied access to the subcontractor's records; or

(4) The contracting officer determines that, because of factors such as

the size of the proposed subcontract price, audit or field pricing support for a subcontract or subcontracts at any tier is critical to a fully detailed analysis of the prime contract proposal.

(b) When the contracting officer requests the cognizant ACO or auditor to review a subcontractor's cost estimates, the request shall include, when available, a copy of any review prepared by the prime contractor or higher tier subcontractor, the subcontractor's proposal, cost or pricing data provided by the subcontractor, and the results of the prime contractor's cost or price analysis.

(c) When the Government performs the subcontract analysis, the Government shall furnish to the prime contractor or higher tier subcontractor, with the consent of the subcontractor reviewed, a summary of the analysis performed in determining any unacceptable costs, by element, included in the subcontract proposal. If the subcontractor withholds consent, the Government shall furnish a range of unacceptable costs for each element in such a way as to prevent disclosure of subcontractor proprietary data.

[54 FR 34753, Aug. 21, 1989]

15.807 Prenegotiation objectives.

(a) The process of determining prenegotiation objectives helps the contracting officer to judge the overall reasonableness of proposed prices and to negotiate a fair and reasonable price or cost and fee. In setting the prenegotiation objectives, the contracting officer shall analyze the offeror's proposal, taking into account the field pricing report, if any; any audit report and technical analysis whether or not part of a field pricing report; and other pertinent data such as independent Government cost estimates and price histories. This process may include fact-finding sessions with the offeror when the contracting officer deems appropriate.

(b) The contracting officer shall establish prenegotiation objectives before the negotiation of any pricing action. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action. When cost analysis is required, the analysis shall address (1) the pertinent issues to be negotiated, (2) the cost objectives, and (3) a profit or fee objective.

(c) The Government's cost objective and proposed pricing arrangement directly affect the profit or fee objective. Because profit or fee is only one of several interrelated variables, the contracting officer shall not agree on profit or fee without concurrent agreement on cost and type of contract. Specific agreement on the exact values or weights assigned to individual profit-analysis factors (see 15.905) is not required during negotiations and should not be attempted.

15.808 Price negotiation memorandum.

(a) At the conclusion of each negotiation of an initial or revised price, the contracting officer shall promptly prepare a memorandum of the principal elements of the price negotiation. The memorandum shall be included in the contract file and shall contain the following minimum information:

(1) The purpose of the negotiation.

(2) A description of the acquisition, including appropriate identifying numbers (e.g., RFP No.).

(3) The name, position, and organization of each person representing the contractor and the Government in the negotiation.

(4) The current status of the contractor's purchasing system when material is a significant cost element.

(5) If certified cost or pricing data were required, the extent to which the contracting officer—

(i) Relied on the cost or pricing data submitted and used them in negotiating the price; and

(ii) Recognized as inaccurate, incomplete, or noncurrent any cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated.

(6) If cost or pricing data were not required in the case of any price negotiation over $100,000, the exemption or waiver used and the basis for claiming or granting it.

(7) If certified cost or pricing data were required in the case of any price

negotiation under $100,000, the rationale for such requirement.

(8) A summary of the contractor's proposal, the field pricing report recommendations, and the reasons for any pertinent variances from the field pricing report recommendations. Where the determination of price reasonableness is based on cost analysis, the summary shall address the amount of each major cost element: (i) Proposed by the contractor, (ii) recommended by the field or other pricing assistance report (if any), (iii) contained in the Government's negotiation objective, and (iv) considered negotiated as a part of the price.

(9) The most significant facts or considerations controlling the establishment of the prenegotiation price objective and the negotiated price including an explanation of any significant differences between the two positions. To the extent such direction is received, the price negotiation memorandum (PNM) shall discuss and quantify the impact of direction given by Congress, other agencies, and higher level officials (i.e., officials who would not normally exercise authority during the award and review process for the instant contract action) if the direction has had a significant effect on the action.

(10) The basis for determining the profit or fee prenegotiation objective and the profit or fee negotiated.

(b) Whenever a field pricing report has been submitted, the contracting officer shall forward a copy of the price negotiation memorandum (PNM) to the cognizant audit office and a copy to the cognizant administrative contracting officer. When appropriate, information on how the advisory services of the field pricing support team can be made more effective should be provided separately.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 52 FR 19803, May 27, 1987]

15.809 Forward pricing rate agreements.

(a) Negotiation of forward pricing rate agreements (FPRA's) may be requested by the contracting officer or the contractor or initiated by the administrative contracting officer (ACO). In determining whether or not to establish such an agreement, the ACO should consider whether the benefits to be derived from the agreement are commensurate with the effort of establishing and monitoring it. Normally, FPRA's should be negotiated only with contractors having a significant volume of Government contract proposals. The cognizant contract administration agency shall determine whether an FPRA will be established.

(b) The ACO shall obtain the contractor's proposal and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission. The ACO shall invite the cognizant contract auditor and contracting offices having a significant interest to participate in developing a Government objective and in the negotiations. Upon completing negotiations, the ACO shall prepare a price negotiation memorandum (PNM) (see 15.808) and forward copies of the PNM and FPRA to the cognizant auditor and to all contracting offices that are known to be affected by the FPRA. A Certificate of Current Cost or Pricing Data shall not be required at this time (see 15.804-4(g)).

(c) The FPRA shall provide specific terms and conditions covering expiration, application, and data requirements for systematic monitoring to assure the validity of the rates. The agreement shall provide for cancellation at the option of either party and shall require the contractor to submit to the ACO and to the cognizant contract auditor any significant change in cost or pricing data.

(d) Offerors are required (see 15.804-4(g)) to describe any FPRA's in each specific pricing proposal to which the rates apply and identify the latest cost or pricing data already submitted in accordance with the agreement. All data submitted in connection with the agreement, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification.

(e) Contracting officers will use FPRA rates as bases for pricing all contracts, modifications, and other contractual actions to be performed during the period covered by the agreement, unless the ACO determines that changed conditions have invalidated part or all of the agreement. Conditions that may affect the agreement's validity shall be promptly reported to the ACO.

(1) If the ACO determines that the agreement is still valid, the ACO shall notify the individual or agency that reported the changed conditions.

(2) If the ACO determines that a changed condition has invalidated the agreement, the ACO shall notify all interested parties of the extent of its effect and initiate revision of the agreement.

(f) When an FPRA has been invalidated, the contractor, ACO, and contracting officer shall reflect the changed condition in proposals, cost analyses, and negotiations, pending revision of the agreement.

15.810 Should-cost analysis.

(a) Should-cost analysis is a specialized form of cost analysis which is used to evaluate the cost of production programs by evaluating and challenging a contractor's management and operating systems or portions thereof. It does not assume the use of the contractor's existing workforce, methods, materials, facilities, or management and operating systems. It addresses significant cost drivers and may be tailored to a specific part of the contractor's operations, for example, indirect expense activities, factory layout, etc. This analysis is accomplished by an integrated team of Government contracting, contract administration, pricing, audit, and engineering representatives. The objective of should-cost analysis is to promote both short- and long-range improvements in the contractor's economy and efficiency by evaluating and challenging the contractor's existing workforce, methods, materials, facilities, or management and operating systems to identify uneconomical or inefficient practices. In addition, by providing rationale for any recommendations and quantifying their impact on cost, the Government will be better able to develop realistic price objectives for negotiation.

(b) A should-cost analysis should be considered, particularly in the case of a major system acquisition (see part 34), when—

(1) Some initial production has already taken place;

(2) The contract will be awarded on a sole-source basis;

(3) There are future year production requirements for substantial quantities of like items;

(4) The items being acquired have a history of increasing costs;

(5) The work is sufficiently defined to permit an effective analysis and major changes are unlikely;

(6) Sufficient time is available to plan and conduct the should-cost analysis adequately; and

(7) Personnel with the required skills are available or can be assigned for the duration of the should-cost analysis.

(c) The scope of a should-cost analysis can range from a large-scale review examining the contractor's entire operation (including plant-wide overhead and selected major subcontractors) to a small-scale review examining specific portions of a contractor's operation. When a should-cost analysis is conducted relative to a contractor proposal, a separate audit report on the proposal is required. In determining the team size for the review, the various factors outlined in this paragraph (c) should be considered.

(d) The contracting officer should decide which elements of the contractor's operation have the greatest potential for cost savings and assign the available personnel resources accordingly. While the particular elements to be analyzed are a function of the contract work task, elements such as manufacturing, pricing and accounting, management and organization, and subcontract and vendor management are normally reviewed in a should-cost analysis.

(e) In acquisitions for which a should-cost analysis is conducted, a separate should-cost analysis team report, prepared in accordance with agency procedures, is required. Field pricing reports are required only to the extent that they contribute to the combined team position. The contracting officer shall consider the findings and recommendations contained in the should-cost analysis team report when negotiating the contract price. After completing the negotiation, the contracting officer shall provide the administrative contracting officer a report of any identified uneconomical or inefficient practices, together with a report of correction or disposition agreements reached with the contractor. The contracting officer shall establish a follow-up plan to monitor the correction of the uneconomical or inefficient practices.

(f) When a should-cost analysis is planned, the contracting officer should state this fact (1) in the acquisition plan (see subpart 7.1) and (2) in the solicitation.

[48 FR 42187, Sept. 19, 1983, as amended at 51 FR 36971, Oct. 16, 1986]

15.811 Estimating systems.

(a) The consistent preparation of proposals using an acceptable estimating system benefits both the Government and the contractor by increasing the accuracy and reliability of individual proposals. Cognizant audit activities, when it is appropriate to do so, shall establish and manage regular programs for reviewing selected contractors' estimating systems or methods, in order to (1) reduce the scope of reviews to be performed on individual proposals, (2) expedite the negotiation process, and (3) increase the reliability of proposals. The results of estimating system reviews shall be documented in survey reports.

(b) The auditor shall send a copy of the estimating system survey report and a copy of the official notice of corrective action required to each contracting office and contract administration office having substantial business with that contractor. Significant deficiencies not corrected by the contractor shall be a consideration in subsequent proposal analyses and negotiations.

(c) In determining the acceptability of a contractor's estimating system, the auditor should consider—

(1) The source of data for estimates and the procedures for ensuring that the data are accurate, complete, and current;

(2) The documentation developed and maintained in support of the estimate;

(3) The assignment of responsibilities for originating, reviewing, and approving estimates;

(4) The procedures followed for developing estimates for direct and indirect cost elements;

(5) The extent of coordination and communication between organizational elements responsible for the estimate; and

(6) Management support, including estimate approval, establishment of controls, and training programs.

15.812 Unit prices.

15.812-1 General.

(a) Direct and indirect costs are generally allocated to contracts in accordance with the Cost Accounting Standards of part 30 (when applicable) and the Contract Cost Principles and Procedures of part 31. However, for the purpose of pricing all items of supplies, distribution of those costs within contracts shall be on a basis that ensures the unit prices are in proportion to the item's base cost (e.g., manufacturing or acquisition costs. Any method of distributing costs to line items that distorts the unit prices shall not be used. For example, distributing costs equally among line items is not acceptable except when there is little or no variation in base cost.

(b) However, the policy in paragraph (a) of this subsection does not apply to any Department of Defense (DoD) or National Aeronautics and Space Administration (NASA) contract or subcontract item of supply for which the price is, or is based on, an established catalog or market price of a commercial item sold in substantial quantities to the general public. A price is "based on" a catalog or market price only if the item is sufficiently similar to the catalog or market price commercial item to ensure that any difference in price can be identified and justified without resort to cost analysis.

(c) In addition, when contracting by negotiation without full and open competition, contracting officers shall require that offerors identify in their proposals those items of supply which they will not manufacture or to which they will not contribute significant value. The contracting officer shall require similar information when contracting by negotiation with full and open competition if adequate price competition is not expected (see 15.804-3(b)). The information need not be requested in connection with the award of contracts under the General Services Administration's competitive Multiple Award Schedule Program. For DoD and NASA contracts, the information shall not be requested for commercial items sold in substantial quantities to the general public when the prices are, or are based on, established catalog or market prices. Such information is to be used to determine whether the intrinsic value of an item has been distorted, such as through the application of overhead, and whether such items should be considered for breakout. The contracting officer may require such information in any other negotiated contracts when appropriate.

[51 FR 27120, July 29, 1986 as amended at; 52 FR 21886, June 9, 1987; 53 FR 27462, July 20, 1988]

15.812-2 Contract clause.

(a) The contracting officer shall insert the clause at 52.215-26, Integrity of Unit Prices, in all solicitations and contracts for other than—

(1) Small purchases under part 13;

(2) Construction or architect-engineer services under part 36;

(3) Utility services under subpart 8.3; or

(4) Service contracts where supplies are not required.

(b) The contracting officer shall insert the clause with its *Alternate I* when contracting without full and open competition or when prescribed by agency regulations.

[51 FR 27120, July 29, 1986, as amended at 52 FR 21887, June 9, 1987]

15.813 Commercial pricing certificates.

15.813-1 Scope and applicability.

This section prescribes policies and procedures for obtaining certificates from contractors relating to prices offered for parts or components as defined in 15.813-2. It implements the statutory provisions in 41 U.S.C. 253e for civilian agencies and in 10 U.S.C. 2323 for the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard.

[55 FR 25527, June 21, 1990]

15.813-2 Definitions.

Lowest commercial price, as used in this section, means the lowest price at which a sale was made to the general public of a particular part or component. The term does not include the price at which a sale was made to—

(a) Any agency of the United States;

(b) Customers located outside the United States;

(c) A subsidiary, affiliate, or parent business organization of the contractor or any other branch of the same business entity; and

(d) For contracts awarded by the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, such term also does not include the sale to any customer—

(1) For resale after such customer performs a service or function in connection with such part or component that increases the cost of the part or component unless the agency procuring the part or component can demonstrate that the agency is procuring the part or component before such service or function has been performed by any such customer (see 15.813-6(c)); or

(2) At a price that, for the purpose of making a donation, has been substantially discounted below the fair market value or regular price of such part or component.

Part or component, as used in this section, means—

(a) For acquisitions of the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, any individual piece, part, subassembly, or component which is furnished for the logistic support or repair of an end item and not as an end item itself; or

(b) For acquisitions of civilian agencies other than the National Aeronautics and Space Administration and the Coast Guard, any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of a part or component.

[55 FR 25527, June 21, 1990]

15.813-3 Policy.

Contracts entered into using other than full and open competition may not result in prices for parts or components (as defined in 15.813-2) offered for sale to the general public that exceed the contractor's lowest commercial prices for such parts or components unless the price difference is clearly justified by the seller or the contracting officer has determined to exempt the contractor from the requirement under 15.813-5(d). To this end, 41 U.S.C. 253e and 10 U.S.C. 2323 require offerors to certify that prices offered for parts or components are not more than their lowest commercial prices, or to submit a written statement specifying the amount of the difference between their lowest commercial prices for the parts or components and the prices offered, and providing justification for those differences. Because the forces of the competitive marketplace usually ensure that the Government does not pay an unreasonable price for commercial parts or components, commercial pricing certificates are necessary only when these forces are not present in a particular contract action.

[55 FR 25528, June 21, 1990]

15.813-4 Requirements for submission of commercial pricing certificates.

Unless a contract is exempt from the requirement pursuant to 15.813-5, commercial pricing certificates are required to be submitted with any offer/proposal that—

(a) Includes any parts or components that are offered for sale to the general public; and

(b) Is submitted in connection with any of the following:

(1) Offers/proposals in connection with contracts to be awarded with other than full and open competition.

(2) Contract modifications, including contract modifications for additional parts or components, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause (but see subparagraph (b)(5) of this subsection), or funding and other administrative modifications.

(3) Orders under the provisioning line item of a contract, a basic ordering agreement, or similar arrangement if the order is being placed with other than full and open competition.

(4) Definitization of price on a letter contract, unpriced order, or other contract, modification, or order awarded without a definitive price. (The commercial pricing certificate is not required before the initial award, but rather shall be submitted with the proposal to definitize.)

(5) Any modification issued pursuant to the Changes clause that results in the providing of new or different parts or components.

[55 FR 25528, June 21, 1990]

15.813-5 Exemption from the requirement to submit commercial pricing certificates.

A contract is exempt from the requirement that a commercial pricing certificate be submitted if—

(a) The simplified small purchase procedures of part 13 are used;

(b) An acquisition is being made under the procedures established by the General Services Administration for its multiple award schedule program; or

(c) An order is placed under an indefinite delivery type contract. (However, a certificate is required in connection with the award with other than full and open competition of an indefinite delivery type contract.); or

(d) The contracting officer determines that obtaining the commercial pricing certificate is not appropriate because of—

(1) National security considerations; or

(2) Significant differences between the terms of the commercial sales of the parts or components to be acquired under the contract and the terms of the contract, including differences in quantity, quality, delivery requirements, or other terms and conditions.

[55 FR 25528, June 21, 1990]

§ 15.813-6 Procedures.

(a) If a commercial pricing certificate is required in accordance with 15.813-4, the contracting officer shall ensure that the certificate set forth in paragraph (b) of the clause at 52.215-32, Certification of Commercial Pricing for Parts or Components, is submitted with each offer/proposal. Notice of the requirement and requests for submission of a certificate in the solicitation are accomplished through use of the solicitation provision of 52.215-37. Contracting officers are encouraged to enter into advance agreements with contractors to consolidate submission requirements when detailed repetitive certifications and justifications would otherwise be required.

(b) When requested pursuant to paragraph (a) of this subsection, offerors/contractors are required to submit the commercial pricing certificate with their proposals unless the contracting officer determines to grant an exemption pursuant to 15.813-5(d). Exemptions from the requirement to submit a commercial pricing certificate should not be granted pursuant to 15.813-5(d)(2) unless the contracting officer has sufficient information to verify that the contractor's lowest commercial price for parts or components offered for sale to the general public are subject to such substantial differences (in quantity, quality, delivery, or other terms and conditions) from Government contract terms so as to warrant the exemption. If the contracting officer determines that use of the lowest commercial price for a part or component is not appropriate for a contract under 15.813-5(d), this determination should be communicated to the offeror/contractor in writing. Contracting officers may accept information supporting possible exemptions from offerors/contractors at any time prior to agreement on price. Exemptions relieve the offerors/contractors from the statutory and contractual submission requirement.

(c) For the Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard, a contracting officer may make a determination that the definition of "Lowest Commercial Price" in the clause of 52.215-32 shall include the price at which a sale was made to any person or corporation for resale by the person or corporation. In making this determination, the contracting officer must be able to demonstrate that the parts or components are being procured by the contracting officer under the same terms and conditions at which a sale was made to the person or corporation for resale.

(d) The contracting officer shall request submission of a new certificate when the validity of the certificate originally submitted with an offer/proposal becomes doubtful before award because of submission of a new or revised proposal or as a result of discussions.

(e) If, after award, the contracting officer learns or suspects that a certificate was inaccurate, incomplete, or misleading, the contracting officer shall request an audit under the authority of paragraph (c) of the clause of 52.215-32. If the contracting officer determines that a certificate is inaccurate, incomplete, or misleading, the Government is entitled to a price adjustment for any overcharge (see paragraph (d) of the clause at 52.215-32).

(f) Individual or class determinations made under 15.813-5(d) (1) or (2), and advance agreements made under paragraph (a) of this subsection, shall be documented in the contract file.

(g) Possession of a commercial pricing certificate is not a substitute for examining a contractor's proposal and determining that the prices offered are fair and reasonable. The certificate represents a tool to assist the contracting officer in the determination. The contracting officer shall obtain sufficient information with regard to commercial parts or components to permit an understanding of the contractor's commercial pricing structure and where within that structure the acquisition fits. (See 15.804-3(h) and data obtained on the Standard Form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data.)

[55 FR 25528, June 21, 1990]

15.813-7 Solicitation provision and contract clause.

(a)(1) The contracting officer shall insert the clause at 52.215-32, Certification of Commercial Pricing for Parts or Components, in solicitations and contracts if a commercial pricing certificate is required by 15.813-4.

(2) The contracting officer shall insert the clause with its Alternate I in solicitations and contracts for sealed bids or negotiated acquisitions involving the furnishing of parts or components using full and open competition.

(b) The contracting officer shall insert the provision at 52.215-37, Commercial Pricing Certificate—Notice, in solicitations if a commercial pricing certificate is required by 15.813-4.

[55 FR 25529, June 21, 1990]

15.814 Unbalanced offers.

(a) Offers shall also be analyzed to determine whether they are unbalanced with respect to prices or separately priced line items. This is particularly important when evaluating the relationship of the price for first article tests or test items to the price for the production units, and in evaluating the prices for options in relationship to the prices for the basic requirement.

(b) An offer is mathematically unbalanced if it is based on prices which are significantly less than cost for some contract line items and significantly overstated in relation to cost for others. An offer is materially unbalanced if it is mathematically unbalanced, and if—

(1) There is a reasonable doubt that the offer would result in the lowest overall cost to the Government, even though it is the lowest evaluated offer; or

(2) The offer is so grossly unbalanced that its acceptance would be tantamount to allowing an advance payment.

(c) Offers that are materially unbalanced may be rejected.

(d) Depending on the nature of the acquisition, contracting officers shall use either price analysis or cost analysis techniques, or a combination of the two techniques, to determine if offers are materially unbalanced. The following are examples of techniques that can be used to determine if an offer is unbalanced. Although these examples specifically relate to first article testing, they may also be used for other procurements where unbalanced offers may be of concern.

(1) Compare all offers to determine if the offerors have significantly higher prices for the first articles than for the production units. The comparison should consider whether the Government or the contractor will perform the first article test.

(2) For an individual offer, compare the relationship of first article prices to prices for production items. The cost to the offeror for first articles may be estimated (i) By comparing the total price offered, including the first article to an alternate proposal by the same offeror which does not include first article testing (see 9.306(d)); or (ii) if cost data has been submitted, by reviewing certain elements of cost to determine, for instance, whether manufacturing and special tooling, and test equipment costs, are prorated among the first articles and the production units, or are only applied to the first articles. If cost data are not available, it may be necessary for contracting officers to estimate contractor cost.

[55 FR 25529, June 21, 1990]

Subpart 15.9—Profit

15.900 Scope of subpart.

This subpart—

(a) Prescribes policies for establishing the profit or fee portion of the Government prenegotiation objective;

(b) Applies to price negotiations based on cost analysis;

(c) Prescribes policies for agencies' development and use of a structured approach for determining the profit or fee prenegotiation objective (see 15.905 for the contents of a structured approach); and

(d) Specifies (1) situations requiring contracting officers to analyze profit and (2) considerations for that analysis.

15.901 General.

(a) Profit or fee prenegotiation objectives do not necessarily represent net income to contractors. Rather, they represent that element of the potential total remuneration that contractors *may* receive for contract performance over and above allowable costs. This potential remuneration element and the Government's estimate of allowable costs to be incurred in contract performance together equal the Government's total prenegotiation objective. Just as actual costs may vary from estimated costs, the contractor's actual realized profit or fee may vary from negotiated profit or fee, because of such factors as efficiency of performance, incurrence of costs the Government does not recognize as allowable, and contract type.

(b) It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to (1) stimulate efficient contract performance, (2) attract the best capabilities of qualified large and small business concerns to Government contracts, and (3) maintain a viable industrial base.

(c) Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's interest. Negotiation of extremely low profits, use of historical averages, or automatic application of predetermined percentages to total estimated costs do not provide proper motivation for optimum contract performance. With the exception of statutory ceilings in 15.903(d) on profit and fee, agencies shall not (1) establish administrative ceilings or (2) create administrative procedures that could be represented to contractors as de facto ceilings.

15.902 Policy.

(a) Structured approaches (see 15.905) for determining profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered. Subject to the authorities in 1.301(c), agencies making noncompetitive contract awards over $100,000 totaling $50 million or more a year—

(1) Shall use a structured approach for determining the profit or fee objective in those acquisitions that require cost analysis; and

(2) May prescribe specific exemptions for situations in which mandatory use of a structured approach would be clearly inappropriate.

(b) Agencies may use another agency's structured approach.

15.903 Contracting officer responsibilities.

(a) When the price negotiation is not based on cost analysis, contracting officers are not required to analyze profit.

(b) When the price negotiation is based on cost analysis, contracting officers in agencies that have a structured approach shall use it to analyze profit. When not using a structured approach, contracting officers shall comply with 15.905-1 in developing profit or fee prenegotiation objectives.

(c) Contracting officers shall use the Government prenegotiation cost objective amounts as the basis for calculating the profit or fee prenegotiation objective. Before the allowability of facilities capital cost of money, this cost was included in profits or fees. Therefore, before applying profit or fee factors, the contracting officer shall exclude any facilities capital cost of money included in the cost objective amounts. If the prospective contractor fails to identify or propose facilities capital cost of money in a proposal for a contract that will be subject to the cost principles for contracts with commercial organizations (see subpart 31.2), facilities capital cost of money will not be an allowable cost in any resulting contract (see 15.904).

(d) (1) The contracting officer shall not negotiate a price or fee that exceeds the following statutory limitations, imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b):

(i) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 percent of the contract's estimated cost, excluding fee.

(ii) For architect-engineering services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.

(iii) For other cost-plus-fixed-fee contracts, the fee shall not exceed 10 percent of the contract's estimated cost, excluding fee.

(2) The limitations in subdivisions (1)(i) and (iii) above shall apply also to the maximum fees on cost-plus-incentive-fee and cost-plus-award-fee contracts. However, a deviation to the maximum-fee limitation for a specific cost-plus-incentive-fee or cost-plus-award-fee contract may be authorized in accordance with subpart 1.4.

(e) The contracting officer shall not require any prospective contractor to submit details of its profit or fee objective but shall consider them if they are submitted voluntarily.

(f) If a change or modification (1) calls for essentially the same type and mix of work as the basic contract and (2) is of relatively small dollar value compared to the total contract value, the contracting officer may use the basic contract's profit or fee rate as the prenegotiation objective for that change or modification.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 23606, June 4, 1985]

15.904 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.215-30, Facilities Capital Cost of Money, in solicitations expected to result in contracts that are subject to the cost principles for contracts with commercial organizations (see subpart 31.2).

(b) If the propsective contractor does not propose facilities capital cost of money in its offer, insert the clause at 52.215-31, Waiver of Facilities Capital Cost of Money, in the resulting contract.

[52 FR 35613, Sept. 22, 1987]

15.905 Profit-analysis factors.

15.905-1 Common factors.

Unless it is clearly inappropriate or not applicable, each factor outlined in paragraphs (a) through (f) following shall be considered by agencies in developing their structured approaches and by contracting officers in analyzing profit whether or not using a structured approach.

(a) *Contractor effort.* This factor measures the complexity of the work and the resources required of the prospective contractor for contract performance. Greater profit opportunity should be provided under contracts requiring a high degree of professional and managerial skill and to prospective contractors whose skills, facilities, and technical assets can be expected to lead to efficient and economical contract performance. Subfactors (1) through (4) following shall be considered in determining contractor effort, but they may be modified in specific situations to accommodate differences in the categories used by prospective contractors for listing costs:

(1) *Material acquisition.* This subfactor measures the managerial and technical effort needed to obtain the required purchased parts and material, subcontracted items, and special tooling. Considerations include (i) the complexity of the items required, (ii) the number of purchase orders and subcontracts to be awarded and administered, (iii) whether established sources are available or new or second sources must be developed, and (iv) whether material will be obtained through routine purchase orders or through complex subcontracts requiring detailed specifications. Profit consideration should correspond to the managerial and technical effort involved.

(2) *Conversion direct labor.* This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items. Considerations include the diversity of engineering, scientific, and manufacturing labor skills required and the amount and quality of supervision and coordi-

nation needed to perform the contract task.

(3) *Conversion-related indirect costs.* This subfactor measures how much the indirect costs contribute to contract performance. The labor elements in the allocable indirect costs should be given the profit consideration they would receive if treated as direct labor. The other elements of indirect costs should be evaluated to determine whether they (i) merit only limited profit consideration because of their routine nature or (ii) are elements that contribute significantly to the proposed contract.

(4) *General management.* This subfactor measures the prospective contractor's other indirect costs and general and administrative (G&A) expense, their composition, and how much they contribute to contract performance. Considerations include (i) how labor in the overhead pools would be treated if it were direct labor, (ii) whether elements within the pools are routine expenses or instead are elements that contribute significantly to the proposed contract, and (iii) whether the elements require routine as opposed to unusual managerial effort and attention.

(b) *Contract cost risk.* (1) This factor measures the degree of cost responsibility and associated risk that the prospective contractor will assume (i) as a result of the contract type contemplated and (ii) considering the reliability of the cost estimate in relation to the complexity and duration of the contract task. Determination of contract type should be closely related to the risks involved in timely, cost-effective, and efficient performance. This factor should compensate contractors proportionately for assuming greater cost risks.

(2) The contractor assumes the greatest cost risk in a closely priced firm-fixed-price contract under which it agrees to perform a complex undertaking on time and at a predetermined price. Some firm-fixed-price contracts may entail substantially less cost risk than others because, for example, the contract task is less complex or many of the contractor's costs are known at the time of price agreement, in which case the risk factor should be reduced accordingly. The contractor assumes the least cost risk in a cost-plus-fixed-fee level-of-effort contract, under which it is reimbursed those costs determined to be allocable and allowable, plus the fixed fee.

(3) In evaluating assumption of cost risk, contracting officers shall, except in unusual circumstances, treat time-and-materials, labor-hour, and firm-fixed-price, level-of-effort term contracts as cost-plus-fixed-fee contracts.

(c) *Federal socioeconomic programs.* This factor measures the degree of support given by the prospective contractor to Federal socioeconomic programs, such as those involving small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, handicapped sheltered workshops, labor surplus areas, and energy conservation. Greater profit opportunity should be provided contractors who have displayed unusual initiative in these programs.

(d) *Capital investments.* This factor takes into account the contribution of contractor investments to efficient and economical contract performance.

(e) *Cost-control and other past accomplishments.* This factor allows additional profit opportunities to a prospective contractor that has previously demonstrated its ability to perform similar tasks effectively and economically. In addition, consideration should be given to (1) measures taken by the prospective contractor that result in productivity improvements and (2) other cost-reduction accomplishments that will benefit the Government in follow-on contracts.

(f) *Independent development.* Under this factor, the contractor may be provided additional profit opportunities in recognition of independent development efforts relevant to the contract end item without Government assistance. The contracting officer should consider whether the development cost was recovered directly or indirectly from Government sources.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 23606, June 4, 1985]

15.905-2 Additional factors.

In order to foster achievement of program objectives, each agency may include additional factors in its structured approach or take them into account in the profit analysis of individual contract actions.

Subpart 15.10—Preaward, Award and Postaward Notifications, Protests, and Mistakes

15.1001 Notifications to unsuccessful offerors.

(a) *General.* The Contracting officer shall promptly notify each offeror whose proposal is determined to be unacceptable or whose offer is not selected for award, unless disclosure might prejudice the Government's interest.

(b) *Preaward notices.* (1) When the proposal evaluation period for a solicitation estimated to exceed the small purchase limitation in part 13 is expected to exceed 30 days, or when a limited number of offerors have been selected as being within the competitive range (see 15.609), the contracting officer, upon determining that a proposal is unacceptable, shall promptly notify the offeror. The notice shall at least state (i) in general terms the basis for the determination and (ii) that a revision of the proposal will not be considered.

(2) In a small business set-aside (see subpart 19.5), upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror. The notice shall also state that (i) the Government will not consider subsequent revisions of the unsuccessful proposal and (ii) no response is required unless a basis exists to challenge the small business size status of the apparently successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay.

(c) *Postaward notices.* (1) Promptly after award of contracts resulting from solicitations exceeding the small purchase limitation in part 13, the contracting officer shall notify unsuccessful offerors in writing, unless preaward notice was given under paragraph (b) above. The notice shall include—

(i) The number of offerors solicited;

(ii) The number of proposals received;

(iii) The name and address of each offeror receiving an award;

(iv) The items, quantities, and unit prices of each award (if the number of items or other factors makes listing unit prices impracticable, only the total contract price need be furnished); and

(v) In general terms, the reason the offeror's proposal was not accepted, unless the price information in (iv) above readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) For acquisitions subject to the Trade Agreements Act (see 25.405(e)), provide the information in subparagraph (c)(1) of this section within 7 working days after a contract award to unsuccessful offerors from designated countries.

(3) Upon request, the contracting officer shall furnish the information described in 15.1001(c)(1)(i) through (v) above to unsuccessful offerors in solicitations not exceeding the small purchase limitation in part 13.

[48 FR 42187, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 23606, June 4, 1985; 50 FR 52433, Dec. 23, 1985; 53 FR 27464, July 20, 1988]

15.1002 Notification to successful offeror.

The contracting officer shall award a contract with reasonable promptness to the successful offeror (selected in accordance with 15.611(d)) by transmitting written notice of the award to that offeror (but see 15.608(b)). When an award is made to an offeror for less than all of the items that may be awarded to that offeror and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the offer acceptance period.

[50 FR 1741, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985, as amended at 55 FR 3881, Feb. 5, 1990]

15.1003 Debriefing of unsuccessful offerors.

(a) When a contract is awarded on a basis other than price alone (see subpart 15.6), unsuccessful offerors, upon their written request, shall be debriefed and furnished the basis for the selection decision and contract award.

(b) Debriefing information shall include the Government's evaluation of the significant weak or deficient factors in the proposal; however, point-by-point comparisons with other offerors' proposals shall not be made. Debriefing shall not reveal the relative merits or technical standing of competitors or the evaluation scoring. Moreover, debriefing shall not reveal any information that is not releasable under the Freedom of Information Act; for example—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques; and

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information.

(c) The contracting officer shall include a summary of the debriefing in the contract file.

[48 FR 42187, Sept. 19, 1983. Redesignated and amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

15.1004 Protests against award.

Protests against award in negotiated acquisitions shall be treated substantially the same as in sealed bidding (see subpart 33.1).

[48 FR 42187, Sept. 19, 1983. Redesignated and amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2650, Jan. 17, 1986]

15.1005 Discovery of mistakes.

For treatment of mistakes in an offeror's proposal that are discovered before award, see 15.607. Mistakes in a contractor's proposal that are disclosed after award shall be processed in accordance with 14.406-4.

[48 FR 42187, Sept. 19, 1983. Redesignated at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

PART 16—TYPES OF CONTRACTS

Sec.
16.000 Scope of part.

Subpart 16.1—Selecting Contract Types

16.101 General.
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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42219, Sept. 19, 1983, unless otherwise noted.

16.000 Scope of part.

This part describes types of contracts that may be used in acquisitions other than small purchases under part 13. It prescribes policies and procedures and provides guidance for selecting a contract type appropriate to the circumstances of the acquisition.

Subpart 16.1—Selecting Contract Types

16.101 General.

(a) A wide selection of contract types is available to the Government and contractors in order to provide needed flexibility in acquiring the large variety and volume of supplies and services required by agencies. Contract types vary according to (1) the degree and timing of the responsibility assumed by the contractor for the costs of performance and (2) the amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals.

(b) The contract types are grouped into two broad categories: fixed-price contracts (see subpart 16.2) and cost-reimbursement contracts (see subpart 16.3). The specific contract types range from firm-fixed-price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between are the various incentive contracts (see subpart 16.4), in which the contractor's responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.

16.102 Policies.

(a) Contracts resulting from sealed bidding shall be firm-fixed-price contracts or fixed-price contracts with economic price adjustment.

(b) Contracts negotiated under part 15 may be of any type or combination of types that will promote the Government's interest, except as restricted in this part (see 10 U.S.C. 2306(a) and 41 U.S.C. 254(a)). Contract types not described in this regulation shall not be used, except as a deviation under subpart 1.4.

(c) The cost-plus-a-percentage-of-cost system of contracting shall not be used (see 10 U.S.C. 2306(a) and 41 U.S.C. 254(b)). Prime contracts (including letter contracts) other than firm-fixed-price contracts shall, by an appropriate clause, prohibit cost-plus-a-percentage-of-cost subcontracts (see clauses prescribed in subpart 44.2 for cost-reimbursement contracts and subparts 16.2 and 16.4 for fixed-price contracts).

(d) No contract may be awarded before the execution of any determination and findings (D&F's) required by this part. Minimum requirements for the content of D&F's required by this part are specified in 1.704.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

16.103 Negotiating contract type.

(a) Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. Negotiating the contract type and negotiating prices are closely related and should be considered together. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.

(b) A firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty. However, when a reasonable basis for firm pricing does not exist, other contract types should be considered, and negotiations should be directed toward selecting a contract type (or combination of types) that will appropriately tie profit to contractor performance.

(c) In the course of an acquisition program, a series of contracts, or a single long-term contract, changing circumstances may make a different contract type appropriate in later periods than that used at the outset. In particular, contracting officers should avoid protracted use of a cost-reimbursement or time-and-materials contract after experience provides a basis for firmer pricing.

(d) Each contract file shall include documentation to show why the particular contract type was selected. Exceptions to this requirement are: (1) Small purchases under part 13, (2) contracts on a firm fixed-price basis other than those for major systems or research and development, and (3) awards on the set-aside portion of sealed bid partial set-asides for small business or labor surplus area concerns.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989]

16.104 Factors in selecting contract types.

There are many factors that the contracting officer should consider in selecting and negotiating the contract type. They include the following:

(a) *Price competition.* Normally, effective price competition results in realistic pricing, and a fixed-price contract is ordinarily in the Government's interest.

(b) *Price analysis.* Price analysis, with or without competition, may provide a basis for selecting the contract type. The degree to which price analysis can provide a realistic pricing standard should be carefully considered. (See 15.808-2.)

(c) *Cost analysis.* In the absence of effective price competition and if price analysis is not sufficient, the cost estimates of the offeror and the Government provide the bases for negotiating contract pricing arrangements. It is essential that the uncertainties involved in performance and their possible impact upon costs be identified and evaluated, so that a contract type that places a reasonable degree of cost responsibility upon the contractor can be negotiated.

(d) *Type and complexity of the requirement.* Complex requirements, particularly those unique to the Government, usually result in greater risk assumption by the Government. This is especially true for complex research and development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk should shift to the contractor, and a fixed-price contract should be considered.

(e) *Urgency of the requirement.* If urgency is a primary factor, the Government may choose to assume a greater proportion of risk or it may offer incentives to ensure timely contract performance.

(f) *Period of performance or length of production run.* In times of economic uncertainty, contracts extending over a relatively long period may require economic price adjustment terms.

(g) *Contractor's technical capability and financial responsibility.*

(h) *Adequacy of the contractor's accounting system.* Before agreeing on a contract type other than firm-fixed-price, the contracting officer shall ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This factor may be critical when the contract type requires price revision while performance is in progress, or when a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis.

(i) *Concurrent contracts.* If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their pricing arrangements, should be considered.

(j) *Extent and nature of proposed subcontracting.* If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor should be selected.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

16.105 Solicitation provision.

The contracting officer shall complete and insert the provision at 52.216-1, Type of Contract, in requests for proposals and in requests for quotations unless the solicitation is for (a) a small purchase (see part 13) or (b) information or planning purposes (see 15.405).

Subpart 16.2—Fixed-Price Contracts

16.201 General.

Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

16.202 Firm-fixed-price contracts.

16.202-1 Description.

A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties.

16.202-2 Application.

A firm-fixed-price contract is suitable for acquiring commercial products or commercial-type products (see 11.001) or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications (see 10.001) when the contracting officer can establish fair and reasonable prices at the outset, such as when—

(a) There is adequate price competition;

(b) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data;

(c) Available cost or pricing information permits realistic estimates of the probable costs of performance; or

(d) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.

16.203 Fixed-price contracts with economic price adjustment.

16.203-1 Description.

A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. Economic price adjustments are of three general types:

(a) *Adjustments based on established prices.* These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.

(b) *Adjustments based on actual costs of labor or material.* These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(c) *Adjustments based on cost indexes of labor or material.* These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

16.203-2 Application.

A fixed-price contract with economic price adjustment may be used when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. Price adjustments based on established prices should normally be restricted to industry-wide contingencies. Price adjustments based on labor and material costs should be limited to contingencies beyond the contractor's control. For use of economic price adjustment in sealed bid contracts, see 14.407-4.

(a) In establishing the base level from which adjustment will be made, the contracting officer shall ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor under economic price adjustment clause.

(b) In contracts that do not require submission of cost or pricing data, the contracting officer shall obtain adequate information to establish the base level from which adjustment will be made and may require verification of data submitted.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

16.203-3 Limitations.

A fixed-price contract with economic price adjustment shall not be used unless the contracting officer determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices.

16.203-4 Contract clauses.

(a) *Adjustment based on established prices—standard supplies.* (1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.216-2, Economic Price Adjustment—Standard Supplies, or an agency-prescribed clause as authorized in subparagraph (2) below, in solicitations and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) The requirement is for standard supplies that have an established catalog or market price, verified using the criteria in 15.804-3.

(iii) The contracting officer has made the determination specified in 16.203-3.

(2) If all the conditions in subparagraph (a)(1) above apply and the contracting officer determines that the use of the clause at 52.216-2 is inappropriate, the contracting officer may use an agency-prescribed clause instead of the clause at 52.216-2.

(3) If the negotiated unit price reflects a net price after applying a trade discount from a catalog or list price, the contracting officer shall document in the contract file both the catalog or list price and the discount. (This does not apply to prompt payment or cash discounts.)

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(b) *Adjustment based on established prices—semistandard supplies.* (1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.216-3, Economic Price Adjustment—Semistandard Supplies, or an agency-prescribed clause as authorized in subparagraph (2) below, in solicitations and contracts when all of the following conditions apply:

(i) A fixed price contract is contemplated.

(ii) The requirement is for semistandard supplies for which the prices can be reasonably related to the prices of nearly equivalent standard supplies that have an established catalog or market price, verified using the criteria in 15.804-3.

(iii) The contracting officer has made the determination specified in 16.203-3.

(2) If all conditions in subparagraph (b)(1) above apply and the contracting officer determines that the use of the clause at 52.216-3 is inappropriate, the contracting officer may use an agency-prescribed clause instead of the clause at 52.216-3.

(3) If the negotiated unit price reflects a net price after applying a trade discount from a catalog or list price, the contracting officer shall document in the contract file both the catalog or list price and the discount. (This does not apply to prompt payment or cash discounts.)

(4) Before entering into the contract, the contracting officer and contractor must agree in writing on the identity of the standard supplies and the corresponding contract line items to which the clause applies.

(5) If the supplies are standard, except for preservation, packaging, and packing requirements, the clause prescribed in 16.203-4(a), shall be used rather than this clause.

(c) *Adjustments based on actual cost of labor or material.* (1) The contracting officer shall, when contracting by negotiation, insert a clause that is substantially the same as the clause at 52.216-4, Economic Price Adjustment—Labor and Material, or an agency-prescribed clause as authorized in subparagraph (2) below, in solicitation and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) There is no major element of design engineering or development work involved.

(iii) One or more identifiable labor or material cost factors are subject to change.

(iv) The contracting officer has made the determination specified in 16.203-3.

(2) If all conditions in subparagraph (c)(1) above apply and the contracting officer determines that the use of the clause at 52.216-4 is inappropriate, the contracting officer may use an agency-prescribed clause instead of the clause at 52.216-4.

(3) The contracting officer shall describe in detail in the contract Schedule—

(i) The types of labor and materials subject to adjustment under the clause;

(ii) The labor rates, including fringe benefits (if any) and unit prices of materials that may be increased or decreased; and

(iii) The quantities of the specified labor and materials allocable to each unit to be delivered under the contract.

(4) In negotiating adjustments under the clause, the contracting officer shall—

(i) Consider work in process and materials on hand at the time of changes in labor rates, including fringe benefits (if any) or material prices;

(ii) Not include in adjustments any indirect cost (except fringe benefits as defined in 31.205-6(m)) or profit; and

(iii) Consider only those fringe benefits specified in the contract Schedule.

(d) *Adjustments based on cost indexes of labor or material.* The contracting officer should consider using an economic price adjustment clause based on cost indexes of labor or material under the circumstances and subject to approval as described in subparagraphs (1) and (2) below.

(1) A clause providing adjustment based on cost indexes of labor or materials may be appropriate when—

(i) The contract involves an extended period of performance with significant costs to be incurred beyond 1 year after performance begins;

(ii) The contract amount subject to adjustment is substantial; and

(iii) The economic variables for labor and materials are too unstable to permit a reasonable division of risk between the Government and the contractor, without this type of clause.

(2) Any clause using this method shall be prepared and approved under agency procedures. Because of the variations in circumstances and clause wording that may arise, no standard clause is prescribed.

[48 FR 42219, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987]

16.204 Fixed-price incentive contracts.

A fixed-price incentive contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by a formula based on the relationship of final negotiated total cost to total target cost. Fixed-price incentive contracts are covered in subpart 16.4, Incentive Contracts. See 16.403 for more complete descriptions and for application, limitations, and prescribed clauses for these contracts.

16.205 Fixed-price contracts with prospective price redetermination.

16.205-1 Description.

A fixed-price contract with prospective price redetermination provides for (a) a firm fixed price for an initial period of contract deliveries or performance and (b) prospective redetermination, at a stated time or times during performance, of the price for subsequent periods of performance.

16.205-2 Application.

A fixed-price contract with prospective price redetermination may be used in acquisitions of quantity production or services for which it is possible to negotiate a fair and reasonable firm fixed price for an initial period, but not for subsequent periods of contract performance.

(a) The initial period should be the longest period for which it is possible to negotiate a fair and reasonable firm fixed price. Each subsequent pricing period should be at least 12 months.

(b) The contract may provide for a ceiling price based on evaluation of the uncertainties involved in performance and their possible cost impact. This ceiling price should provide for assumption of a reasonable proportion of the risk by the contractor and, once established, may be adjusted only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

16.205-3 Limitations.

This contract type shall not be used unless—

(a) Negotiations have established that (1) the conditions for use of a firm-fixed-price contract are not present (see 16.202-2), and (2) a fixed-price incentive contract would not be more appropriate;

(b) The contractor's accounting system is adequate for price redetermination;

(c) The prospective pricing periods can be made to conform with operation of the contractor's accounting system; and

(d) There is reasonable assurance that price redetermination actions will take place promptly at the specified times.

16.205-4 Contract clause.

The contracting officer shall, when contracting by negotiation, insert the clause at 52.216-5, Price Redetermination—Prospective, in solicitations and contracts when a fixed-price contract is contemplated and the conditions specified in 16.205-2 and 16.205-3(a) through (d) apply.

16.206 Fixed-ceiling-price contracts with retroactive price redetermination.

16.206-1 Description.

A fixed-ceiling-price contract with retroactive price redetermination provides for (a) a fixed ceiling price and (b) retroactive price redetermination within the ceiling after completion of the contract.

16.206-2 Application.

A fixed-ceiling-price contract with retroactive price redetermination is appropriate for research and development contracts estimated at $100,000 or less when it is established at the outset that a fair and reasonable firm fixed price cannot be negotiated and that the amount involved and short performance period make the use of any other fixed-price contract type impracticable.

(a) A ceiling price shall be negotiated for the contract at a level that reflects a reasonable sharing of risk by the contractor. The established ceiling price may be adjusted only if required by the operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

(b) The contract should be awarded only after negotiation of a billing price that is as fair and reasonable as the circumstances permit.

(c) Since this contract type provides the contractor no cost control incentive except the ceiling price, the contracting officer should make clear to the contractor during discussion before award that the contractor's management effectiveness and ingenuity will be considered in retroactively redetermining the price.

16.206-3 Limitations.

This contract type shall not be used unless—

(a) The contract is for research and development and the estimated cost is $100,000 or less;

(b) The contractor's accounting system is adequate for price redetermination;

(c) There is reasonable assurance that the price redetermination will take place promptly at the specified time; and

(d) The head of the contracting activity (or a higher-level official, if required by agency procedures) approves its use in writing.

16.206-4 Contract clause.

The contracting officer shall, when contracting by negotiation, insert the clause at 52.216-6, Price Redetermination–Retroactive, in solicitations and contracts when a fixed-price contract is contemplated and the conditions in 16.206-2 and 16.206-3(a) through (d) apply.

16.207 Firm-fixed-price, level-of-effort term contracts.

16.207-1 Description.

A firm-fixed-price, level-of-effort term contract requires (a) the contractor to provide a specified level of effort, over a stated period of time, on work that can be stated only in general terms and (b) the Government to pay the contractor a fixed dollar amount.

16.207-2 Application.

A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The product of the contract is usually a report showing the results achieved through application of the required level of effort. However, payment is based on the effort expended rather than on the results achieved.

16.207-3 Limitations.

This contract type may be used only when—

(a) The work required cannot otherwise be clearly defined;

(b) The required level of effort is identified and agreed upon in advance;

(c) There is reasonable assurance that the intended result cannot be achieved by expending less than the stipulated effort; and

(d) The contract price is $100,000 or less, unless approved by the chief of the contracting office.

Subpart 16.3—Cost-Reimbursement Contracts

16.301 General.

16.301-1 Description.

Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.

16.301-2 Application.

Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

16.301-3 Limitations.

A cost-reimbursement contract may be used only when—

(a) The contractor's accounting system is adequate for determining costs applicable to the contract;

(b) Appropriate Government surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used; and

(c) A determination and findings has been executed, in accordance with agency procedures, showing that (1) this contract type is likely to be less costly than any other type or (2) it is impractical to obtain supplies or services of the kind or quality required without the use of this contract type (see 10 U.S.C. 2306(c), 2310(b), and 2311 or 41 U.S.C. 254(b), 257(b), and 257(a)).

(d) See 15.903(d) for statutory limitations on price or fee.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

16.302 Cost contracts.

(a) *Description.* A cost contract is a cost-reimbursement contract in which the contractor receives no fee.

(b) *Application.* A cost contract may be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations, and for facilities contracts.

(c) *Limitations.* See 16.301-3.

16.303 Cost-sharing contracts.

(a) *Description.* A cost-sharing contract is a cost-reimbursement contract in which the contractor receives no fee and is reimbursed only for an agreed-upon portion of its allowable costs.

(b) *Application.* A cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits.

(c) *Limitations.* See 16.301-3.

16.304 Cost-plus-incentive-fee contracts.

A cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for an initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. Cost-plus-incentive-fee contracts are covered in subpart 16.4, Incentive Contracts. See 16.404-1 for a more complete description and discussion of application of these contracts. See 16.301-3 for limitations.

16.305 Cost-plus-award-fee contracts.

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (a) a base amount (which may be zero) fixed at inception of the contract and (b) an award amount, based upon a judgmental evaluation by the Government, sufficient to provide motivation for excellence in contract performance. Cost-plus-award-fee contracts are covered in subpart 16.4, Incentive Contracts. See 16.404-2 for a more complete description and discussion of application of these contracts. See 16.301-3 and 16.404-2(c) for limitations.

16.306 Cost-plus-fixed-fee contracts.

(a) *Description.* A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract. This contract type permits contracting for efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs.

(b) *Application.* (1) A cost-plus-fixed-fee contract is suitable for use when the conditions of 16.301-2 are present and, for example—

(i) The contract is for the performance of research or preliminary exploration or study, and the level of effort required is unknown; or

(ii) The contract is for development and test, and using a cost-plus- incentive-fee contract is not practical.

(2) A cost-plus-fixed-fee contract normally should not be used in development of major systems (see part 34) once preliminary exploration, studies, and risk reduction have indicated a high degree of probability that the development is achievable and the Government has established reasonably firm performance objectives and schedules.

(c) *Limitations.* No cost-plus-fixed-fee contract shall be awarded unless—

(1) All limitations in 16.301-3 are complied with; and

(2) The agency head or designee has signed a determination and findings establishing the basis for application of the statutory price or fee limitation (see 15.903(d)).

(d) *Completion and term forms.* A cost-plus-fixed-fee contract may take one of two basic forms—completion or term.

(1) The completion form describes the scope of work by stating a definite goal or target and specifying an end product. This form of contract normally requires the contractor to complete and deliver the specified end product (e.g., a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. However, in the event the work cannot be completed within the estimated cost, the Government may require more effort without increase in fee, provided the Government increases the estimated cost.

(2) The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under this form, if the performance is considered satisfactory by the Government, the fixed fee is payable at the expiration of the agreed-upon period, upon contractor certification that the level of effort specified in the contract has been expended in performing the contract work. Renewal for further periods of performance is a new acquisition that involves new cost and fee arrangements.

(3) Because of the differences in obligation assumed by the contractor, the completion form is preferred over the term form whenever the work, or specific milestones for the work, can be defined well enough to permit development of estimates within which the contractor can be expected to complete the work.

(4) The term form shall not be used unless the contractor is obligated by the contract to provide a specific level of effort within a definite time period.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

16.307 Contract clauses.

(a) The contracting officer shall insert the clause at 52.216-7, Allowable Cost and Payment, in solicitations and contracts when a cost-reimbursement contract (other than a facilities contract) is contemplated. If the contract is with an educational institution, modify the clause by deleting from paragraph (a) the words "subpart 31.2" and substituting for them "subpart 31.3." If the contract is with a State or local government, modify the clause by deleting from paragraph (a) the words "subpart 31.2" and substituting for them "subpart 31.6." If the contract is with a nonprofit organization other than an educational institution, a State or local government, or a nonprofit organization exempted under OMB Circular No. A-122, modify the clause by deleting from paragraph (a) the words "subpart 31.2" and substituting for them "subpart 31.7."

(b) The contracting officer shall insert the clause at 52.216-8, Fixed Fee, in solicitations and contracts when a cost-plus-fixed-fee contract (other than a facilities contract or a construction contract) is contemplated.

(c) The contracting officer shall insert the clause at 52.216-9, Fixed-Fee—Construction, in solicitations and contracts when a cost-plus-fixed-fee construction contract, is contemplated.

(d) The contracting officer shall insert the clause at 52.216-10, Incentive Fee, in solicitations and contracts when a cost-plus-incentive-fee contract (other than a facilities contract) is contemplated.

(e)(1) The contracting officer shall insert the clause at 52.216-11, Cost Contract—No Fee, in solicitations and contracts when a cost-reimbursement contract is contemplated that provides no fee and is not a cost-sharing contract or a facilities contract.

(2) If a cost-reimbursement research and development contract with an educational institution or a nonprofit organization that provides no fee or other payment above cost and is not a cost-sharing contract is contemplated, and if the contracting officer determines that withholding of a portion of allowable costs is not required, the contracting officer shall use the clause with its Alternate I.

(f)(1) The contracting officer shall insert the clause at 52.216-12, Cost-Sharing Contract—No Fee, in solicitations and contracts when a cost-sharing contract (other than a facilities contract) is contemplated.

(2) If a cost-sharing research and development contract with an educational institution or a nonprofit organization is contemplated, and if the contracting officer determines that withholding of a portion of allowable costs is not required, the contracting officer shall use the clause with its Alternate I.

(g)(1) The contracting officer shall insert the clause at 52.216-13, Allowable Cost and Payment—Facilities, in solicitations and contracts when a cost-reimbursement consolidated facilities contract or a cost-reimbursement facilities acquisition contract (see 45.302-6) is contemplated.

(2) If a facilities acquisition contract is contemplated and, in the judgment of the contracting officer, it may be necessary to withhold payment of an amount to protect the Government's interest, the contracting officer shall use the clause with its Alternate I.

(h) The contracting officer shall insert the clause at 52.216-14, Allowable Cost and Payment—Facilities Use, in solicitations and contracts when a facilities use contract is contemplated.

(i) The contracting officer shall insert the clause at 52.216-15, Predetermined Indirect Cost Rates, in solicitations and contracts when a cost-reimbursement research and development contract with an educational institution (see 42.705-3(b)) is contemplated and predetermined indirect cost rates are to be used.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 23606, June 4, 1985]

Subpart 16.4—Incentive Contracts

16.401 General.

(a) Incentive contracts as described in this subpart are appropriate when a firm-fixed-price contract is not appropriate and the required supplies or services can be acquired at lower costs and, in certain instances, with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor's performance. Incentive contracts are designed to obtain specific acquisition objectives by—

(1) Establishing reasonable and attainable targets that are clearly communicated to the contractor; and

(2) Including appropriate incentive arrangements designed to (i) motivate contractor efforts that might not otherwise be emphasized and (ii) discourage contractor inefficiency and waste.

(b) When predetermined, formula-type incentives on technical performance or delivery are included, increases in profit or fee are provided only for achievement that surpasses the targets, and decreases are provided for to the extent that such targets are not met. The incentive increases or decreases are applied to performance targets rather than minimum performance requirements.

(c) The two basic categories of incentive contracts are fixed-price incentive contracts (see 16.403) and cost-reimbursement-incentive contracts (see 16.404). Since it is usually to the Government's advantage for the contractor to assume substantial cost responsibility and an appropriate share of the cost risk, fixed-price incentive contracts are preferred when contract costs and performance requirements are reasonably certain. Cost-reimbursement incentive contracts are subject to the overall limitations in 16.301 that apply to all cost-reimbursement contracts.

16.402 Application of predetermined, formula-type incentives.

16.402-1 Cost incentives.

(a) Most incentive contracts include only cost incentives, which take the form of a profit or fee adjustment formula and are intended to motivate the contractor to effectively manage costs. No incentive contract may provide for other incentives without also providing a cost incentive (or constraint).

(b) Except for cost-plus-award-fee contracts (see 16.404-2), incentive contracts include a target cost, a target profit or fee, and a profit or fee adjustment formula that (within the constraints of a price ceiling or minimum and maximum fee) provides that—

(1) Actual cost that meets the target will result in the target profit or fee;

(2) Actual cost that exceeds the target will result in downward adjustment of target profit or fee; and

(3) Actual cost that is below the target will result in upward adjustment of target profit or fee.

16.402-2 Technical performance incentives.

(a) Technical performance incentives may be considered in connection with specific product characteristics (e.g., a missile range, an aircraft speed, an engine thrust, or a vehicle maneuverability) or other specific elements of the contractor's performance. These incentives should be designed to tailor profit or fee to results achieved by the contractor, compared with specified target goals.

(b) Technical performance incentives may be particularly appropriate in major systems contracts, both in development (when performance objectives are known and the fabrication of prototypes for test and evaluation is required) and in production (if improved performance is attainable and highly desirable to the Government).

(c) Technical performance incentives may involve a variety of specific characteristics that contribute to the overall performance of the end item. Accordingly, the incentives on individual technical characteristics must be balanced so that no one of them is exaggerated to the detriment of the overall performance of the end item.

(d) Performance tests are generally essential in order to determine the degree of attainment of performance targets. Therefore, the contract must be as specific as possible in establishing test criteria such as testing conditions, instrumentation precision, and data interpretation.

(e) Because performance incentives present complex problems in contract administration, the contracting officer should negotiate them in full coordination with Government engineering and pricing specialists.

(f) It is essential that the Government and contractor agree explicitly on the effect that contract changes (e.g., pursuant to the Changes clause) will have on performance incentives.

(g) The contracting officer must exercise care, in establishing performance criteria, to recognize that the contractor should not be rewarded or penalized for attainments of Government-furnished components.

16.402-3 Delivery incentives.

(a) Delivery incentives should be considered when improvement from a required delivery schedule is a significant Government objective. It is important to determine the Government's primary objectives in a given contract (e.g., earliest possible delivery or earliest quantity production).

(b) Incentive arrangements on delivery should specify the application of the reward-penalty structure in the event of Government-caused delays or other delays beyond the control, and without the fault or negligence, of the contractor or subcontractor.

16.402-4 Structuring multiple-incentive contracts.

A properly structured multiple-incentive arrangement should—

(a) Motivate the contractor to strive for outstanding results in all incentive areas; and

(b) Compel trade-off decisions among the incentive areas, consistent with the Government's overall objectives for the acquisition. Because of the interdependency of the Government's cost, the technical performance, and the delivery goals, a contract that emphasizes only one of the goals may jeopardize control over the others. Because outstanding results may not be attainable for each of the incentive areas, all multiple-incentive contracts must include a cost incentive (or constraint) that operates to preclude rewarding a contractor for superior technical performance or delivery results when the cost of those results outweighs their value to the Government.

16.403 Fixed-price incentive contracts.

(a) *Description.* A fixed-price incentive contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target cost. The final price is subject to a price ceiling, negotiated at the outset. The two forms of fixed-price incentive contracts, firm target and successive targets, are further described in 16.403-1 and 16.403-2 below.

(b) *Application.* A fixed-price incentive contract is appropriate when—

(1) A firm-fixed-price contract is not suitable;

(2) The nature of the supplies or services being acquired and other circumstances of the acquisition are such that the contractor's assumption of a degree of cost responsibility will provide a positive profit incentive for effective cost control and performance; and

(3) If the contract also includes incentives on technical performance and/or delivery, the performance requirements provide a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work.

(c) *Limitations.* A fixed-price incentive contract may be used only when a determination and findings has been executed, in accordance with agency procedures, showing that (1) this contract type is likely to be less costly than any other type or (2) it is impractical to obtain supplies or services of the kind or quality required without the use of this contract type (see 10 U.S.C. 2306(c), 2310(b), and 2311 or 41 U.S.C. 254(b), 257(b), and 257(a)).

(d) *Billing prices.* In fixed-price incentive contracts, billing prices are established as an interim basis for payment. These billing prices may be adjusted, within the ceiling limits, upon request of either party to the contract, when it becomes apparent that final negotiated cost will be substantially different from the target cost.

16.403-1 Fixed-price incentive (firm target) contracts.

(a) *Description.* A fixed-price incentive (firm target) contract specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a profit adjustment formula. These elements are all negotiated at the outset. The price ceiling is the maximum that may be paid to the contractor, except for any adjustment under other contract clauses. When the contractor completes performance, the parties negotiate the final cost, and the final price is established by applying the formula. When the final cost is less than the target cost, application of the formula results in a final profit greater than the target profit; conversely, when final cost is more than target cost, application of the formula results in a final profit less than the target profit, or even a net loss. If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss. Because the profit varies inversely with the cost, this contract type provides a positive, calculable profit incentive for the contractor to control costs.

(b) *Application.* A fixed-price incentive (firm target) contract is appropriate when the parties can negotiate at the outset a firm target cost, target profit, and profit adjustment formula that will provide a fair and reasonable incentive and a ceiling that provides for the contractor to assume an appropriate share of the risk. When the contractor assumes a considerable or major share of the cost responsibility under the adjustment formula, the target profit should reflect this responsibility.

(c) *Limitations.* This contract type may be used only when—

(1) The contractor's accounting system is adequate for providing data

to support negotiation of final cost and incentive price revision;

(2) Adequate cost or pricing information for establishing reasonable firm targets is available at the time of initial contract negotiation; and

(3) The determination and findings required by 16.403(c) has been signed.

(d) *Contract Schedule.* The contracting officer shall specify in the contract Schedule the target cost, target profit, and target price for each item subject to incentive price revision.

16.403-2 Fixed-price incentive (successive targets) contracts.

(a) *Description.* (1) A fixed-price incentive (successive targets) contract specifies the following elements, all of which are negotiated at the outset:

(i) An initial target cost.

(ii) An initial target profit.

(iii) An initial profit adjustment formula to be used for establishing the firm target profit, including a ceiling and floor for the firm target profit. (This formula normally provides for a lesser degree of contractor cost responsibility than would a formula for establishing final profit and price.)

(iv) The production point at which the firm target cost and firm target profit will be negotiated (usually before delivery or shop completion of the first item).

(v) A ceiling price that is the maximum that may be paid to the contractor, except for any adjustment under other contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

(2) When the production point specified in the contract is reached, the parties negotiate the firm target cost, giving consideration to cost experience under the contract and other pertinent factors. The firm target profit is established by the formula. At this point, the parties have two alternatives, as follows:

(i) They may negotiate a firm fixed price, using the firm target cost plus the firm target profit as a guide.

(ii) If negotiation of a firm fixed price is inappropriate, they may negotiate a formula for establishing the final price using the firm target cost and firm target profit. The final cost is then negotiated at completion, and the final profit is established by formula, as under the fixed-price incentive (firm target) contract (see 16.403-1 above).

(b) *Application.* A fixed-price incentive (successive targets) contract is appropriate when—

(1) Available cost or pricing information is not sufficient to permit the negotiation of a realistic firm target cost and profit before award;

(2) Sufficient information is available to permit negotiation of initial targets; and

(3) There is reasonable assurance that additional reliable information will be available at an early point in the contract performance so as to permit negotiation of either (i) a firm fixed price or (ii) firm targets and a formula for establishing final profit and price that will provide a fair and reasonable incentive. This additional information is not limited to experience under the contract, itself, but may be drawn from other contracts for the same or similar items.

(c) *Limitations.* This contract type may be used only when—

(1) The contractor's accounting system is adequate for providing data for negotiating firm targets and a realistic profit adjustment formula, as well as later negotiation of final costs;

(2) Cost or pricing information adequate for establishing a reasonable firm target cost is reasonably expected to be available at an early point in contract performance; and

(3) The determination and findings required by 16.403(c) has been signed.

(d) *Contract Schedule.* The contracting officer shall specify in the contract Schedule the initial target cost, initial target profit, and initial target price for each item subject to incentive price revision.

16.404 Cost-reimbursement incentive contracts.

See 16.301 for requirements applicable to all cost-reimbursement contracts, for use in conjunction with the following subsections.

16.404-1 Cost-plus-incentive-fee contracts.

(a) *Description.* The cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. This contract type specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee payable to the contractor is determined in accordance with the formula. The formula provides, within limits, for increases in fee above target fee when total allowable costs are less than target costs, and decreases in fee below target fee when total allowable costs exceed target costs. This increase or decrease is intended to provide an incentive for the contractor to manage the contract effectively. When total allowable cost is greater than or less than the range of costs within which the fee-adjustment formula operates, the contractor is paid total allowable costs, plus the minimum or maximum fee.

(b) *Application.* (1) A cost-plus-incentive-fee contract is appropriate for development and test programs when (i) a cost-reimbursement contract is necessary (see 16.301-2) and (ii) a target cost and a fee adjustment formula can be negotiated that are likely to motivate the contractor to manage effectively.

(2) The contract may include technical performance incentives when it is highly probable that the required development of a major system is feasible and the Government has established its performance objectives, at least in general terms. This approach may also apply to other development programs, if the use of both cost and technical performance incentives is desirable and administratively practical.

(3) The fee adjustment formula should provide an incentive that will be effective over the full range of reasonably foreseeable variations from target cost. If a high maximum fee is negotiated, the contract shall also provide for a low minimum fee that may be a zero fee or, in rare cases, a negative fee.

(c) *Limitations.* No cost-plus-incentive-fee contract shall be awarded unless all limitations in 16.301-3 are complied with.

16.404-2 Cost-plus-award-fee contracts.

(a) *Description.* A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (1) a base amount fixed at inception of the contract and (2) an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in such areas as quality, timeliness, technical ingenuity, and cost-effective management. The amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination is made unilaterally by the Government and is not subject to the Disputes clause.

(b) *Application.* (1) The cost-plus-award-fee contract is suitable for use when—

(i) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, technical performance, or schedule;

(ii) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(iii) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits.

(2) The number of evaluation criteria and the requirements they represent will differ widely among contracts. The criteria and rating plan should motivate the contractor to improve performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas.

(3) Cost-plus-award-fee contracts shall provide for evaluation at stated intervals during performance, so that the contractor will periodically be informed of the quality of its perform-

ance and the areas in which improvement is expected. Partial payment of fee shall generally correspond to the evaluation periods. This makes effective the incentive which the award fee can create by inducing the contractor to improve poor performance or to continue good performance.

(c) *Limitations.* No cost-plus-award-fee contract shall be awarded unless—

(1) All of the limitations in 16.301-3 are complied with;

(2) The maximum fee payable (i.e., the base fee plus the highest potential award fee) complies with the limitations in 16.301-3; and

(3) The contract amount, performance period, and expected benefits are sufficient to warrant the additional administrative effort and cost involved.

16.405 Contract clauses.

(a) The contracting officer shall insert the clause at 52.216-16, Incentive Price Revision—Firm Target, in solicitations and contracts when a fixed-price incentive (firm target) contract is contemplated. If the contract calls for supplies or services to be ordered under a provisioning document or Government option and the prices are to be subject to the incentive price revision under the clause, the contracting officer shall use the clause with its Alternate I.

(b) The contracting officer shall insert the clause at 52.216-17, Incentive Price Revision—Successive Targets, in solicitations and contracts when a fixed-price incentive (successive targets) contract is contemplated. If the contract calls for supplies or services to be ordered under a provisioning document or Government option and the prices are to be subject to incentive price revision under the clause, the contracting officer shall use the clause with its Alternate I.

(c) The clause at 52.216-7, Allowable Cost and Payment, is prescribed in 16.307(a) for insertion in solicitations and contracts when a cost-plus-incentive-fee contract or a cost-plus-award-fee contract is contemplated.

(d) The clause at 52.216-10, Incentive Fee, is prescribed in 16.307(d) for insertion in solicitations and contracts when a cost-plus-incentive-fee contract is contemplated.

(e) The contracting officer shall insert an appropriate award fee clause in solicitations and contracts when a cost-plus-award-fee contract is contemplated, provided that the clause—

(1) Is prescribed by or approved under agency acquisition regulations;

(2) Is compatible with the clause at 52.216-7, Allowable Cost and Payment; and

(3) Expressly excludes from the operation of the Disputes clause any disagreement by the contractor concerning the amount of the award fee.

Subpart 16.5—Indefinite-Delivery Contracts

16.501 General.

(a) There are three types of indefinite-delivery contracts—definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used when the exact times and/or quantities of future deliveries are not known at the time of contract award.

(b) The various types of indefinite-delivery contracts offer the following advantages:

(1) All three types permit (i) Government stocks to be maintained at minimum levels and (ii) direct shipment to users.

(2) Indefinite-quantity contracts and requirements contracts also permit (i) flexibility in both quantities and delivery scheduling and (ii) ordering of supplies or services after requirements materialize.

(3) Indefinite-quantity contracts limit the Government's obligation to the minimum quantity specified in the contract.

(4) Requirements contracts may permit faster deliveries when production lead time is involved, because contractors are usually willing to maintain limited stocks when the Government will obtain all of its actual purchase requirements from the contractor.

(c) Indefinite-delivery contracts may provide for firm fixed prices (see 16.202), fixed prices with economic price adjustment (see 16.203), fixed prices with prospective redetermination (see 16.205), or prices based on catalog or market prices (see 15.804-3(c)). When prices are based on catalog or market prices, the price to be paid may be determined by establishing an adjustment factor and applying it to the price in industrywide pricing guides or manufacturers' price catalogs. Normally, the adjustment factor will be a fixed percentage discount to be applied to the price in effect on the date of each order. When fast payment procedures are included in indefinite-delivery contracts, the contracting officer shall include in the contract the special data required by 13.303(b).

16.502 Definite-quantity contracts.

(a) *Description.* A definite-quantity contract provides for delivery of a definite quantity of specific supplies or services for a fixed period, with deliveries to be scheduled at designated locations upon order.

(b) *Application.* A definite-quantity contract may be used when it can be determined in advance that (1) a definite quantity of supplies or services will be required during the contract period and (2) the supplies or services are regularly available or will be available after a short lead time.

16.503 Requirements contracts.

(a) *Description.* A requirements contract provides for filling all actual purchase requirements of designated Government activities for specific supplies or services during a specified contract period, with deliveries to be scheduled by placing orders with the contractor.

(1) For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available.

(2) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract may also specify maximum or minimum quantities that the Government may order under each individual order and the maximum that it may order during a specified period of time.

(b) *Application.* A requirements contract may be used when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period. Generally, a requirements contract is appropriate for items or services that are commercial products or commercial-type products (see 11.001). Funds are obligated by each delivery order, not by the contract itself.

(c) *Government property furnished for repair.* When a requirements contract is used to acquire work (e.g., repair, modification, or overhaul) on existing items of Government property, the contracting officer shall specify in the Schedule that failure of the Government to furnish such items in the amounts or quantities described in the Schedule as *estimated* or *maximum* will not entitle the contractor to any equitable adjustment in price under the Government Property clause of the contract.

16.504 Indefinite-quantity contracts.

(a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of specific supplies or services to be furnished during a fixed period, with deliveries to be scheduled by placing orders with the contractor.

(1) The contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if and as ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. The contracting officer may obtain the basis for the maximum from records of previous requirements and consumption, or by other means, but the maximum quantity should be realistic

and based on the most current information available.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each delivery order and the maximum that it may order during a specific period of time.

(b) *Application.* An indefinite-quantity contract may be used when (1) the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period and (2) it is inadvisable for the Government to commit itself for more than a minimum quantity. An indefinite- quantity contract should be used only for items or services that are commercial products or commercial-type products (see 11.001) and when a recurring need is anticipated. Funds for other than the stated minimum quantity are obligated by each delivery order, not by the contract itself.

16.505 Contract clauses.

(a) The contracting officer shall insert the clause at 52.216-18, Ordering, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(b) The contracting officer shall insert a clause substantially the same as the clause at 52.216-19, Delivery-Order Limitations, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(c) The contracting officer shall insert the clause at 52.216-20, Definite Quantity, in solicitations and contracts when a definite-quantity contract is contemplated.

(d) (1) The contracting officer shall insert the clause at 52.216-21, Requirements, in solicitations and contracts when a requirements contract is contemplated.

(2) If the contract is for nonpersonal services and related supplies and covers estimated requirements that exceed a specific Government activity's internal capability to produce or perform, the contracting officer shall use the clause with its Alternate I.

(3) If the contract includes subsistence for both Government use and resale in the same Schedule, and similar products may be acquired on a brand-name basis, the contracting officer shall use the clause with its Alternate II (but see subparagraph (5) below).

(4) If the contract involves a partial small business or labor surplus area set-aside, the contracting officer shall use the clause with its Alternate III (but see subparagraph (5) below).

(5) If the contract (i) includes subsistence for both Government use and resale in the same Schedule and similar products may be acquired on a brand-name basis and (ii) involves a partial small business or labor surplus area set-aside, the contracting officer shall use the clause with its Alternate IV.

(e) The contracting officer shall insert the clause at 52.216-22, Indefinite Quantity, in solicitations and contracts when an indefinite-quantity contract is contemplated.

16.506 Ordering.

(a) The contracting officer shall include in the Schedule of indefinite-delivery contracts the names of the activity or activities authorized to issue orders under indefinite-delivery contracts.

(b) If appropriate, authorization for placing oral orders may be included in the contract Schedule; *provided,* that procedures have been established for obligating funds and that oral orders are confirmed in writing.

(c) Orders may be placed by written telecommunication, if provided for in the contract Schedule.

(d) Orders placed under indefinite-delivery contracts shall contain the following information:

(1) Date of order.

(2) Contract number and order number.

(3) Item number and description, quantity, and unit price.

(4) Delivery or performance date.

(5) Place of delivery or performance (including consignee).

(6) Packaging, packing, and shipping instructions, if any.

(7) Accounting and appropriation data.

(8) Any other pertinent information.

Subpart 16.6—Time-and-Materials, Labor-Hour, and Letter Contracts

16.601 Time-and-materials contracts.

(a) *Description.* A time-and-materials contract provides for acquiring supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit and (2) materials at cost, including, if appropriate, material handling costs as part of material costs.

(b) *Application.* A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.

(1) *Government surveillance.* A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.

(2) *Material handling costs.* When included as part of material costs, material handling costs shall include only costs clearly excluded from the labor-hour rate. Material handling costs may include all appropriate indirect costs allocated to direct materials in accordance with the contractor's usual accounting procedures consistent with part 31.

(3) *Optional method of pricing material.* When the nature of the work to be performed requires the contractor to furnish material that it regularly sells to the general public in the normal course of its business, the contract may provide for charging material on a basis other than at cost if—

(i) The total estimated contract price does not exceed $25,000 or the estimated price of material so charged does not exceed 20 percent of the estimated contract price;

(ii) The material to be so charged is identified in the contract;

(iii) No element of profit on material so charged is included as profit in the fixed hourly labor rates; and

(iv) The contract provides (A) that the price to be paid for such material shall be based on an established catalog or list price in effect when material is furnished, less all applicable discounts to the Government, and (B) that in no event shall the price exceed the contractor's sales price to its most-favored customer for the same item in like quantity, or the current market price, whichever is lower.

(c) *Limitations.* A time-and-materials contract may be used (1) only after the contracting officer executes a determination and findings that no other contract type is suitable and (2) only if the contract includes a ceiling price that the contractor exceeds at its own risk. The contracting officer shall document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price.

16.602 Labor-hour contracts.

Description. A labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor. See 16.601(b) and 16.601(c) for application and limitations, respectively.

16.603 Letter contracts.

16.603-1 Description.

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing services.

16.603-2 Application.

(a) A letter contract may be used when (1) the Government's interests demand that the contractor be given a binding commitment so that work can start immediately and (2) negotiating a definitive contract is not possible in sufficient time to meet the requirement. However, a letter contract should be as complete and definite as feasible under the circumstances.

(b) When a letter contract award is based on price competition, the contracting officer shall include an overall price ceiling in the letter contract.

(c) Each letter contract shall, as required by the clause at 52.216-25, Contract Definitization, contain a negotiated definitization schedule including (1) dates for submission of the contractor's price proposal, required cost or pricing data, and, if required, make-or-buy and subcontracting plans, (2) a date for the start of negotiations, and (3) a target date for definitization, which shall be the earliest practicable date for definitization. The schedule will provide for definitization of the contract within 180 days after the date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first. However, the contracting officer may, in extreme cases and according to agency procedures, authorize an additional period. If, after exhausting all reasonable efforts, the contracting officer and the contractor cannot negotiate a definitive contract because of failure to reach agreement as to price or fee, the clause at 52.216-25 requires the contractor to proceed with the work and provides that the contracting officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.8 and part 31, subject to appeal as provided in the Disputes clause.

(d) The maximum liability of the Government inserted in the clause at 52.216-24, Limitation of Government Liability, shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization. However, it shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official that authorized the letter contract.

(e) The contracting officer shall assign a priority rating to the letter contract if it is appropriate under 12.304.

16.603-3 Limitations.

A letter contract may be used only after the head of the contracting activity or a designee determines in writing that no other contract is suitable. Letter contracts shall not—

(a) Commit the Government to a definitive contract in excess of the funds available at the time the letter contract is executed;

(b) Be entered into without competition when competition is required by part 6; or

(c) Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment is subject to the same requirements and limitations as a new letter contract.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 31426, Sept. 3, 1986]

16.603-4 Contract clauses.

(a) The contracting officer shall include in each letter contract the clauses required by this regulation for the type of definitive contract contemplated and any additional clauses known to be appropriate for it.

(b) In addition, the contracting officer shall insert the following clauses in solicitations and contracts when a letter contract is contemplated:

(1) The clause at 52.216-23, Execution and Commencement of Work, except that this clause may be omitted from letter contracts awarded on SF 26;

(2) The clause at 52.216-24, Limitation of Government Liability, with dollar amounts completed in a manner consistent with 16.603-2(d); and

(3) The clause at 52.216-25, Contract Definitization, with its paragraph (b) completed in a manner consistent with 16.603-2(c). If the letter contract is being awarded on the basis of price competition, the contracting officer shall use the clause with its Alternate I.

(c) The contracting officer shall also insert the clause at 52.216-26, Payments of Allowable Costs Before Definitization, in solicitations and contracts if a cost-reimbursement definitive contract is contemplated, unless the acquisition involves conversion, alteration, or repair of ships.

Subpart 16.7—Agreements

16.701 Scope.

This subpart prescribes policies and procedures for establishing and using basic agreements and basic ordering agreements. (See subpart 13.2 for blanket purchase agreements (BPA's) and see 35.015(b) for additional coverage of basic agreements with educational institutions and nonprofit organizations.)

16.702 Basic agreements.

(a) *Description.* A basic agreement is a written instrument of understanding, negotiated between an agency or contracting activity and a contractor, that (1) contains contract clauses applying to future contracts between the parties during its term and (2) contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the basic agreement. A basic agreement is not a contract.

(b) *Application.* A basic agreement should be used when a substantial number of separate contracts may be awarded to a contractor during a particular period and significant recurring negotiating problems have been experienced with the contractor. Basic agreements may be used with negotiated fixed-price or cost-reimbursement contracts.

(1) Basic agreements shall contain (i) clauses required for negotiated contracts by statute, executive order, and this regulation and (ii) other clauses prescribed in this regulation or agency acquisition regulations that the parties agree to include in each contract as applicable.

(2) Each basic agreement shall provide for discontinuing its future applicablity upon 30 days' written notice by either party.

(3) Each basic agreement shall be reviewed annually before the anniversary of its effective date and revised as necessary to conform to the requirements of this regulation. Basic agreements may need to be revised before the annual review due to mandatory statutory requirements. A basic agreement may be changed only by modifying the agreement itself and not by a contract incorporating the agreement.

(4) Discontinuing or modifying a basic agreement shall not affect any prior contract incorporating the basic agreement.

(5) Contracting officers of one agency should obtain and use existing basic agreements of another agency to the maximum practical extent.

(c) *Limitations.* A basic agreement shall not—

(1) Cite appropriations or obligate funds;

(2) State or imply any agreement by the Government to place future contracts or orders with the contractor; or

(3) Be used in any manner to restrict competition.

(d) *Contracts incorporating basic agreements.* (1) Each contract incorporating a basic agreement shall include a scope of work and price, delivery, and other appropriate terms that apply to the particular contract. The basic agreement shall be incorporated into the contract by specific reference (including reference to each amendment) or by attachment.

(2) The contracting officer shall include clauses pertaining to subjects not covered by the basic agreement, but applicable to the contract being negotiated, in the same manner as if there were no basic agreement.

(3) If an existing contract is modified to effect new acquisition, the modification shall incorporate the most recent basic agreement, which shall apply only to work added by the modification, except that this action is not mandatory if the contract or modification includes all clauses required by statute, executive order, and this regulation as of the date of the modification. However, if it is in the Government's interest and the contractor agrees, the modification may incorporate the most recent basic agreement for application to the entire contract as of the date of the modification.

16.703 Basic ordering agreements.

(a) *Description.* A basic ordering agreement is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains (1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) a description, as specific as practicable, of supplies or services to be provided, and (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement. A basic ordering agreement is not a contract.

(b) *Application*. A basic ordering agreement may be used to expedite contracting for uncertain requirements for supplies or services when specific items, quantities, and prices are not known at the time the agreement is executed, but a substantial number of requirements for the type of supplies or services covered by the agreement are anticipated to be purchased from the contractor. Under proper circumstances, the use of these procedures can result in economies in ordering parts for equipment support by reducing administrative lead-time, inventory investment, and inventory obsolescence due to design changes.

(c) *Limitations*. A basic ordering agreement shall not state or imply any agreement by the Government to place future contracts or orders with the contractor or be used in any manner to restrict competition.

(1) Each basic ordering agreement shall—

(i) Describe the method for determining prices to be paid to the contractor for the supplies or services;

(ii) Include delivery terms and conditions or specify how they will be determined;

(iii) List one or more Government activities authorized to issue orders under the agreement;

(iv) Specify the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);

(v) Provide that failure to reach agreement on price for any order issued before its price is established (see paragraph (d)(3) below) is a dispute under the Disputes clause included in the basic ordering agreement; and

(vi) If fast payment procedures will apply to orders, include the special data required by 13.303(b).

(2) Each basic ordering agreement shall be reviewed annually before the anniversary of its effective date and revised as necessary to conform to the requirements of this regulation. Basic ordering agreements may need to be revised before the annual review due to mandatory statutory requirements. A basic ordering agreement shall be changed only by modifying the agreement itself and not by individual orders issued under it. Modifying a basic ordering agreement shall not retroactively affect orders previously issued under it.

(d) *Orders*. A contracting officer representing any Government activity listed in a basic ordering agreement may issue orders for required supplies or services covered by that agreement.

(1) Before issuing an order under a basic ordering agreement, the contracting officer shall—

(i) Obtain competition in accordance with part 6;

(ii) If the order is being placed after competition, ensure that use of the basic ordering agreement is not prejudicial to other offerors; and

(iii) Sign or obtain any applicable justifications and approvals, and any determination and findings, in accordance with 1.602-1(b), and comply with other requirements, as if the order were a contract awarded independently of a basic ordering agreement.

(2) Contracting officers shall—

(i) Issue orders under basic ordering agreements on Optional Form (OF) 347, Order for Supplies or Services, or on any other appropriate contractual instrument;

(ii) Incorporate by reference the provisions of the basic ordering agreement;

(iii) If applicable, cite the authority under 6.302 in each order; and

(iv) Comply with 5.203 when synopsis is required by 5.201.

(3) The contracting officer shall neither make any final commitment nor authorize the contractor to begin work on an order under a basic ordering agreement until prices have been established, unless the order establishes

a ceiling price limiting the Government's obligation and either—

(i) The basic ordering agreement provides adequate procedures for timely pricing of the order early in its performance period; or

(ii) The need for the supplies or services is compelling and unusually urgent (i.e., when the Government would be seriously injured, financially or otherwise, if the requirement is not met sooner than would be possible if prices were established before the work began). The contracting officer shall proceed with pricing as soon as practical. In no event shall an entire order be priced retroactively.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

PART 17—SPECIAL CONTRACTING METHODS

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42231, Sept. 19, 1983, unless otherwise noted.

17.000 Scope of part.

This part prescribes policies and procedures for the acquisition of supplies and services through special contracting methods, including—

(a) Multi-year contracting;
(b) Options; and
(c) Leader company contracting.

Subpart 17.1—Multiyear Contracting

17.101 Definitions.

Advance acquisition, as used in this subpart, means an exception to the full funding policy which allows acquisition of long leadtime items (advanced long lead acquisition) or economic order quantities (EOQ) of items (advance EOQ acquisition) in a fiscal year in advance of that in which the related end item is to be acquired. Advance acquisitions may include materials, parts, and components as well as costs associated with the further processing of those materials, parts, and components.

Annual funding, as used in this subpart, means the current Congressional practice of limiting authorizations and appropriations to 1 fiscal year at a time. The term should not be confused with 2-year or 3-year funds which permit the Executive Branch more than 1 year to obligate the funds.

Cancellation, as used in this subpart, means the cancellation of the total requirements of all remaining program years. Cancellation results when the contracting officer (a) notifies the contractor of nonavailability of funds for contract performance for any subsequent program year, or (b) fails to notify the contractor that funds are available for performance of the succeeding program year requirement.

Cancellation ceiling, as used in this subpart, means the maximum amount that the Government will pay the contractor which the contractor would have recovered as a part of the unit price, had the contract been completed. The amount which is actually paid to the contractor upon settlement for unrecovered costs (which can only be equal to or less than the ceiling) is referred to as the cancellation charge. This ceiling generally includes only nonrecurring costs.

Multiyear acquisition, as used in this subpart, means contracting, to some degree, for more than the current year requirement. Examples include multiyear contracts and advance EOQ acquisition. Generally, advance long lead acquisitions in support of a single year's requirement would not be considered in a multiyear acquisition.

Multiyear contracts, as used in this subpart, means contracts covering more than 1-year's but not in excess of 5-year's requirements, unless otherwise authorized by statute. Total contract quantities and annual quantities are planned for a particular level and type of funding as displayed in a current 5-year development plan. Each program year is annually budgeted and funded and, at the time of award, funds need only to have been appropriated for the first year. The contractor is protected against loss resulting from cancellation by contract provisions which allow reimbursement of costs included in the cancellation ceiling.

Multiyear funding, as used in this subpart, means Congressional authorization and appropriation covering more than 1 fiscal year. The term should not be confused with 2-year or 3-year funds which cover only 1 fiscal year's requirement but permit the Executive Branch more than 1-year to obligate the funds.

No-year funding, as used in this subpart, means Congressional funding that does not require obligation in any specific year or years.

Nonrecurring costs, as used in this subpart, means those production costs which are generally incurred on a one time basis and include such costs as plant or equipment relocation, plant rearrangement, special tooling and special test equipment, preproduction engineering, initial spoilage and rework, and specialized work force training (see 17.103-1(d)(2)).

Recurring costs, as used in this subpart, means production costs that vary with the quantity being produced such as labor and materials.

Termination for convenience, as used in this subpart, means the procedure which may apply to any Government contract, including multiyear contracts. As contrasted with cancellation, termination can be effected at any time during the life of the contract (cancellation is effected between fiscal years) and can be for the total quantity or a partial quantity (whereas cancellation must be for all subsequent fiscal years' quantities).

Termination liability, as used in this subpart, means the maximum cost the Government would incur if a contract is terminated. In the case of a multiyear contract terminated before completion of the current fiscal year's deliveries, termination liability would include an amount for both current year termination charges and outyear cancellation charges.

Termination liability funding, as used in this subpart, means obligating contract funds to cover the contractor's expenditures plus termination liability but not the total cost of the completed end items.

17.102 Policy.

17.102-1 Uses.

(a) Multiyear contracting may be used when no-year or multiyear funds are available or, in the case of 1-year funds, when multiyear contracting is specifically authorized by statute. (Specific statutory authority is needed for an agency to make financial commitments for amounts greater than those appropriated annually by the Congress. See 31 U.S.C. 1341(a)(1).)

(b) The multiyear contracting method may be used for the acquisition of services or supplies (including, but not limited to systems, subsystems, major equipment, components, parts, materials, supplies and the advance acquisition thereof, and commercial and noncommercial items).

[48 FR 42233, Sept. 19, 1983, as amended at 51 FR 2650, Jan. 17, 1986]

17.102-2 General.

(a) Multiyear contracting is a special contracting method used to acquire known requirements in quantities and total cost not over planned requirements for 5 years unless otherwise authorized by statute, even though the total funds ultimately to be obligated are not available at the time of contract award. This method may be used in sealed bidding or negotiated acquisition.

(b) Under multiyear contracting, contract requirements are budgeted and financed for the program year for which they are authorized. Prices are solicited both for the current 1-year program requirement alone and for the total multiyear requirements. Award is made on whichever alternative offers the lowest unit prices to the Government. (With respect to competitive contracting, award may be based only on price or price and other factors considered.) If award is made on the multiyear basis, funds are obligated only for the first year's requirement, with succeeding years' requirements funded annually.

(c) If funds do not become available to support the succeeding years' requirements, the agency must cancel the contract. Multiyear contracts may contain a contract term allowing reimbursement of unrecovered nonrecurring costs included in prices for canceled items to protect the contractor against loss resulting from cancellation.

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

17.102-3 Objectives.

(a) Use of multiyear contracting is encouraged to take advantage of one or more of the following:

(1) Lower costs.

(2) Enhancement of standardization.

(3) Reduction of administrative burden in the placement and administration of contracts.

(4) Substantial continuity of production or performance, thus avoiding annual startup costs, pre-production testing costs, makeready expenses, and phaseout costs.

(5) Stabilization of contractor work forces.

(6) Avoidance of the need for establishing and *proving out* quality control techniques and procedures for a new contractor each year.

(7) Broadening the competitive base with opportunity for participation by firms not otherwise willing or able to compete for lesser quantities, particularly in cases involving high startup costs.

(8) Provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology.

(b) Contracts awarded under this multiyear procedure shall be firm-fixed-price, fixed-price with economic price adjustment, or fixed-price incentive.

(c) Given the longer performance period associated with multiyear acquisition, consideration in pricing contracts should be given to the use of economic price adjustment terms, profit objectives comparable with risk, and financing arrangements which reflect contractor cash flow requirements.

(d) Multiyear contracting is a flexible contracting method applicable to a wide range of acquisitions. The requirements of this subpart and the clauses at 52.217-1, Limitation of Price and Contractor Obligations, and 52.217-2 Cancellation of Items, respectively, may be modified in the following respects:

(1) *Level unit prices.* Multiyear contract procedures provide for the amor-

tization of certain costs over the entire contract quantity resulting in identical (level) unit prices (except when economic price adjustment provisions apply) for all items or services under the multiyear contract. When level unit pricing is not in the Government's interest, the head of a contracting activity or a designee may approve the use of variable unit pricing, provided that for competitive proposals there is a valid method of evaluation.

(2) *Cancellation provisions.* Whether, or to what extent, cancellation provisions are used in multiyear acquisitions will depend on the unique circumstances of each acquisition. The head of a contracting activity or a designee may authorize the use of modified cancellation provisions or the exclusion of cancellation provisions from the contract.

(3) *Recurring costs in cancellation ceiling.* The inclusion of recurring costs in cancellation ceilings is an exception to normal contract financing arrangements and requires approval by the agency head or a designee.

(4) *Annual and multiyear proposals.* Circumstances in which both annual and multiyear offers or only multiyear offers will be requested are prescribed in 17.103-2. Obtaining both provides reduced lead time for making an annual award in the event that the multiyear award is not in the Government's interest. Obtaining both also provides a basis for the computation of savings and other benefits. However, the preparation and evaluation of dual proposals may increase administrative costs and workloads for both offerors and the Government, especially for large or complex acquisitions. The head of a contracting activity or a designee may authorize the use of a solicitation requesting only multiyear prices provided it is found that such a solicitation is in the Government's interest, and that dual proposals are not necessary to meet the objectives listed in 17.102-3(a).

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

17.103 Procedures.

17.103-1 General.

(a) *Criteria.* Except as limited in 17.103-1(b), multiyear contracting may be used when one or more of the objectives in 17.102-3 can be met, and the following criteria are present:

(1) The use of such a contract will result in reduced total costs under the contract.

(2) The minimum need for the item to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, acquisition rate, and total quantities.

(3) There is a reasonable expectation that throughout the contemplated contract period the department or agency will request funding for the contract at the level required to avoid contract cancellation.

(4) There is a stable design for the item to be acquired and the technical risks associated with such items are not excessive.

(5) The estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(b) *Limitations.* Except as permitted by statute, agencies shall not use multiyear contracts when—

(1) Funds covering the acquisition are limited by statute for obligation during the fiscal year in which the contract is executed; or

(2) Requirements exceed a 5-year planned program.

(c) *Method of contracting.* The nature of the requirement should govern the selection of the method of contracting, since the multiyear procedure is compatible with sealed bidding, including two-step sealed bidding, and negotiation.

(d) *Cancellation.* (1) All program years except the first are subject to cancellation. For each program year subject to cancellation, the contracting officer shall establish a cancellation ceiling. Ceilings must exclude amounts for items included in prior program years. The contracting officer shall reduce the cancellation ceiling for each program year in direct proportion to the remaining requirements subject to cancellation. For example, consider that the total nonrecurring costs (see 15.804-6) are estimated at 10 percent of the total multiyear price, and the percentages for each of the program-year requirements for 5-years are (i) 30 in the first year, (ii) 30 in the second, (iii) 20 in the third, (iv) 10 in the fourth, and (v) 10 in the fifth. The cancellation percentages, after deducting 3 percent for the first program year, would be 7, 4, 2, and 1 percent of the total price applicable to the second, third, fourth, and fifth program years, respectively.

(2) In determining cancellation ceilings, the contracting officer must estimate reasonable preproduction or startup, labor learning, and other nonrecurring costs to be incurred by an *average* prime contractor or subcontractor, which would be applicable to, and which normally would be amortized over, the items or services to be furnished under the multiyear requirements. Nonrecurring costs include such costs, where applicable, as plant or equipment relocation or rearrangement, special tooling and special test equipment, preproduction engineering, initial rework, initial spoilage, pilot runs, allocable portions of the costs of facilities to be acquired or established for the conduct of the work, costs incurred for the assembly training and transportation of a specialized work force to and from the job site, and unrealized labor learning. They shall not include any costs of labor or materials, or other expenses (except as indicated above), which might be incurred for performance of subsequent program year requirements. The total estimate of the above costs must then be compared with the best estimate of the contract cost to arrive at a reasonable percentage or dollar figure. To perform this calculation, the contracting officer should obtain in-house engineering cost estimates identifying the detailed recurring and nonrecurring costs, and indicating labor learning implications.

(3) The contracting officer shall establish cancellation dates for each program year's requirements regarding production lead time and the date by which funding for these requirements can reasonably be established. The contracting officer shall include these dates in the schedule, as appropriate.

(e) *Cancellation ceilings.* Cancellation ceilings and dates may be revised after issuing the solicitation if necessary. In sealed bidding, the contracting officer shall change the ceiling by amending the solicitation before bid opening. In two-step sealed bidding, discussions conducted during the first step may indicate the need for revised ceilings and dates which may be incorporated in step two. In a negotiated acquisition, negotiations with offerors may provide information requiring a change in cancellation ceilings and dates before final negotiation and contract award.

(f) *Funding/payment of cancellation charges.* Cancellation charges need not be funded before cancellation. If cancellation occurs, the contractor is entitled to payment (see the clause at 52.217-2, Cancellation of Items).

(g) *Presolicitation or pre-bid conferences.* To ensure that all interested sources of supply are thoroughly aware of how multiyear contracting is accomplished, use of presolicitation or pre-bid conferences may be advisable.

(h) *Payment limit.* The contracting officer shall limit the Government's payment obligation to an amount available for contract performance. The contracting officer shall insert the amount for the first program year in the contract upon award and modify it for successive program years upon availability of funds.

(i) *Termination payment.* If the contract is terminated for the convenience of the Government in whole, including items subject to cancellation, the Government's obligation shall not exceed the amount specified in the Schedule as available for contract performance, plus the cancellation ceiling.

(j) *Economic price adjustment clauses.* Economic price adjustment clauses are adaptable to multiyear contracting needs. When the period of production is likely to warrant a labor and material costs contingency in the contract price, the contracting officer should normally use an economic price adjustment clause (see 16.203).

(k) *Price adjustment clause.* When contracting for services, the contracting officer—

(1) Shall add the clause at 52.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiyear and Option Contracts), when the contract includes the clause at 52.222-41, Service Contract Act of 1965;

(2) May modify the clause at 52.222-43 in overseas contracts when laws, regulations, or international agreements require contractors to pay higher wage rates; or

(3) May use an economic price adjustment clause authorized by 16.203 when potential fluctuations require coverage, and are not included in cost contingencies provided for by the clause at 52.222-43.

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

17.103-2 Solicitations.

Solicitations for multiyear contracts shall reflect all the factors to be considered for evaluation, specifically including the following:

(a) The requirements, by item or service, for the—

(1) First program year; and

(2) Multiyear contract including the requirements for each program year.

(b) When previous acquisitions of the item or service have been made with competition, a provision that a price may be submitted—

(1) For the total requirements of the first program year, or for the total multiyear requirements, or both; or

(2) Only for the total multiyear requirement, and that prices on a single-year basis will not be considered when (i) competition in future acquisitions would be impracticable after award of a contract covering the first program year requirement and (ii) it is necessary to prevent a first program year *buy-in.*

(c) When previous acquisitions for the item or service have been made without competition, and a first program year *buy-in* is not anticipated, include—

(1) A provision that a price must be submitted for the first program year requirements, that a price may be submitted for the total multiyear requirements, and that an offer on only the multiyear requirements will be nonresponsive; and

(2) A provision that if only one offer on the multiyear requirements is received that is both responsive and from a responsible offeror, the Government reserves the right to disregard the offer on the multiyear requirements and make an award only for the first program year requirements; or

(d) When competition after the first program year would be impracticable after award of a contract covering the first program year requirement, and it is necessary to prevent a first program year *buy-in,* include—

(1) A provision that a price may be submitted only on the total multiyear requirement and that prices on a single-year basis will not be considered for the purpose of award.

(2) A provision that if only one offer on the multiyear requirements is received that is both responsive and from a responsible offeror, the Government reserves the right to cancel the solicitation and resolicit on a single-year basis by whatever procedures are then appropriate.

(e) A provision that the unit price of each item or service in the multiyear requirement shall be the same for all program years (level unit price) included. (See 16.203 for the use of an economic price adjustment clause which might effect the level unit price.)

(f) Criteria for comparing the lowest evaluated submission on the first program year's requirement against the lowest evaluated submission on the multiyear requirements (see 17.103-3(e)).

(g) Criteria for evaluation factors other than price where the acquisition is on the basis of price and other factors.

(h) A provision that if the Government determines before award that only the first program year requirements are needed, the Government may evaluate offers and make award solely on the basis of price offered on that year's requirements.

(i) A provision specifying a separate cancellation ceiling (on a percentage or dollar basis) and dates applicable to each program year subject to a cancellation (see 17.103-1(d)).

(j) A prominently placed provision directing attention to the multiyear features of the solicitation, and to—

(1) The clause at 52.217-1, Limitation of Price and Contractor Obligations, which limits the payment obligation of the Government to the requirements of the first program year and to those requirements of succeeding program years funded by the Government (see 17.105);

(2) The clause at 52.217-2, Cancellation of Items, which allows the Government to cancel by a specific date or within a specific period, all remaining program years; and

(3) The cancellation ceiling set forth in the schedule.

(k) A statement that award will not be made on less than the first program year requirements.

(l) In the event the solicitation is only for supplies and delivery destinations are unknown—

(1) A definite place or places as the point to which transportation costs will be computed (but only for the purpose of evaluation); and

(2) Insert the provision at 52.247-49, Destination Unknown, which is prescribed at 47.305-5(b)(2).

(m) If Government administrative costs are to be used as a factor in evaluation (see 17.103-3(e)(2)), the dollar amount of those costs. Unless Government administrative costs incident to annual contracting and administration can be reasonably established, they shall not be used as a factor for evaluation.

(n) Where the multiyear acquisition is being computed on a basis other than price alone, the solicitation shall advise of the relative importance of the evaluation factors.

(o) When Government property is provided, it may be used on a rent-free basis. The solicitation shall then contain detailed procedures for eliminating competitive advantage (see subpart 45.2).

[48 FR 42233, Sept. 19, 1983, as amended at 51 FR 2650, Jan. 17, 1986]

17.103-3 Evaluation.

In addition to the factors in 17.103-2, the contracting officer shall comply with the following:

(a) Evaluation of offers shall involve (1) determination of the lowest overall evaluated cost to the Government for both the multiyear and the first program year acquisition, and (2) comparison of the cost of buying the total requirement under a multiyear acquisition with the cost of buying the total requirement in successive independent acquisitions.

(b) The cancellation ceiling shall not be a factor for evaluation.

(c) If Government property is provided, the contracting officer shall, for evaluation purposes, add an amount for the use of such property computed to eliminate competitive advantage to each offeror's unit price for the first program year requirement and the unit price for the multiyear requirements.

(d) When the solicitation only provides for submission of prices for the total multiyear quantity, submission of prices for the single-year quantity will be disregarded but will not render the offer nonresponsive as to any alternative multiyear submission by the offeror.

(e) To determine the lowest evaluated unit price, the contracting officer shall compare the lowest evaluated offer on the first program year alternative against the lowest evaluated offer on the multiyear alternative as follows:

(1) Multiply the evaluated unit price for each item of the lowest evaluated offer on the first program year alternative by the total number of units of that item required by the multiyear alternative.

(2) Add the total amount for all the items to the dollar amount of any administrative costs identified in the solicitation.

(3) Compare this result against the total evaluated price of the lowest offer on the multiyear alternative.

(4) Where the multiyear acquisition is being computed on a basis other than price alone, the contracting officer shall conduct the evaluation based

on the evaluation factors contained in the solicitation (see 17.103-2(n)).

(5) The evaluation procedures contained in this subpart may be modified if necessary to meet the unique circumstances of a particular acquisition.

17.103-4 Award.

(a) When the acquisition is on the basis of price only, the contracting officer shall award to firms offering the lowest evaluated unit price whether that price is on a single-year or a multiyear basis.

(b) When the acquisition is on the basis of price and other factors, the contracting officer shall award to the offeror submitting the proposal most advantageous to the Government, price and other factors considered.

(c) In the case of sole source acquisitions, awards shall be made only if a detailed review of the cost and technical proposals supports the objectives of 17.103-1, and significant benefits of cost savings will result from multiyear acquisitions.

(d) However, if only one responsive offer is received on the multiyear requirements from a responsible offeror, the contracting officer shall proceed as follows:

(1) If the solicitation gave the offeror the choice of submitting prices on a single-year or multiyear basis, or both, make the award under 17.103-4(a) or 17.103-4(b).

(2) If the solicitation required the submission of prices on the first program year requirements (see 17.103-2(c)(1)), make award to the lowest evaluated offeror on the single-year basis, even though the multiyear price submission may represent the lowest evaluated price submission. However, if the multiyear price offers distinct advantages to the Government, a multiyear award may be made with the advance approval of the head of the contracting activity.

(3) If the solicitation restricted the submission of prices to the multiyear basis only, cancel it and issue a new solicitation. However, if the multiyear price offers distinct advantages to the Government, a multiyear award may be made with the advance approval of the head of the contracting activity.

(e) If the contract is awarded for multiyear requirements, the Schedule shall state that the award was made under *multiyear contracting.*

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

17.104 Related areas.

17.104-1 Set-asides.

(a) Total small business or labor surplus area set-asides and multiyear contracting are compatible and may be used together.

(b) Partial set-asides for small business or labor surplus area concerns generally are not compatible with multiyear contracting when high startup costs are involved because of the potential duplication of costs by the set-aside and non-set-aside contractors. However—

(1) Even when high startup costs are involved, partial set-asides combined with the multiyear procedure may be appropriate if the criteria for partial set-asides are met under part 19 and it is likely that the broader competition will offset any duplication of startup costs; and

(2) Partial set-asides are compatible with multiyear contracting when the multiyear procedure is based on cost savings from anticipated production over longer periods of time. (Partial labor surplus area set-asides are only authorized for DOD activities at this time.)

(c) When considering combining multiyear contracting and set-asides, the contracting officer shall request the advice of the activity's small business specialist and the SBA representative, if one is assigned to the activity, and permit them to review the facts and make recommendations.

17.104-2 Multiyear subcontracts.

(a) The benefits and advantages of multiyear prime contracts may frequently be increased by multiyear subcontracts under the prime contracts. While prime contractors should be encouraged to employ multiyear subcontracts, the choice of the appropriate subcontract types remains with the prime contractor who should employ multiyear subcontracts only when in its judgment—

(1) The subcontract item or service is of stable design and specification;

(2) The quantity required is reasonably firm and continuing;

(3) Effective competition may be enhanced; and

(4) Multiyear subcontracts can reasonably be expected to result in reduced prices.

(b) Multiyear subcontracts may be particularly desirable under a multiyear prime contract awarded without full and open competition, since effective competition at the subcontract level may be enhanced and the attendant cost reductions realized the prime contractor and the Government.

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

17.104-3 Options.

Benefits may accrue by providing for options with a multiyear contract. In that event, contracting officers must follow both the requirements of subpart 17.2 and the following:

(a) Option prices should not include (1) charges for plant and equipment already amortized, or (2) other nonrecurring charges which were included in the basic contract price. Accordingly, solicitations should require offerors to submit prices for option quantities which do not include such charges.

(b) Contracting officers should also consider including a term allowing the Government the option, upon payment of the unamortized portion of the cost of the plant or equipment, to take title to them.

17.104-4 Multiyear contracting using modified requirements contracts.

(a) *Description of procedure*. Multiyear acquisition of supplies and/or services may be accomplished using a requirements contract, modified from the type discussed in 16.503 as described below. This type of contract will only be used when anticipated annual requirements, expressed as the Best Estimated Quantity (BEQ), can be projected with reasonable certainty. Under this method, a fixed-price contract is awarded for specified supplies and/or services up to a designated maximum quantity with orders placed on an as-required basis during the multiyear period. Contracts awarded only on the first program year requirements will not include provision for cancellation charges. The modified requirements contract differs from the contract discussed in 16.503 in the following respects:

(1) Contract quantities anticipated to be acquired are set forth in the contract as the BEQ.

(2) Nonrecurring costs are to be amortized on the BEQ.

(3) The contractor is entitled to reimbursement for preproduction and other nonrecurring costs in accordance with the contract schedule cancellation ceiling in the event that the Government orders lesser quantities than the aggregate BEQ, or cancels program year requirements by cancellation notice.

(4) Quantities in excess of the aggregate BEQ and up to the maximum quantity set forth in the schedule will be priced exclusive of the nonrecurring costs amortizing on the BEQ.

(b) *Solicitation procedures*. Solicitation procedures shall be in conformance with those contained in 17.103-2 except the term *requirements* as used in 17.103-2 will be deemed to mean BEQ. The solicitation shall include the following:

(1) A BEQ and a maximum quantity for each item for both the first program year and for each subsequent program year. The maximum quantity for individual program years is not separately priced.

(2) A line item, essentially as follows, to apply to quantities exceeding the aggregate multiyear BEQ:

"The price established for this line item is applicable to all units ordered in excess of the aggregate BEQ of... and up to the total multiyear contract maximum quantity ..."

(3) Applicable solicitation schedule notes, essentially as follows:

(i) "NOTE 1: Offeror will submit unit price for the single year requirement, which shall apply to all quantities up to the single year maximum in the event that a 1-year requirements contract is awarded only for the single-year requirement. If a contract is awarded only on the first program year requirements, such a contract will not provide for any cancellation charges."

(ii) "NOTE 2: Offeror will submit a single unit price, inclusive of nonrecurring costs, to be entered on the schedule as the BEQ price for each program year, applicable to quantities within and up to the aggregate BEQ, under multiyear procedures."

(iii) "NOTE 3: Offerors will also submit a single unit price, exclusive of nonrecurring costs amortized over the BEQ, applicable only to quantities ordered in excess of the aggregate BEQ and up to the total multiyear contract maximum quantity."

(4) A statement that quantities ordered in excess of the program year BEQ but which do not exceed the aggregate BEQ will be priced inclusive of nonrecurring costs.

(5) A statement that evaluation will be on the basis of the lowest unit price offered for the first program year BEQ against the lowest unit price offered for the aggregate BEQ.

(6) A statement setting forth a single cancellation ceiling, applicable only in the event of contract award on the multiyear basis.

(7) A notification that the amount of cancellation charges payable shall be determined on the basis of the ratio between the total quantity ordered at the time of cancellation and the aggregate contract BEQ.

(8) A date of specific time period for Government notification to the contractor as to the availability or nonavailability of funds and any anticipated significant changes in the BEQ for the succeeding program year.

(9) A statement that in the event the contract is awarded for more than one program year, the contract will include the clause at 52.217-2, Cancellation of Items, with its Alternate I.

17.105 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the following clauses in solicitations and contracts when a multiyear contract or a multiyear modified-requirements contract is contemplated:

(1) The clause at 52.217-1, Limitations of Price and Contractor Obligations.

(2) The clause at 52.217-2, Cancellation of Items. If a multiyear modified requirements contract is awarded for more than one program year, the contracting officer shall use the clause with its Alternate I.

(b) For purposes of determining the provisions and clauses applicable to solicitations and contracts under the procedure in 17.104-4 above, prescriptions pertaining to requirements contracts are applicable (see 16.505(a), 16.505(b), and 16.505(d)).

(c) Provisions and clauses prescribed elsewhere in the FAR shall also be used when the conditions specified in their prescriptions are applicable.

Subpart 17.2—Options

17.200 Scope of subpart.

This subpart prescribes policies and procedures for the use of option solicitation provisions and contract clauses. Except as provided in agency regulations, this subpart does not apply to contracts for:

(a) Services involving the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other kinds of real property;

(b) Architect-engineer services;

(c) Research and development services;

(d) Automatic data processing (ADP) equipment systems; and

(e) Telecommunications equipment and services.

However, it does not preclude the use of options in those contracts.

[53 FR 17858, May 18, 1988]

17.201 Definition.

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

17.202 Use of options.

(a) Subject to the limitations of paragraphs (b) and (c) below, the contracting officer may include options in contracts when it is in the Government's interest. (See 17.207(f) with regard to the exercise of options.)

(b) Inclusion of an option is normally not in the Government's interest when, in the judgment of the contracting officer, the foreseeable requirements involve—

(1) Minimum economic quantities (i.e., quantities large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price); and

(2) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.

(c) The contracting officer shall not employ options if—

(1) The supplies or services are readily available on the open market;

(2) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable;

(3) An indefinite quantity or requirements contract is appropriate (except that the contracting officer may use options for extending the term of such contracts);

(4) Market prices for the supplies or services involved are likely to change substantially; or

(5) The option represents known firm requirements for which funds are available unless (i) the basic quantity is a learning or testing quantity and (ii) competition for the option is impracticable once the initial contract is awarded.

(d) In recognition of (1) the Government's need in certain service contracts for continuity of operations and (2) the potential cost of disrupted support, options may be included in service contracts if there is an anticipated need for a similar service beyond the first contract period.

[48 FR 42231, Sept. 19, 1983, as amended at 53 FR 17858, May 18, 1988]

17.203 Solicitations.

(a) Solicitations shall include appropriate option provisions and clauses when resulting contracts will provide for the exercise of options (see 17.208).

(b) Solicitations containing option provisions shall state the basis of evaluation, either exclusive or inclusive of the option and, when appropriate, shall inform offerors that it is anticipated that the Government may exercise the option at time of award.

(c) Solicitations normally should allow option quantities to be offered without limitation as to price, and there shall be no limitation as to price if the option quantity is to be considered in the evaluation for award (see 17.206).

(d) Solicitations that allow the offer of options at unit prices which differ from the unit prices for the basic requirement shall state that offerors may offer varying prices for options, depending on the quantities actually ordered and the dates when ordered.

(e) If it is anticipated that the Government may exercise an option at the time of award and if the condition specified in paragraph (d) above applies, solicitations shall specify the price at which the Government will evaluate the option (highest option price offered or option price for specified requirements).

(f) Solicitations may, in unusual circumstances, require that options be offered at prices no higher than those for the initial requirement; e.g., when (1) the option cannot be evaluated under 17.206, or (2) future competition for the option is impracticable.

(g) Solicitations that require the offering of an option at prices no higher than those for the initial requirement shall—

(1) Specify that the Government will accept an offer containing an option price higher than the base price only if the acceptance does not prejudice any other offeror; and

(2) Limit option quantities for additional supplies to not more than 50 percent of the initial quantity of the same contract line item. In unusual circumstances, an authorized person at a level above the contracting officer may approve a greater percentage of quantity.

(h) See 25.402(a)(4) regarding use of options in calculating the estimated contract amount for application of the Trade Agreements Act threshold.

[48 FR 42231, Sept. 19, 1983, as amended at 53 FR 27464, July 20, 1988]

17.204 Contracts.

(a) The contract shall specify limits on the purchase of additional supplies or services, or the overall duration of the term of the contract, including any extension.

(b) The contract shall state the period within which the option may be exercised.

(c) The period shall be set so as to provide the contractor adequate lead time to ensure continuous production.

(d) The period may extend beyond the contract completion date for service contracts. This is necessary for situations when exercise of the option would result in the obligation of funds that are not available in the fiscal year in which the contract would otherwise be completed.

(e) Unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services, and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies. Statutes applicable to various classes of contracts may place additional restrictions on the length of contracts.

(f) Contracts may express options for increased quantities of supplies or services in terms of (1) percentage of specific line items, (2) increase in specific line items, or (3) additional numbered line items identified as the option.

(g) Contracts may express extensions of the term of the contract as an amended completion date or as additional time for performance; e.g., days, weeks, or months.

[48 FR 42231, Sept. 19, 1983, as amended at 54 FR 5055, Jan. 31, 1989]

17.205 Documentation.

(a) The contracting officer shall justify in writing the quantities or the term under option, the notification period for exercising the option, and any limitation on option price under 17.203(g); and shall include the justification document in the contract file.

(b) Any justifications and approvals and any determination and findings required by part 6 shall specify both the basic requirement and the increase permitted by the option.

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

17.206 Evaluation.

(a) In awarding the basic contract, the contracting officer shall, except as provided in paragraph (b) of this section, evaluate offers for any option quantities or periods contained in a solicitation when it has been determined prior to soliciting offers that the Government is likely to exercise the options. (See 17.208.)

(b) The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is a reasonable certainty that funds will be unavailable to permit exercise of the option.

[53 FR 17858, May 18, 1988]

17.207 Exercise of options.

(a) When exercising an option, the contracting officer shall provide written notice to the contractor within the time period specified in the contract.

(b) When the contract provides for economic price adjustment and the contractor requests a revision of the price, the contracting officer shall determine the effect of the adjustment on prices under the option before the option is exercised.

(c) The contracting officer may exercise options only after determining that—

(1) Funds are available;

(2) The requirement covered by the option fulfills an existing Government need;

(3) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors (see paragraphs (d) and (e) below) considered; and

(4) The option was synopsized in accordance with part 5 unless exempted

by 5.202(a)(10) or other appropriate exemptions in 5.202.

(d) The contracting officer, after considering price and other factors, shall make the determination on the basis of one of the following:

(1) A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option. If it is anticipated that the best price available is the option price or that this is the more advantageous offer, the contracting officer should not use this method of testing the market.

(2) An informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer.

(3) The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer. The contracting officer shall take into consideration such factors as market stability and comparison of the time since award with the usual duration of contracts for such supplies or services.

(e) The determination of other factors under (c)(3) of this section should take into account the Government's need for continuity of operations and potential costs of disrupting operations.

(f) Before exercising an option, the contracting officer shall make a written determination for the contract file that exercise is in accordance with the terms of the option, the requirements of this section, and part 6. To satisfy requirements of part 6 regarding full and open competition, the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract, e.g.—

(1) A specific dollar amount;

(2) An amount to be determined by applying provisions (or a formula) provided in the basic contract, but not including renegotiation of the price for work in a fixed-price type contract;

(3) In the case of a cost-type contract, if—

(i) The option contains a fixed or maximum fee; or

(ii) The fixed or maximum fee amount is determinable by applying a formula contained in the basic contract (but see 16.102(c));

(4) A specific price that is subject to an economic price adjustment provision; or

(5) A specific price that is subject to change as the result of changes to prevailing labor rates provided by the Secretary of Labor.

(g) The contract modification or other written document which notifies the contractor of the exercise of the option shall cite the option clause as authority.

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52433, 52434, Dec. 23, 1985; 53 FR 17858, May 18, 1988]

17.208 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert a provision substantially the same as the provision at 52.217-3, Evaluation Exclusive of Options, in solicitations when the solicitation includes an option clause and does not include one of the provisions prescribed in paragraph (b) or (c) below.

(b) The contracting officer shall insert a provision substantially the same as the provision at 52.217-4, Evaluation of Options Exercised at Time of Contract Award, in solicitations when the solicitation includes an option clause, a determination has been made that there is a reasonable likelihood that the option will be exercised, and the option may be exercised at the time of contract award.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.217-5, Evaluation of Options, in solicitations when—

(1) The solicitation contains an option clause;

(2) An option is not to be exercised at the time of contract award;

(3) A firm-fixed-price contract, a fixed-price contract with economic price adjustment, or other type of contract approved under agency procedures is contemplated; and

(4) A determination has been made that there is a reasonable likelihood that the option will be exercised.

(d) The contracting officer shall insert a clause substantially the same as the clause at 52.217-6, Option for Increased Quantity, in solicitations and contracts, other than those for services, when the inclusion of an option is appropriate (see 17.200 and 17.202) and the option quantity is expressed as a percentage of the basic contract quantity or as an additional quantity of a specific line item.

(e) The contracting officer shall insert a clause substantially the same as the clause at 52.217-7, Option for Increased Quantity—Separately Priced Line Item, in solicitations and contracts, other than those for services, when the inclusion of an option is appropriate (see 17.200 and 17.202) and the option quantity is identified as a separately priced line item having the same nomenclature as a corresponding basic contract line item.

(f) The contracting officer shall insert a clause substantially the same as the clause at 52.217-8, Options to Extend Services, in solicitations and contracts for services when the inclusion of an option is appropriate. (See 17.200, 17.202, and 37.111.)

(g) The contracting officer shall insert a clause substantially the same as the clause at 52.217-9, Option to Extend the Term of the Contract, in solicitations and contracts when the inclusion of an option is appropriate (see 17.200 and 17.202) and it is necessary to include in the contract a requirement that the Government shall give the contractor a preliminary written notice of its intent to extend the contract, a stipulation that an extension of the contract includes an extension of the option, and/or a specified limitation on the total duration of the contract.

[48 FR 42231, Sept. 19, 1983, as amended at 53 FR 17858, May 18, 1988; 54 FR 5055, Jan. 31, 1989; 54 FR 29281, July 11, 1989; 55 FR 38516, Sept. 18, 1990]

Subpart 17.3—[Reserved]

Subpart 17.4—Leader Company Contracting

17.401 General.

Leader company contracting is an extraordinary acquisition technique that is limited to special circumstances and utilized only when its use is in accordance with agency procedures. A developer or sole producer of a product or system is designated under this acquisition technique to be the leader company, and to furnish assistance and know-how under an approved contract to one or more designated follower companies, so they can become a source of supply. The objectives of this technique are one or more of the following:

(a) Reduce delivery time.

(b) Achieve geographic dispersion of suppliers.

(c) Maximize the use of scarce tooling or special equipment.

(d) Achieve economies in production.

(e) Ensure uniformity and reliability in equipment, compatibility or standardization of components, and interchangeability of parts.

(f) Eliminate problems in the use of proprietary data that cannot be resolved by more satisfactory solutions.

(g) Facilitate the transition from development to production and to subsequent competitive acquisition of end items or major components.

17.402 Limitations.

(a) Leader company contracting is to be used only when—

(1) The leader company has the necessary production know-how and is able to furnish required assistance to the follower(s);

(2) No other source can meet the Government's requirements without the assistance of a leader company;

(3) The assistance required of the leader company is limited to that which is essential to enable the follower(s) to produce the items; and

(4) Its use is authorized in accordance with agency procedures.

(b) When leader company contracting is used, the Government shall reserve the right to approve subcontracts between the leader company and the follower(s).

17.403 Procedures.

(a) The contracting officer may award a prime contract to a—

(1) Leader company, obligating it to subcontract a designated portion of the required end items to a specified follower company and to assist it to produce the required end items;

(2) Leader company, for the required assistance to a follower company, and a prime contract to the follower for production of the items; or

(3) Follower company, obligating it to subcontract with a designated leader company for the required assistance.

(b) The contracting officer shall ensure that any contract awarded under this arrangement contains a firm agreement regarding disclosure, if any, of contractor trade secrets, technical designs or concepts, and specific data, or software, of a proprietary nature.

Subpart 17.5—Interagency Acquisitions Under the Economy Act

17.500 Scope of subpart.

This subpart prescribes policies and procedures applicable to interagency acquisitions under the Economy Act (31 U.S.C. 1535). Policies and procedures for acquisitions from required sources of supplies are prescribed in part 8.

[48 FR 42233, Sept. 19, 1983, as amended at 51 FR 2650, Jan. 17, 1986]

17.501 Definition.

Interagency acquisition means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency).

17.502 General.

Under the Economy Act, an agency may place orders with any other agency for supplies or services that the servicing agency may be in a position or equipped to supply, render, or obtain by contract if it is determined by the head of the requesting agency, or designee, that it is in the Government's interest to do so.

17.503 Determination requirements.

(a) The determination prescribed in 17.502 shall include a finding that—

(1) Legal authority for the acquisition otherwise exists; and

(2) The action does not conflict with any other agency's authority or responsibility; e.g., that of the Administrator of General Services under the Federal Property and Administrative Services Act (see 40 U.S.C. 481, 486, and 41 CFR 101-25.2).

(b) If the acquisition involves the use of a commercial or industrial activity operated by the servicing agency, the determination shall also include a finding that the acquisition conforms to the requirements of subpart 7.3, Contractor Versus Government Performance.

17.504 Ordering procedures.

(a) When placing an order for supplies or services from another Government agency, the contracting officer shall first obtain the determination required in 17.502.

(b) The order may be placed on any form or document that is acceptable to both agencies. The order should include—

(1) A description of the supplies or services required;

(2) Delivery requirements;

(3) A funds citation;

(4) A payment provision (see 17.505); and

(5) Acquisition authority as may be appropriate (see 17.504(d)).

(c) The requesting and servicing agencies should agree to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third-party forum. If a third party is proposed, consent of the third party should be obtained in writing.

(d) When an interagency acquisition requires the servicing agency to award a contract, the following procedures apply:

(1) If a justification and approval or a determination and findings (D&F) is required by law or regulation, the

servicing agency shall execute and issue the justification and approval or D&F. The requesting agency shall furnish the servicing agency any information needed to make the justification and approval and the D&F.

(2) The requesting agency shall also be responsible for furnishing other assistance that may be necessary, such as providing special contract terms or other requirements that must comply with any condition or limitation applicable to the funds of the requesting agency.

(3) The servicing agency is responsible for compliance with all other legal or regulatory requirements applicable to the contract including (i) having adequate statutory authority for the contractual action and (ii) complying fully with the competition requirements of part 6 (see 6.002).

(e) Nonsponsoring Federal agencies may use a Federally Funded Research and Development Center (FFRDC) only if the terms of the FFRDC's sponsoring agreement permit work from other than a sponsoring agency. Work placed with the FFRDC is subject to the acceptance by the sponsor and must fall within the purpose, mission, general scope of effort, or special competency of the FFRDC. (See 35.017; see also 6.302 for procedures to follow where using less than full and open competition.) The nonsponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with domestic private industry.

[48 FR 42231, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 55 FR 3881, Feb. 5, 1990]

17.505 Payment.

(a) Under the Economy Act—

(1) The servicing agency may request the requesting agency, in writing, for advance payment by check for all or part of the estimated cost of furnishing the supplies or services; or

(2) If approved by the servicing agency, payment by check for actual costs may be made by the requesting agency after the supplies or services have been furnished.

(b) If advance payment is made, adjustments on the basis of actual costs shall be made as agreed by the agencies.

(c) Bills rendered or requests for advance payment shall not be subject to audit or certification in advance of payment.

Subpart 17.6—Management and Operating Contracts

17.600 Scope of subpart.

This subpart prescribes policies and procedures for management and operating contracts for the Department of Energy and any other agency having requisite statutory authority.

17.601 Definition.

Management and operating contract means an agreement under which the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency.

17.602 Policy.

(a) Heads of agencies, with requisite statutory authority, may determine in writing to authorize contracting officers to enter into or renew any management and operating contract in accordance with the agency's statutory authority, or the Competition in Contracting Act of 1984, and the agency's regulations governing such contracts. This authority shall not be delegated. Every contract so authorized shall show its authorization upon its face.

(b) Agencies may authorize management and operating contracts only in a manner consistent with the guidance of this subpart and only if they are consistent with the situations described in 17.604.

(c) Within 2 years of the effective date of this regulation, agencies shall review their current contractual arrangements in the light of the guidance of this subpart, in order to (1) identify, modify as necessary, and authorize management and operating contracts and (2) modify as necessary or terminate contracts not so identified and authorized, except that any contract with less than 4 years remaining as of the effective date of this regulation need not be terminated, nor need it be identified, modified, or authorized unless it is renewed or its terms are substantially renegotiated.

[48 FR 42163, Sept. 19, 1983, as amended at 50 FR 52434, Dec. 23, 1985]

17.603 Limitations.

(a) Management and operating contracts shall not be authorized for—

(1) Functions involving the direction, supervision, or control of Government personnel, except for supervision incidental to training;

(2) Functions involving the exercise of police or regulatory powers in the name of the Government, other than guard or plant protection services;

(3) Functions of determining basic Government policies;

(4) Day-to-day staff or management functions of the agency or of any of its elements; or

(5) Functions that can more properly be accomplished in accordance with subpart 45.3, Providing Government Property to Contractors.

(b) Since issuance of an authorization under 17.602(a) is deemed sufficient proof of compliance with paragraph (a) immediately above, nothing in paragraph (a) immediately above shall affect the validity or legality of such an authorization.

17.604 Identifying management and operating contracts.

A management and operating contract is characterized both by its purpose (see 17.601) and by the special relationship it creates between Government and contractor. The following criteria can generally be applied in identifying management and operating contracts:

(a) Government-owned or -controlled facilities must be utilized; for instance, (1) in the interest of national defense or mobilization readiness, (2) to perform the agency's mission adequately, or (3) because private enterprise is unable or unwilling to use its own facilities for the work.

(b) Because of the nature of the work, or because it is to be performed in Government facilities, the Government must maintain a special, close relationship with the contractor and
contractor's personnel in various
portant areas (e.g., safety, secur
cost control, site conditions).

(c) The conduct of the work
wholly or at least substantially se
rate from the contractor's other bu
ness, if any.

(d) The work is closely related to
agency's mission and is of a long-te
or continuing nature, and there i
need (1) to ensure its continuity
(2) for special protection covering
orderly transition of personnel
work in the event of a change in c
tractors.

17.605 Award, renewal, and extension.

(a) Effective work performa
under management and operating c
tracts usually involves high levels
expertise and continuity of operatio
and personnel. Because of program
quirements and the unusual (som
times unique) nature of the work p
formed under management and op
ating contracts, the Government
often limited in its ability to eff
competition or to replace a contract
Therefore contracting officers sho
take extraordinary steps before aw
to assure themselves that the prosp
tive contractor's technical and ma
gerial capacity are sufficient, that
ganizational conflicts of interest
adequately covered, and that the c
tract will grant the Government bro
and continuing rights to involve its
if necessary, in technical and manag
rial decisionmaking concerning p
formance.

(b) The contracting officer sh
review each management and oper
ing contract, following agency pro
dures, at appropriate intervals and
least once every 5 years. The revi
should determine whether meaning
improvement in performance or c
might reasonably be achieved. Any
tension or renewal of an operating a
management contract must be auth
ized at a level within the agency
lower than the level at which t
original contract was authorized in
cordance with 17.602(a).

(c) Replacement of an incum
contractor is usually based larg
upon expectation of meaningful

provement in performance or cost. Therefore, when reviewing contractor performance, contracting officers should consider—

(1) The incumbent contractor's overall performance, including, specifically, technical, administrative, and cost performance;

(2) The potential impact of a change in contractors on program needs, including safety, national defense, and mobilization considerations; and

(3) Whether it is likely that qualified offerors will compete for the contract.

PART 18—[RESERVED]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 19—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42240, Sept. 19, 1983, unless otherwise noted.

19.000 Scope of part.

(a) This part implements the acquisition-related sections of the Small Business Act (15 U.S.C. 631 *et seq.*), applicable sections of the Armed Services Procurement Act (10 U.S.C. 2301 et seq., the Federal Property and Administrative Services Act (41 U.S.C. 252), and Executive Order 12138, May 18, 1979. It covers—

(1) The determination that a concern is eligible for participation in the programs identified in this part;

(2) The respective roles of executive agencies and the Small Business Administration (SBA) in implementing the programs;

(3) Setting acquisitions aside for exclusive competitive participation by small business concerns;

(4) The certificate of competency program;

(5) The subcontracting assistance program;

(6) The *8(a)* program, under which agencies contract with the SBA for goods or services to be furnished under a subcontract by a small disadvantaged business concern; and

(7) The use of women-owned small business concerns.

(b) This part applies only inside the United States, its territories and possessions, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.

19.001 Definitions.

Concern, as used in this part, means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. *Concern* includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see 19.101) any business entity, whether organized for profit or not, and any foreign business entity; i.e., any entity located outside the United States, shall be included.

Determination of eligibility, as used in this part, means the written determination issued by the SBA or the Department of Labor certifying that the holder is a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act (see 22.608-2(f)(2)).

Fair market price, as used in this part, means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost (see 19.202-6).

Handicapped individual means a person who has a physical, mental, or emotional impairment, defect, ailment, disease, or disability of a permanent nature which in any way limits the selection of any type of employment for which the person would otherwise be qualified or qualifiable.

Industry, as used in this part, means all concerns primarily engaged in similar lines of activity, as listed and described in the Standard Industrial Classification (SIC) Manual.

Public or private organization for the handicapped means one which (a) is organized under the laws of the United States or of any State, operated in the interest of handicapped individuals, the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; (b) complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and (c) employs in the production of commodities and in the provision of services, handicapped individuals for not less than 75 percent of the direct labor required for the production or provision of the commodities or services.

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102). Such a concern is *not dominant in its field of operation* when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

Small disadvantaged business concern means a small business concern that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals and that has its management and daily business controlled by one or more such individuals. This terms also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian Organization, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one of these entities, that has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian Organization, and that meets the requirements of 13 CFR part 124.

(a) *Socially disadvantaged individuals* means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals.

(b) *Economically disadvantaged individuals* means socially disadvantaged individuals whose ability to compete in the free enterprise system is impaired due to diminished opportunities to obtain capital and credit as compared to others in the same line of business who are not socially disadvantaged. Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged.

(1) *Subcontinent Asian Americans* means United States citizens whose origins are in India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal.

(2) *Asian Pacific Americans* means United States citizens whose origins area in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific Islands (Republic of Palau), the Northern Mariana Islands, Laos, Kampuchea (Cambodia), Taiwan, Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, or the Federated States of Micronesia.

(3) *Native Americans* means American Indians, Eskimos, Aleuts, and native Hawaiians.

(c) *Native Hawaiian Organization* means any community service organization serving Native Hawaiians in, and chartered as a not-for-profit organization by, the State of Hawaii, which is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

(d) *Indian tribe* means any Indian tribe, band, nation, or other organized group of community of Indians, including any Alaska Native Corporation as defined in 13 CFR 124.100 which is recognized as eligible for the special programs and services provided by the U.S. to Indians because of their status as Indians, or which is recognized as such by the State in which such tribe, band, nation, group, or community resides.

[51 FR 2650, Jan. 17, 1986, as amended at 52 FR 38189, Oct. 14, 1987; 54 FR 25062, June 12, 1989; 55 FR 3881, Feb. 5, 1990]

Subpart 19.1—Size Standards

19.101 Explanation of terms.

Affiliates. As used in this subpart, business concerns are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or another concern controls or has the power to control both. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships; *provided,* that restraints imposed by a franchise agreement are not considered in determining whether the franchisor controls or has the power to control the franchisee, if the franchisee has the right to profit from its effort, commensurate with ownership, and bears the risk of loss or failure. Any business entity may be found to be an affiliate, whether or not it is organized for profit or located inside the United States.

(a) *Nature of Control.* Every business concern is considered as having one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

(b) *Meaning of party or parties.* The term *party* or *parties* includes, but is not limited to, two or more persons with an identity of interest such as members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control a concern, persons with an identity of interest may be treated as though they were one person.

(c) *Control through stock ownership.* (1) A party is considered to control or have the power to control a concern, if the party controls or has the power to control 50 percent or more of the concern's voting stock.

(2) A party is considered to control or have the power to control a concern, even though the party owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock the party owns, controls, or has the power to control is large, as compared with any other outstanding block of stock. If two or more parties each owns, controls, or has the power to control, less than 50 percent of the voting stock of a concern, and such minority block is equal or substantially equal in size, and large as compared with any other block outstanding, there is a presumption that each such party controls or has the power to control such concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(3) If a concern's voting stock is distributed other than as described above, its management (officers and directors) is deemed to be in control of such concern.

(d) *Stock options and convertible debentures.* Stock options and convertible debentures exercisable at the time or within a relatively short time after a size determination and agreements to merge in the future, are considered as having a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are treated as though the rights held thereunder had been exercised.

(e) *Voting trusts.* If the purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may qualify as a small business within the size regulations, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not valid within the appropriate jurisdiction. However, if a voting trust is entered into for a legitimate purpose other than that described above, and it is valid within the appropriate jurisdiction, it may be considered valid for the purpose of a size determination, provided such consideration is determined to be in the best interest of the small business program.

(f) *Control through common management.* A concern may be found as controlling or having the power to control another concern when one or more of the following circumstances are found to exist, and it is reasonable to conclude that under the circumstances, such concern is directing or influencing, or has the power to direct or influence, the operation of such other concern.

(1) *Interlocking management.* Officers, directors, employees, or principal stockholders of one concern serve as a working majority of the board of directors or officers of another concern.

(2) *Common facilities.* One concern shares common office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operation, or where such concerns were formerly affiliated.

(3) *Newly organized concern.* Former officers, directors, principal stockholders, and/or key employees of one concern organize a new concern in the same or a related industry or field operation, and serve as its officers, directors, principal stockholders, and/or key employees, and one concern is furnishing or will furnish the other concern with subcontracts, financial or technical assistance, and/or facilities, whether for a fee or otherwise.

(g) *Control through contractual relationships*—(1) *Definition of a joint venture for size determination purposes.* A joint venture for size determination purposes is an association of persons and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out a single specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. A joint venture is viewed as a business entity in determining power to control its management.

(2) *Joint venture—procurement and property sale assistance*—Concerns bidding on a particular procurement or property sale as joint venturers are considered as affiliated and controlling or having the power to control each other with regard to performance of the contract. Moreover, an ostensible subcontractor which is to perform primary or vital requirements of a contract may have a controlling role such to be considered a joint venturer affiliated on the contract with the prime contractor. A joint venture affiliation finding is limited to particular contracts unless the SBA size determination finds general affiliation between the parties.

(3) Where a concern is not considered as being an affiliate of a concern with which it is participating in a joint venture, it is necessary, nevertheless, in computing annual receipts, etc., for the purpose of applying size standards, to include such concern's share of the joint venture receipts (as distinguished from its share of the profits of such venture).

(4) *Franchise and license agreements.* If a concern operates or is to operate under a franchise (or a license) agreement, the following policy is applicable: In determining whether the franchisor controls or has the power to control and, therefore, is affiliated with the franchisee, the restraints imposed on a franchisee by its franchise agreement shall not be considered, provided that the franchisee has the right to profit from its effort and the risk of loss or failure, commensurate with ownership. Even though a franchisee may not be controlled by the franchisor by virtue of the contractual relationship between them, the franchisee may be controlled by the franchisor or others through common ownership or common management, in which case they would be considered as affiliated.

Annual receipts. (a) Annual receipts of a concern which has been in business for 3 or more complete fiscal years means the annual average gross revenue of the concern taken for the last 3 fiscal years. For the purpose of this definition, gross revenue of the concern includes revenues from sales of products and services, interest, rents, fees, commissions and/or whatever other sources derived, but less returns and allowances, sales of fixed assets, interaffiliate transactions between a concern and its domestic and foreign affiliates, and taxes collected for remittance (and if due, remitted) to a third party. Such revenues shall be measured as entered on the regular books of account of the concern whether on a cash, accrual, or other basis of accounting acceptable to the U.S. Treasury Department for the purpose of supporting Federal income tax returns, except when a change in accounting method from cash to accrual or accrual to cash has taken place during such 3-year period, or when the completed contract method has been used.

(1) In any case of a change in accounting method from cash to accrual or accrual to cash, revenues for such 3-year period shall, prior to the calculation of the annual average, be restated to the accrual method. In any case, where the completed contract method has been used to account for revenues in such 3-year period, revenues must be restated on an accrual basis using the percentage of completion method.

(2) In the case of a concern which does not keep regular books of accounts, but which is subject to U.S. Federal income taxation, *annual receipts* shall be measured as reported, or to be reported to the U.S. Treasury Department, Internal Revenue Service, for Federal income tax purposes, except that any return based on a change in accounting method or on the completed contract method of accounting must be restated as provided for in the preceding paragraphs.

(b) Annual receipts of a concern that has been in business for less than 3 complete fiscal years means its total receipts for the period it has been in business, divided by the number of weeks including fractions of a week that it has been in business, and multiplied by 52. In calculating total receipts, the definitions and adjustments related to a change of accounting method and the completed contract method of paragraph (a) above, are applicable.

Number of employees is a measure of the average employment of a business concern and means its average employment, including the employees of its domestic and foreign affiliates, based on the number of persons employed on a full-time, part-time, temporary, or other basis during each of the pay periods of the preceding 12 months. If a business has not been in existence for 12 months, *number of employees* means the average employment of such concern and its affiliates during the period that such concern has been in existence based on the number of persons employed during each of the pay periods of the period that such concern has been in business. If a business has acquired an affiliate during the applicable 12-month period, it is necessary, in computing the applicant's number of employees, to include the affiliate's number of employees during the entire period, rather than only its employees during the period in which it has been an affiliate. The employees of a former affiliate are not included, even if such concern had been an affiliate during a portion of the period.

[51 FR 2650, Jan. 17, 1986]

19.102 Size standards.

(a) The SBA establishes small business size standards on an industry-by-industry basis. (See 13 CFR part 121.)

(b) Small business size standards are applied by—

(1) Classifying the product or service being acquired in the industry whose definition, as found in the Standard Industrial Classification (SIC) Manual, best describes the principal nature of the product or service being acquired;

(2) Identifying the size standard SBA established for that industry; and

(3) Specifying the size standard in the solicitation, so that offerors can appropriately represent themselves as small or large.

(c) For size standard purposes, a product or service shall be classified in only one industry, whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one.

(d) When acquiring a product or service that could be classified in two or more industries with different size standards, contracting officers shall apply the size standard for the industry accounting for the greatest percentage of the contract price.

(e) If a solicitation calls for more than one item and allows offers to be submitted on any or all of the items, an offeror must meet the size standard for each item it offers to furnish. If a solicitation calling for more than one item requires offers on all or none of the items, an offeror may qualify as a small business by meeting the size standard for the item accounting for the greatest percentage of the total contract price.

(f) Any concern which submits a bid or offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is deemed to be a small business when it has no more than 500 employees, and—

(1) Except as provided in subparagraph (f)(5) of this section, in the case of Government acquisitions set-aside for small businesses, such nonmanufacturer must furnish in the performance of the contract the product of a small business manufacturer or producer, which end product must be manufactured or produced in the United States. The term *nonmanufacturer* includes a concern which can manufacture or produce the product referred to in the specific acquisition but does not do so in connection with that acquisition. For size determination purposes there can be only one manufacturer of the end item being procured. The manufacturer of the end item being acquired is the concern which, with its own forces, transforms inorganic or organic substances including raw materials and/or miscellaneous parts or components into such end item. Whether a bidder on a particular acquisition is the manufacturer or a nonmanufacturer for the purpose of a size determination need not be consistent with whether such concern is or is not a manufacturer for the purpose o the Walsh-Healey Act. However, se the limitations on subcontracting a 52.219-14 which apply to any smal business offeror other than a regula dealer for purposes of set-asides an 8(a) awards.

(2) A concern which purchases item and packages them into a kit is considered to be a nonmanufacturer smal business and can qualify as such for given acquisition if it meets the siz qualifications of a small nonmanufacturer for the acquisition, and if mor than 50 percent of the total value o the kit and its contents is accounted for by items manufactured by small business.

(3) If the acquisition is subject t and is actually procured under *small purchase procedures*, such nonmanufacturer may furnish any domestically produced or manufactured product.

(4) For the purpose of receiving Certificate of Competency on an unrestricted acquisition, a small busines nonmanufacturer may furnish any domestically produced or manufactured product.

(5) As provided in 15 U.S.C. 637(a)(17), in the case of Government acquisitions set aside for small business or awarded under section 8(a) of the Small Business Act, such nonmanufacturer may furnish any domestically produced or manufactured produc when the acquisition is for a produc in a class for which the Small Busines Administration has determined that there are no small business manufacturers or processors in the Federal market, and when such nonmanufacturer is primarily engaged in the wholesale or retail trade and is a regular dealer, as defined pursuant to 4 U.S.C. 35(a) (see 22.601), in the product to be offered unless specifically exempted from section 35(a) by section 7(j)(13)(C) of the Small Business Act. Classes for which a waiver has been granted are as follows:

Backhoes (PSC 3805)
Graders, Road (Construction Machinery) (PSC 3805)
Scrapers, Construction (PCS 3805)
Cranes, Construction (PSC 3810)

(g) The industry size standards are set forth in the following table. The table column labeled *SIC* follows the standard industrial classification code as published by the Government in the Standard Industrial Classification Manual. The Manual is intended to cover the entire field of economic activities. It classifies and defines activities by industry categories and is the source used by SBA as a guide in defining industries for size standards. The number of employees or annual receipts indicates the maximum allowed for a concern, including its affiliates, to be considered small.

SIC	DESCRIPTION	SIZE
	DIVISION A—AGRICULTURE	
	Major Group 01-Agricultural Production-Crops	
0111-0191	Agricultural Production-Crops	$0.5
	Major Group 02-Agricultural Production-Livestock	
0211	Beef Cattle Feedlots (Custom)	$1.0
0212-0291	Agricultural Production-Livestock, except 0211 and 0252	$0.5
0252	Chicken Eggs	$1.0
	Major Group 07-Agricultural Services	
All SIC's		$3.5
	Major Group 08-Forestry	
All SIC's		$3.5
	Major Group 09-Fishing, Hunting, and Trapping	
All SIC's		$2.0
	DIVISION B—MINING	
	Major Group 10-Metal Mining	
1011	Iron Ores	500
1021	Copper Ores	500
1031	Lead and Zinc Ores	500
1041	Cold Ores	500
1044	Silver Ores	500
1061	Ferroalloy Ores, Except Vanadium	500
1081	Metal Mining Services	$3.5
1094	Uranium-Radium-Vanadium Ores	500
1099	Metal Ores, N.E.C.	500
	Major Group 12-Bituminous Coal and Lignite Mining	
1221	Bituminous and Lignite Coal Mining, Surface, and Bituminous Coal Preparation Plants	500
1222	Bituminous Coal Mining, Underground	500
1231	Anthracite Mining	500
1241	Coal Mining Services	$3.5
	Major Group 13-Oil and Gas Extraction	
1311	Crude Petroleum and Natural Gas	500
1321	Natural Gas Liquids	500
1381	Drilling Oil and Gas Wells	500
1382	Oil and Gas Field Exploration Services	$3.5
1389	Oil and Gas Field Services, N.E.C.	$3.5
	Major Group 14-Mining and Quarrying of Non-Metallic Minerals, Except Fuels	
1411	Dimension Stone	500
1422	Crushed and Broken Limestone	500
1423	Crushed and Broken Granite	500
1429	Crushed and Broken Stone, N.E.C.	500
1442	Construction Sand and Gravel	500
1446	Industrial Sand	500
1455	Kaolin and Ball Clay	500
1459	Clay and Related Minerals, N.E.C.	500
1474	Potash, Soda, and Borate Minerals	500
1475	Phosphate Rock	500
1479	Chemical and Fertilizer Mining, N.E.C.	500
1481	Nonmetallic Minerals (Except Fuels) Services	$3.5
1499	Nonmetallic Minerals, N.E.C.	500
	DIVISION C—CONSTRUCTION	
	Major Group 15-Building Construction-General Contractors and Operative Builders	
1521	General Contractors-Single-Family Houses	$17.0
1522	General Contractors-Residential Buildings, Other Than Single-Family	$17.0
1531	Operative Builders	$17.0
1541	General Contractors-Industrial Buildings and Warehouses	$17.0
1542	General Contractors-Nonresidential Buildings, Other Than Industrial Buildings and Warehouses	$17.0
	Major Group 16-Construction Other Than Building Construction-General Contractors	
1611	Highway and Street Construction	$17.0
1622	Bridge, Tunnel, and Elevated Highway Construction	$17.0
1623	Water, Sewer, Pipe Line, Communication and Power Line Construction	$17.0
1629	Heavy Construction, Except Dredging, N.E.C.	$17.0
1629	Dredging and Surface Cleanup Activities[2]	13.5
	Major Group 17-Construction-Special Trade Contractors	
1711	Plumbing, Heating (Except Electric), and Air Conditioning	$7.0
1721	Painting, Paper Hanging, and Decorating	$7.0
1731	Electrical Work	$7.0

Note: Size standards preceded by a dollar sign ($) are in millions of dollars. All others are in number of employees unless specified otherwise.
N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
1741	Masonry, Stone Setting, and Other Stonework	$7.0
1742	Plastering, Drywall, Acoustical, and Insulation Work	$7.0
1743	Terrazzo, Tile, Marble, and Mosaic Work	$7.0
1751	Carpentering	$7.0
1752	Floor Laying and Other Floor Work, N.E.C.	$7.0
1761	Roofing and Sheet Metal Work	$7.0
1771	Concrete Work	$7.0
1781	Water Well Drilling	$7.0
1791	Structural Steel Erection	$7.0
1793	Glass and Glazing Work	$7.0
1794	Excavating and Foundation Work	$7.0
1795	Wrecking and Demolition Work	$7.0
1796	Installation or Erection of Building Equipment, N.E.C.	$7.0
1799	Special Trade Contractors, N.E.C.	$7.0
---	Base Housing Maintenance[17]	$7.0
	DIVISION D-MANUFACTURING[3]	
	Major Group 20-Food and Kindred Products	
2011	Meat Packing Plants	500
2013	Sausages and Other Prepared Meat Products	500
2015	Poultry Slaughtering, Dressing and Processing	500
2021	Creamery Butter	500
2022	Cheese, Natural and Processed	500
2023	Condensed and Evaporated Milk	500
2024	Ice Cream and Frozen Desserts	500
2026	Fluid Milk	500
2032	Canned Specialties	1,000
2033	Canned Fruits, Vegetables, Preserves, Jams and Jellies[4]	500
2034	Dehydrated Fruits, Vegetables, and Soups	500
2035	Pickled Fruits and Vegetables, Vegetable Sauces, and Seasoning, and Salad Dressings	500
2037	Frozen Fruit, Fruit Juices, and Vegetables	500
2038	Frozen Specialities, N.E.C.	500
2041	Flour and Other Grain Mill Products	500
2043	Cereal Breakfast Foods	1,000
2044	Rice Milling	500
2045	Blended and Prepared Flour	500
2046	Wet Corn Milling	750
2047	Dog and Cat Food	500
2048	Prepared Feeds, N.E.C.	500
2051	Bread and Other Bakery Products, Except Cookies and Crackers	500
2052	Cookies and Crackers	750
2053	Frozen Bakery Products	500
2061	Cane Sugar, Except Refining Only	500
2062	Cane Sugar Refining	750
2063	Beet Sugar	750
2064	Confectionery Products	500
2066	Chocolate and Cocoa Products	500
2067	Chewing Gum	500
2068	Salted and Roasted Nuts and Seeds	500
2074	Cottonseed Oil Mills	500
2075	Soybean Oil Mills	500
2076	Vegetable Oil Mills, Except Corn, Cottonseed, and Soybean	1,000
2077	Animal and Marine Fats and Oils	500
2079	Shortening, Table Oils, Margarine and Other Edible Fats and Oils, N.E.C.	750
2082	Malt Beverages	500
2083	Malt	500
2084	Wines, Brandy, and Brandy Spirits	500
2085	Distilled, Rectified, and Blended Liquors	750
2086	Bottled and Canned Soft Drinks and Carbonated Waters	500
2087	Flavoring Extracts and Flavoring Syrups, N.E.C.	500
2091	Canned and Cured Seafoods	500
2092	Fresh or Frozen Packaged Fish and Seafoods	500
2095	Roasted Coffee	500
2096	Potato Chips and Similar Products	500
2097	Manufactured Ice	500
2098	Macaroni, Spaghetti, Vermicelli, and Noodles	500
2099	Food Preparations, N.E.C.	500
	Major Group 21-Tobacco Manufacturers	
2111	Cigarettes	1,000
2121	Cigars	500
2131	Tobacco (Chewing and Smoking) and Snuff	500
2141	Tobacco Stemming and Redrying	500
	Major Group 22-Textile Mill Products	
2211	Broad Woven Fabric Mills, Cotton	1,000
2221	Broad Woven Fabric Mills, Man-Made Fiber, and Silk	500

Notes: Size standards preceded by a dollar sign ($) are in millions of dollars. All others are in number of employees unless specified otherwise.
N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
2231	Broad Woven Fabric Mills, Wool (Including Dyeing and Finishing)	500
2241	Narrow Fabrics and Other Smallwares Mills: Cotton, Wool, Silk, and Man-Made Fiber	500
2251	Women's Full Length and Knee Length Hosiery	500
2252	Hosiery, Except Women's Full Length and Knee Length Hosiery	500
2253	Knit Outerwear Mills	500
2254	Knit Underwear Mills	500
2257	Circular Knit Fabric Mills	500
2258	Warp Knit Fabric Mills	500
2259	Knitting Mills	500
2261	Finishers of Broad Woven Fabrics of Cotton	1,000
2262	Finishers of Broad Woven Fabrics of Man-Made Fiber and Silk	500
2269	Finishers of Textiles, N.E.C.	500
2273	Carpets and Rugs	500
2281	Yarn Mills	500
2282	Throwing and Winding Mills	500
2284	Thread Mills	500
2295	Coated Fabrics, Not Rubberized	1,000
2296	Tire Cord and Fabric	1,000
2297	Nonwoven Fabrics	500
2298	Cordage and Twine	500
2299	Textile Goods, N.E.C.	500
	Major Group 23-Apparel and Other Finished Products Made from Fabrics and Similar Materials	
2311	Men's, Youths', and Boys' Suits, Coats, and Overcoats	500
2321	Men's and Boys' Shirts	500
2322	Men's and Boys' Underwear and Nightwear	500
2323	Men's, Youths', and Boys' Neckwear	500
2325	Men's and Boys' Separate Trousers and Casual Slacks	500
2326	Men's and Boys' Work Clothing	500
2329	Men's, Youths', and Boys' Clothing, N.E.C.	500
2331	Women's, Misses', and Juniors' Blouses, Waists, and Shirts	500
2335	Women's, Misses', and Juniors' Dresses	500
2337	Women's, Misses', and Juniors' Suits, Skirts, and Coats	500
2339	Women's, Misses', and Juniors' Outerwear, N.E.C.	500
2341	Women's, Misses', Children's, and Infants' Underwear and Nightwear	500
2342	Brassieres, Girdles, and Allied Garment	500
2353	Hats, Caps, and Millinery	500
2361	Girls', Children's, and Infants' Dresses, Blouses, Waists, and Shirts	500
2369	Children's Outerwear, N.E.C.	500
2371	Fur Goods	500
2381	Dress and Work Gloves, Except Knit and All-Leather	500
2384	Robes and Dressing Gowns	500
2385	Raincoats and Other Waterproof Outer Garments	500
2386	Leather and Sheep Lined Clothing	500
2387	Apparel Belts	500
2389	Apparel and Accessories, N.E.C	500
2391	Curtains and Draperies	500
2392	House Furnishings, Except Curtains and Draperies	500
2393	Textile Bags	500
2394	Canvas and Related Products	500
2395	Pleating, Decorative and Novelty Stitching, and Tucking for the Trade	500
2396	Automotive Trimmings, Apparel Finding, and Related Products	500
2397	Schiffli Machine Embroideries	500
2399	Fabricated Textile Products, N.E.C.	500
	Major Group 24-Lumber and Wood Products, Except Furniture	
2411	Logging	500
2421	Sawmills and Planning Mills	500
2426	Hardwood Dimension and Flooring Mills	500
2429	Special Product Sawmills, N.E.C.	500
2431	Millwork	500
2434	Wood Kitchen Cabinets	500
2435	Hardwood Veneer and Plywood	500
2436	Softwood Veneer and Plywood	500
2439	Structural Wood Members, N.E.C.	500
2441	Nailed and Lock Corner Wood Boxes and Shook	500
2448	Wood Pallets and Skids	500
2449	Wood Containers, N.E.C.	500
2451	Mobile Homes	500
2452	Prefabricated Wood Buildings and Components	500
2491	Wood Preserving	500
2493	Reconstituted Wood Products	500
2499	Wood Products, N.E.C.	500

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N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
	Major Group 25-Furniture and Fixtures	
2511	Wood Household Furniture, Except Upholstered	500
2512	Wood Household Furniture, Upholstered	500
2514	Metal Household Furniture	500
2515	Mattresses and Bedsprings	500
2517	Wood Television, Radio, Phonograph, and Sewing Machine Cabinets	500
2519	Household Furniture, N.E.C.	500
2521	Wood Office Furniture	500
2522	Office Furniture, Except Wood	500
2531	Public Building and Related Furniture	500
2541	Wood Partitions, Shelving, Lockers, and Office and Store Fixtures	500
2542	Partitions and Fixtures, Except Wood	500
2591	Drapery Hardware, and Window Blinds and Shades	500
2599	Furniture and Fixtures, N.E.C.	500
	Major Group 26-Paper and Allied Products	
2611	Pulp Mills	750
2621	Paper Mills	750
2631	Paperboard Mills	750
2652	Set-up Paperboard Boxes	500
2653	Corrugated and Solid Fiber Boxes	500
2655	Fiber Cans, Tubes, Drums, and Similar Products	500
2656	Sanitary Food Containers	750
2657	Folding Paperboard Boxes	750
2671	Paper Coating and Laminating for Packaging	500
2672	Paper Coating and Laminating, Except for Packaging	500
2673	Bags: Plastics, Laminated, and Coated	500
2674	Bags: Uncoated Paper and Multiwall	500
2675	Die-Cut Paper and Paper Board	500
2676	Sanitary Paper Products, N.E.C.	500
2677	Envelopes	500
2678	Stationery Products	500
2679	Converted Paper Products, N.E.C.	500
	Major Group 27-Printing, Publishing, and Allied Industries	
2711	Newspapers: Publishing, Publishing and Printing	500
2721	Periodicals: Publishing, Publishing and Printing	500
2731	Books: Publishing, Publishing and Printing	500
2732	Book Printing	500
2741	Miscellaneous Publishing	500
2752	Commercial Printing, Litnograph	500
2754	Commercial Printing, Gravure	500
2759	Commercial Printing, N.E.C.	500
2761	Manifold Business Forms	500
2771	Greeting Card Publishing	500
2782	Blankbooks, Looseleaf Binders and Devices	500
2789	Bookbinding and Related Work	500
2791	Typesetting	500
2796	Platemaking	500
	Major Group 28-Chemicals and Allied Products	
2812	Alkalies and Chlorine	1,000
2813	Industrial Gases	1,000
2816	Inorganic Pigments	1,000
2819	Industrial Inorganic Chemicals, N.E.C.	1,000
2821	Plastics Materials, Synthetic Resins, and Nonvulcanizable Elastomers	750
2822	Synthetic Rubber (Vulcanizable Elastomers)	1,000
2823	Cellulosic Man-Made Fibers	1,000
2824	Synthetic Organic Fibers, Except Cellulosic	1,000
2833	Medicinal Chemicals and Botanical Products	750
2834	Pharmaceutical Preparations	750
2835	Diagnostic Substances	500
2836	Biological Products, Except Diagnostic Substances	500
2841	Soap and Other Detergents, Except Specialty Cleaners	750
2842	Specialty Cleaning, Polishing, and Sanitation Preparations	500
2843	Surface Active Agents, Finishing Agents, Sulfonated Oils and Assistants	500
2844	Perfumes, Cosmetics, and Other Toilet Preparations	500
2851	Paints, Varnishes, Lacquers, Enamels, and Allied Products	500
2861	Gum and Wood Chemicals	500
2865	Cyclic (Coal Tar) Crudes, and Cyclic Intermediates, Dyes, and Organic Pigment (Lakes and Toners)	750
2869	Industrial Organic Chemicals, N.E.C.	1,000
2873	Nitrogenous Fertilizers	1,000
2874	Phosphatic Fertilizers	500
2875	Fertilizers, Mixing Only	500
2879	Pesticides and Agricultural Chemicals, N.E.C.	500
2891	Adhesives and Sealants	500

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N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
2892	Explosives	750
2893	Printing Ink	500
2895	Carbon Black	500
2899	Chemicals and Chemical Preparations, N.E.C.	500
	Major Group 29-Petroleum Refining and Related Industries	
2911	Petroleum Refining[5]	1,500
2951	Paving Mixtures and Blocks	500
2952	Asphalt Felts and Coatings	750
2992	Lubricating Oils and Greases	500
2999	Products of Petroleum and Coal, N.E.C.	500
	Major Group 30-Rubber and Miscellaneous Plastics Products	
3011	Tires and Inner Tubes[6]	1,000
3021	Rubber and Plastics Footwear	1,000
3052	Rubber and Plastics Hose and Belting	500
3053	Gaskets, Packing, and Sealing Devices	500
3061	Molded, Extruded, and Lathe-Cut Rubber Mechanical Goods	500
3069	Fabricated Rubber Products, N.E.C.	500
3081	Unsupported Sheet and Film	500
3082	Unsupported Profile Shapes	500
3083	Laminated Plate and Sheet	500
3084	Pipe	500
3085	Bottles	500
3086	Plastics Foam Products	500
3087	Custom Compounding of Purchased Resins	500
3088	Plumbing Fixtures	500
3089	Plastics Products, N.E.C.	500
	Major Group 31-Leather and Leather Products	
3111	Leather Tanning and Finishing	500
3131	Boot and Shoe Cut Stock and Findings	500
3142	House Slippers	500
3143	Men's Footwear, Except Athletic	500
3144	Women's Footwear, Except Athletic	500
3149	Footwear, Except Rubber, N.E.C.	500
3151	Leather Gloves and Mittens	500
3161	Luggage	500
3171	Women's Handbags and Purses	500
3172	Personal Leather Goods, Except Women's Handbags and Purses	500
3199	Leather Goods, N.E.C.	500
	Major Group 32-Stone, Clay, Glass, and Concrete Products	
3211	Flat Glass	1,000
3221	Glass Containers	750
3229	Pressed and Blown Glass and Glassware, N.E.C.	750
3231	Glass Products, Made of Purchased Glass	500
3241	Cement, Hydraulic	750
3251	Brick and Structural Clay Tile	500
3253	Ceramic Wall and Floor Tile	500
3255	Clay Refractories	500
3259	Structural Clay Products, N.E.C.	500
3261	Vitreous China Plumbing Fixtures and China and Earthenware Fittings and Bathroom Accessories	750
3262	Vitreous China Table and Kitchen Articles	500
3263	Fine Earthenware (Whiteware) Table and Kitchen Articles	500
3264	Porcelain Electrical and Electronic Supplies	500
3269	Pottery Products, N.E.C.	500
3271	Concrete Block and Brick	500
3272	Concrete Products, Except Block and Brick	500
3273	Ready-Mixed Concrete	500
3274	Lime	500
3275	Gypsum Products	1,000
3281	Cut Stone and Stone Products	500
3291	Abrasive Products	500
3292	Asbestos Products	750
3295	Minerals and Earths, Ground or Otherwise Treated	500
3296	Mineral Wool	750
3297	Nonclay Refractories	750
3299	Nonmetallic Mineral Products, N.E.C.	500
	Major Group 33-Primary Metal Industries	
3312	Blast Furnaces (Including Coke Ovens), Steel Works, and Rolling Mills	1,000
3313	Electrometallurgical Products	750
3315	Steel Wire Drawing and Steel Nails and Spikes	1,000
3316	Cold Rolled Steel Sheet, Strip, and Bars	1,000
3317	Steel Pipe and Tubes	1,000
3321	Gray Iron Foundries	500
3322	Malleable Iron Foundries	500
3324	Steel Investment Foundries	500
3325	Steel Foundries, N.E.C.	500
3331	Primary Smelting and Refining of Copper	1,000

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N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
3334	Primary Production of Aluminum	1,000
3339	Primary Smelting and Refining of Nonferrous Metals, Except Copper and Aluminum	750
3341	Secondary Smelting and Refining of Nonferrous Metals	500
3351	Rolling, Drawing, and Extruding of Copper	750
3353	Aluminum Sheet, Plate, and Foil	750
3354	Aluminum Extruded Products	750
3355	Aluminum Rolling and Drawing, N.E.C.	750
3356	Rolling, Drawing, and Extruding of Nonferrous Metals, Except Copper and Aluminum	750
3357	Drawing and Insulating of Nonferrous Wire.	1,000
3363	Aluminum Die Castings	500
3364	Nonferrous Die Castings, Except Aluminum	500
3365	Aluminum Foundries	500
3366	Copper Foundries	500
3369	Nonferrous Foundries, Except Aluminum and Copper	500
3398	Metal Heat Treating	750
3399	Primary Metal Products, N.E.C.	750
	Major Group 34-Fabricated Metal Products, Except Machinery and Transportation Equipment	
3411	Metal Cans	1,000
3412	Metal Shopping Barrels, Drums, Kegs, and Pails	500
3421	Cutlery	500
3423	Hand and Edge Tools, N.E.C.	500
3425	Hand Saws and Saw Blades	500
3429	Hardware, N.E.C.	500
3431	Enameled Iron and Metal Sanitary Ware	750
3432	Plumbing Fixture Fittings	500
3433	Heating Equipment, Except Electric	500
3441	Fabricated Structural Metal	500
3442	Metal Doors, Sash, and Trim	500
3443	Fabricated Plate Work (Boiler Shops)	500
3444	Sheet Metal Work	500
3446	Architectural and Ornamental Metal Work.	500
3448	Prefabricated Metal Buildings and Components	500
3449	Miscellaneous Metal Work	500
3451	Screw Machine Products	500
3452	Bolts, Nuts, Screws, Rivets, and Washers	500
3462	Iron and Steel Forgings	500
3463	Nonferrous Forgings	500
3465	Automotive Stampings	500
3466	Crowns and Closures	500
3469	Metal Stampings, N.E.C.	500
3471	Electroplating, Plating, Polishing, Anodizing, and Coloring	500
3479	Coating, Engraving, and Allied Services, N.E.C.	500
3482	Small Arms Ammunition	1,000
3483	Ammunition, Except for Small Arms, N.E.C.	1,500
3484	Small Arms	1,000
3489	Ordnance and Accessories, N.E.C.	500
3491	Industrial Valves	500
3492	Fluid Power Valves and Hose Fittings	500
3493	Steel Springs, Except Wire	500
3494	Valves and Pipe Fittings, N.E.C.	500
3495	Wire Springs	500
3496	Miscellaneous Fabricated Wire Products	500
3497	Metal Foil and Leaf	500
3498	Fabricated Pipe and Fabricated Pipe Fittings	500
3499	Fabricated Metal Products, N.E.C.	500
	Major Group 35-Machinery, Except Electrical	
3511	Steam, Gas, and Hydraulic Turbines and Turbine Generator Set Units	1,000
3519	Internal Combustion Engines, N.E.C.	1,000
3523	Farm Machinery and Equipment	500
3524	Garden Tractors and Lawn and Garden Equipment	500
3531	Construction Machinery	750
3532	Mining Machinery and Equipment, Except Oil Field Machinery and Equipment	500
3533	Oil Field Machinery and Equipment	500
3534	Elevators and Moving Stairways	500
3535	Conveyors and Conveying Equipment	500
3536	Hoists, Cranes, and Monorails	500
3537	Industrial Trucks and Tractors	750
3541	Machine Tools, Metal Cutting Types	500
3542	Machine Tools, Metal Forming Types	500
3543	Industrial Patterns	500
3544	Special Dies and Tools, Die Sets, Jigs and Fixtures, and Industrial Molds	500
3545	Machine Tool Accessories and Measuring Devices	500
3546	Power Driven Hand Tools	500
3547	Rolling Mill Machinery and Equipment	500
3548	Welding Apparatus	500
3549	Metalworking Machinery, N.E.C.	500
3552	Textile Machinery	500
3553	Woodworking Machinery	500
3554	Paper Industries Machinery	500

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N.E.C.: Not Elsewhere Classified.

DESCRIPTION	SIZE
ades Machinery	500
cts Machinery	500
ustry Machinery, N.E.C.	500
Pumping Equipment, Except wer Pumps	500
ller Bearings	750
s Compressors	500
d Exhaust and Ventilation Fans	500
Machinery	500
gers, Drives, and Gears	500
urnaces and Ovens	500
Power Transmission ent, N.E.C.	500
ustrial Machinery and ent, N.E.C.	500
	1,000
torage Devices	1,000
erminals	1,000
eripheral Equipment, N.E.C.	1,000
and Accounting Machines	1,000
ines, N.E.C.	500
Merchandising Machines	500
l Laundry, Dry Cleaning, and Machines	500
n and Heating Equipment	750
nd Dispensing Pumps	500
stry Machines, N.E.C.	500
Pistons, Piston Rings, and	500
Cylinders and Actuators	500
Pumps and Motors	500
alance, Except Laboratory	500
Except Electrical, N.E.C.	500
lectrical and Electronic Machinery, ipment and Supplies	
ibution and Specialty ners	750
nd Switchboard Apparatus	750
Generators	1,000
Graphite Products	750
ndustrial Controls	750
dustrial Apparatus, N.E.C.	500
Cooking Equipment	750
efrigerators and Home and ezers	1,000
aundry Equipment	1,000
sewares and Fans	750
acuum Cleaners	750
ppliances, N.E.C.	500

SIC	DESCRIPTION	SIZE
3641	Electric Lamps	1,000
3643	Current-Carrying Wiring Devices	500
3644	Noncurrent-Carrying Wiring Devices	500
3645	Residential Electric Lighting Fixtures	500
3646	Commercial, Industrial, and Institutional Electric Lighting Fixtures	500
3647	Vehicular Lighting Equipment	500
3648	Lighting Equipment, N.E.C.	500
3651	Radio and Television Receiving Sets, Except Communication Types	750
3652	Phonograph Records and Pre-Recorded Magnetic Tape	750
3661	Telephone and Telegraph Apparatus	1,000
3663	Radio and TV Communications Systems and Equipment, and Broadcast and Studio Equipment	750
3669	Other Communications Equipment, N.E.C.	750
3671	Electron Tubes	750
3672	Printed Circuit Boards	500
3674	Semiconductors and Related Devices	500
3675	Electronic Capacitors	500
3676	Resistors, for Electronic Applications	500
3677	Electronic Coils, Transformers, and Other Inductors	500
3678	Connectors, for Electronic Applications	500
3679	Electronic Components, N.E.C.	500
3691	Storage Batteries	500
3692	Primary Batteries, Dry and Wet	1,000
3694	Electrical Equipment for Internal Combustion Engines	750
3695	Recording Media	1,000
3699	Electrical Equipment, and Supplies, N.E.C.	750
	Major Group 37-Transportation Equipment	
3711	Motor Vehicles and Passenger Car Bodies	1,000
3713	Truck and Bus Bodies	500
3714	Motor Vehicle Parts and Accessories	500
3715	Truck Trailers	500
3716	Motor Homes	1,000
3721	Aircraft	1,500
3724	Aircraft Engines and Engine Parts	1,000
3728	Aircraft Equipment, N.E.C.	1,000
3731	Shipbuilding and Repair of Nuclear Propelled Ships	1,000
	Shipbuilding of Nonnuclear Propelled Ships and Nonpropelled Ships	1,000
	Ship Repair (including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships East of the 108 Meridian	1,000

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ere Classified.

SIC	DESCRIPTION	SIZE
	Ship Repair (including Overhauls and Conversions) Performed on Nonnuclear Propelled and Nonpropelled Ships West of the 108 Meridian	1,000
3732	Boat Building and Repairing	500
3743	Railroad Equipment	1,000
3751	Motorcycles, Bicycles, and Parts	500
3761	Guided Missiles and Space Vehicles	1,000
3764	Guided Missile and Space Vehicle Propulsion Units and Propulsion Unit Parts	1,000
3769	Guided Missile and Space Vehicle Parts and Auxiliary Equipment, N.E.C.	1,000
3792	Travel Trailers and Campers	500
3795	Tanks and Tank Components	1,000
3799	Transportation Equipment, N.E.C.	500
	Major Group 38-Measuring, Analyzing, and Controlling Instruments; Photographic, Medical, and Optical Goods; Watches and Clocks	
3812	Search, Detection, Navigation, and Guidance Systems and Instruments	750
3821	Laboratory Apparatus and Furniture	500
3822	Automatic Controls for Regulating Residential and Commercial Environments and Appliances	500
3823	Industrial Instruments for Measurement, Display, and Control of Process Variables, and Related Products	500
3824	Totalizing Fluid Meters and Counting Devices	500
3825	Instruments for Measuring and Testing of Electricity and Electrical Signals	500
3826	Analytical Instruments	500
3827	Optical Instruments	500
3829	Measuring and Controlling Devices, N.E.C.	500
3841	Surgical and Medical Instruments and Apparatus	500
3842	Orthopedic, Prosthetic, and Surgical Appliances and Supplies	500
3843	Dental Equipment and Supplies	500
3844	X-Ray Apparatus and Tubes	500
3845	Electromedical and Electro Therapeutic Apparatus	500
3851	Ophthalmic Goods	500
3861	Photographic Equipment and Supplies	500
3873	Watches, Clocks, Clockwork Operated Devices, and Parts	500
	Major Group 39-Miscellaneous Manufacturing Industries	
3911	Jewelry, Precious Metal	500
3914	Silverware, Plate Ware, and Stainless Steel Wire	500
3915	Jewelers' Findings and Materials, and Lapidary Work	500
3931	Musical Instruments	500
3942	Dolls	500
3944	Games, Toys, and Children's Vehicles; Except Dolls and Bicycles	500
3949	Sporting and Athletic Goods, N.E.C.	500
3951	Pens, Mechanical Pencils, and Parts	500
3952	Lead Pencils, Crayons, and Artists' Materials	500
3953	Marking Devices	500
3955	Carbon Paper and Inked Ribbons	500
3961	Costume Jewelry and Costume Novelties, Except Precious Metal	500
3965	Needles, Pins, Buttons, and Clothing Fasteners	500
3991	Brooms and Brushes	500
3993	Signs and Advertising Displays	500
3995	Burial Caskets	500
3996	Linoleum, Asphalted-Felt-Base, and Other Hard Surface Floor Coverings, N.E.C.	750
3999	Manufacturing Industries, N.E.C.	500
	DIVISION E—TRANSPORTATION, COMMUNICATIONS, ELECTRIC, GAS AND SANITARY SERVICES	
	Major Group 40-Railroad Transportation	
4011	Railroads, Line-Haul Operating	1,500
4013	Switching and Terminal Establishments	500
	Major Group 41-Local and Suburban Transit and Interurban Highway Passenger Transportation	
4111	Local and Suburban Transit	$3.5
4119	Local Passenger Transportation, N.E.C.	$3.5
4121	Taxicab	$3.5
4131	Intercity and Rural Highway Passenger Transportation	$3.5
4141	Local Passenger Transportation Charter Service	$3.5
4142	Passenger Transportation Charter Service, Except Local	$3.5

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N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
4151	School Buses	$3.5
4173	Bus Terminal and Service Facilities	$3.5
	Major Group 42-Motor Freight Transportation and Warehousing	
4212	Local Trucking Without Storage[7]	$12.5
4213	Trucking, Except Local	$12.5
4214	Local Trucking With Storage	$12.5
4215	Courier, Services, Except By Air	$12.5
4221	Farm Product Warehousing and Storage	$12.5
4222	Refrigerated Warehousing	$12.5
4225	General Warehousing and Storage	$12.5
4226	Special Warehousing and Storage, N.E.C.	$12.5
4231	Terminal and Joint Terminal Maintenance Facilities for Motor Freight Transportation	$3.5
	Major Group 44-Water Transportation[8]	
4412	Deep Sea Foreign Transportation of Freight	500
4424	Deep Sea Domestic Transportation of Freight	500
4432	Freight Transportation on the Great Lakes and Saint Lawrence Seaway	500
4449	Water Transportation of Freight, N.E.C.	500
4481	Deep Sea Transportation of Passengers, Except by Ferries	500
4482	Ferries	500
4489	Water Transportation of Passengers, N.E.C.	500
4491	Marine Cargo Handling	$12.5
4492	Towing and Tugboat Services	$3.5
4493	Marinas	$3.5
4499	Water Transportation Services, N.E.C.	$3.5
	Major Group 45-Transportation by Air[8]	
4512	Air Transportation, Scheduled	[9]1,500
4513	Air Courier Services	[9]1,500
4522	Air Transportation, Nonscheduled	[9]1,500
4581	Services Related to Air Transportation	$3.5
	Major Group 46-Pipe Lines, Except Natural Gas	
4612	Crude Petroleum Pipe Lines	1,500
4613	Refined Petroleum Pipe Lines	1,500
4619	Pipe Lines, N.E.C.	$17.0
	Major Group 47-Transportation Services	
4724	Travel Agencies	[10]$0.5
4725	Tour Operators	$3.5
4729	Arrangement of Passenger Transportation, N.E.C.	$3.5
4731	Freight Forwarding and Arrangement	$12.5
4741	Railroad Car Rental	$3.5
4783	Packing and Crating	$12.5
4785	Inspection Services, Fixed Facilities, N.E.C.	$3.5
4789	Services Incidental to Transportation, N.E.C.	$3.5
	Major Group 48-Communications	
4812	Radio Telephone Communication Services.	1,500
4813	Telephone Communications, Except Radio Telephone	1,500
4832	Radio Broadcasting	$3.5
4833	Television Stations	$7.0
4841	Cable and Other Pay TV	$7.5
4899	Communications Services, N.E.C.	$7.5
	Major Group 49-Electric, Gas, and Sanitary Services	
4911	Electric Services	214
4924	Natural Gas Distribution	500
4941	Water Supply	$3.5
4952	Sewage Systems	$3.5
4953	Refuse Systems[11]	$6.0
4959	Sanitary Services, N.E.C.	$3.5
4961	Steam Supply	$6.0
4971	Irrigation Systems	$3.5
	DIVISION F—WHOLESALE TRADE **(Not applicable to Government Acquisition of Supplies. The nonmanufacturer size standard of 500 employees shall be used for Government acquisition of supplies.)**	
	Major Group 50-Durable Goods	
5012	Automobiles and Other Motor Vehicles	100
5013	Motor Vehicle Parts and Supplies, New	100
5014	Tires and Tubes	100
5015	Motor Vehicle Parts, Used	100
5021	Furniture	100
5023	Home Furnishings	100
5031	Lumber, Plywood, and Millwork	100
5032	Brick, Stone, and Related Products	100
5033	Roofing, Siding, and Insulation	100
5039	Construction Materials, N.E.C.	100
5043	Photographic Equipment and Supplies	100
5044	Office Equipment	100
5045	Computers and Computer Peripheral Equipment and Software	100
5046	Commercial Equipment, N.E.C.	100
5047	Medical and Hospital Equipment	100
5048	Ophthalmic Goods	100
5049	Professional Equipment, N.E.C.	100
5051	Metals Service Centers and Offices	100

Note: Size standards preceded by a dollar sign ($) are in millions of dollars. All others are in number of employees unless specified otherwise.
N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
5052	Coal and Other Minerals and Ores	100
5063	Electrical Apparatus and Equipment	100
5064	Electrical Appliances, Television and Radio Sets	100
5065	Electronic Parts and Equipment	100
5072	Hardware	100
5074	Plumbing and Heating Equipment and Supplies (Hydronics)	100
5075	Warm Air Heating and Air Conditioning Equipment and Supplies	100
5078	Refrigeration Equipment and Supplies	100
5082	Construction and Mining Machinery and Equipment	100
5083	Farm and Garden Machinery and Equipment	100
5084	Industrial Machinery	100
5085	Industrial Supplies	100
5087	Service Establishment Equipment and Supplies	100
5088	Transportation Equipment and Supplies, Except Motor Vehicles	100
5091	Sporting and Recreational Goods	100
5092	Toys and Hobby Groups and Supplies	100
5093	Scrap and Waste Materials	100
5094	Jewelry, Watches, Diamonds and Other Precious Stones	100
5099	Durable Goods, N.E.C.	100

Major Group 51-Wholesale Trade-Nondurable Goods

SIC	DESCRIPTION	SIZE
5111	Printing and Writing Paper	100
5112	Stationery Supplies	100
5113	Industrial and Personal Service Paper	100
5122	Drugs, Drug Proprietaries, and Druggists' Sundries	100
5131	Piece Goods and Notions	100
5136	Men's and Boys' Clothing and Furnishings	100
5137	Women's, Children's and Infants' Clothing and Accessories	100
5139	Footwear	100
5141	Groceries, General Line	100
5142	Frozen Foods	100
5143	Dairy Products	100
5144	Poultry and Poultry Products	100
5145	Confectionery	100
5146	Fish and Seafoods	100
5147	Meats and Meat Products	100
5148	Fresh Fruits and Vegetables	100
5149	Groceries and Related Products, N.E.C.	100
5153	Grain	100
5154	Livestock	100
5159	Farm-Product Raw Materials, N.E.C.	100
5162	Plastics Materials and Basic Shapes	100
5169	Chemicals and Allied Products, N.E.C.	100
5171	Petroleum Bulk Stations and Terminals	100
5172	Petroleum and Petroleum Products Wholesalers, Except Bulk Station and Terminals	100
5181	Beer and Ale	100
5182	Wines and Distilled Alcoholic Beverages	100
5191	Farm Supplies	100
5192	Books, Periodicals, and Newspapers	100
5193	Flowers and Florists' Supplies	100
5194	Tobacco and Tobacco Products	100
5198	Paints, Varnishes, and Supplies	100
5199	Nondurable Goods, N.E.C.	100

DIVISION G—RETAIL TRADE

(Not applicable to Government Acquisition of Supplies. Th nonmanufacturer size standard of 500 employees shall be used for Government acquisition of supplies.)

Major Group 52-Building Materials, Hardware, Garden Supply, and Mobile Home Dealers

SIC	DESCRIPTION	SIZE
5211	Lumber and Other Building Materials Dealers	$3.5
5231	Paint, Glass, and Wallpaper Stores	$3.5
5251	Hardware Stores	$3.5
5261	Retail Nurseries, Lawn and Garden Supply Stores	$3.5
5271	Mobile Home Dealers	$6.5

Major Group 53-General Merchandise Stores

SIC	DESCRIPTION	SIZE
5311	Department Stores	$13.5
5331	Variety Stores	$5.5
5399	Miscellaneous General Merchandise Stores	$3.5

Major Group 54-Food Stores

SIC	DESCRIPTION	SIZE
5411	Grocery Stores	$13.5
5421	Meat and Fish (Seafood) Markets	$3.5
5431	Fruit Stores and Vegetable Markets	$3.5
5441	Candy, Nut, and Confectionery Stores	$3.5
5451	Dairy Products Stores	$3.5
5461	Retail Bakeries	$3.5
5499	Miscellaneous Food Stores	$3.5

Major Group 55-Automotive Dealers and Gasolin Service Stations

SIC	DESCRIPTION	SIZE
5511	Motor Vehicle Dealers (New and Used)	$11.5
5521	Motor Vehicle Dealers (Used Only)	$11.5
5531	Auto and Home Supply Stores	$3.5
5541	Gasoline Service Stations	$4.5
5551	Boat Dealers	$3.5

Notes: Size standards preceded by a dollar sign ($) are in millions of dollars. All others are in number of employees unless specified otherwise.
N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
5561	Recreational Vehicle Dealers	$3.5
5571	Motorcycle Dealers	$3.5
5599	Automotive Dealers, N.E.C.[12]	$3.5
	Major Group 56-Apparel and Accessory Stores	
5611	Men's and Boys' Clothing and Furnishings Stores	$4.5
5621	Women's Ready-to-Wear Stores	$4.5
5632	Women's Accessory and Specialty Stores	$3.5
5641	Children's and Infants' Wear Stores	$3.5
5651	Family Clothing Stores	$4.5
5661	Shoe Stores	$4.5
5699	Miscellaneous Apparel and Accessory Stores	$3.5
	Major Group 57-Furniture, Home Furnishings, and Equipment Stores	
5712	Furniture Stores	$3.5
5713	Floor Covering Stores	$3.5
5714	Drapery, Curtain, and Upholstery Stores	$3.5
5719	Miscellaneous Home Furnishing Stores	$3.5
5722	Household Appliance Stores	$4.5
5731	Radio, Television and Electronics Stores	$4.5
5734	Computer and Software Stores	$4.5
5735	Record and Prerecorded Tapes Stores	$3.5
5736	Musical Instrument Stores	$3.5
	Major Group 58-Eating and Drinking Places	
5812	Eating Places (Except Food Services)	$3.5
5812	Food Services	$10.0
5813	Drinking Places (Alcoholic Beverages)	$3.5
	Major Group 59-Miscellaneous Retail	
5912	Drug Stores and Proprietary Stores	$3.5
5921	Liquor Stores	$3.5
5932	Used Merchandise Stores	$3.5
5941	Sporting Goods Stores and Bicycle Shops	$3.5
5942	Book Stores	$3.5
5943	Stationery Stores	$3.5
5944	Jewelry Stores	$3.5
5945	Hobby, Toy, and Game Shops	$3.5
5946	Camera and Photographic Supply Stores	$3.5
5947	Gift, Novelty, and Souvenir Shops	$3.5
5948	Luggage and Leather Goods Stores	$3.5
5949	Sewing, Needlework, and Piece Goods Stores	$3.5
5961	Mail Order Houses	$12.5
5962	Automatic Merchandising Machine Operators	$3.5
5963	Direct Selling Establishments	$3.5
5983	Fuel Oil Dealers	$6.0
5984	Liquefied Petroleum Gas (Bottled Gas) Dealers	$3.5
5989	Fuel Dealers, N.E.C.	$3.5
5992	Florists	$3.5
5993	Cigar Stores and Stands	$3.5
5994	News Dealers and Newsstands	$3.5
5995	Opticians Stores	$3.5
5999	Miscellaneous Retail Stores, N.E.C.	$3.5
	DIVISION H—FINANCE, INSURANCE, AND REAL ESTATE[13]	
	Major Group 60-Banking	
6021	National Banks	[14]$100
6022	State Commercial Banks	[14]$100
6029	Commercial Banks, N.E.C.	[14]$100
6035	Savings Institutions, Federally Chartered	[14]$100
6036	Savings Institutions, Not Federally Chartered	[14]$100
	Major Group 62-Security and Commodity Brokers, Dealers, Exchanges, and Services	
6221	Commodity Contracts, Brokers, and Dealers	$3.5
	Major Group 63-Insurance	
6331	Fire, Marine, and Casualty Insurance	1,500
	Major Group 64-Insurance Agents, Brokers, and Service	
6411	Insurance Agents, Brokers, and Service	$3.5
	Major Group 65-Real Estate	
6515	Operators of Residential Mobile Home Sites	$3.5
---	Leasing of Building Space to Federal Government by Owners[15]	$10.0
6531	Real Estate Agents and Managers	[10]$1.0
	DIVISION I—SERVICES[16]	
	Major Group 70-Hotels, Rooming Houses, Camps, and Other Lodging Places	
7011	Hotels, Motels, and Tourist Courts	$3.5
7021	Rooming and Boarding Houses	$3.5
7032	Sporting and Recreational Camps	$3.5

Note: Size standards preceded by a dollar sign ($) are in millions of dollars. All others are in number of employees unless specified otherwise.
N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
7033	Trailering Parks and Camp Sites for Transients	$3.5
7041	Organization Hotels, and Lodging Houses, on Membership Basis	$3.5
	Major Group 72-Personal Services	
7211	Power Laundries, Family and Commercial	$7.0
7212	Garment Pressing, and Agents for Laundries and Dry Cleaners	$3.5
7213	Linen Supply	$7.0
7215	Coin-operated Laundries and Dry Cleaning	$3.5
7216	Dry Cleaning Plants, Except Rug Cleaning	$2.5
7217	Carpet and Upholstery Cleaning	$2.5
7218	Industrial Launderers	$7.0
7219	Laundry and Garment Services, N.E.C.	$3.5
7221	Photographic Studios, Portrait	$3.5
7231	Beauty Shops	$3.5
7241	Barber Shops	$3.5
7251	Shoe Repair Shops, Shoe Shine Parlors, and Hat Cleaning Shops	$3.5
7261	Funeral Service and Crematories	$3.5
7291	Tax Return Preparation Services	$3.5
7299	Miscellaneous Personal Services	$3.5
	Major Group 73-Business Services	
7311	Advertising Agencies	$3.5
7312	Outdoor Advertising Services	$3.5
7313	Radio, Television, and Publishers' Advertising Representatives	$3.5
7319	Advertising, N.E.C.	$3.5
7322	Adjustment and Collection Services	$3.5
7323	Credit Reporting	$3.5
7331	Direct Mail Advertising Services	$3.5
7334	Photocopying and Duplicating Services	$3.5
7335	Commercial Photography	$3.5
7336	Commercial Art and Graphic Design	$3.5
7338	Stenographic and Court Reporting Services	$3.5
7342	Disinfecting and Exterminating Services	$3.5
7349	Building Maintenance Services, N.E.C.	$8.0
7352	Medical Equipment Rental	$3.5
7353	Heavy Construction and Earthmoving Equipment Rental and Leasing	$3.5
7359	Equipment Rental and Leasing, N.E.C.	$3.5
7361	Employment Agencies	$3.5
7363	Help Supply Services	$3.5
7371	Custom Computer Programming Services	$7.0
7372	Prepackaged Computer Software	$7.0
7373	Computer Integrated System Design	$7.0
7374	Computer Processing and Data Preparation Services	$7.0
7375	Electronic Information Retrieval Services	$7.0
7376	Computer Facilities Management Services	$7.0
7377	Computer Rental and Leasing	$12.5
7378	Computer Maintenance and Repair	$12.5
7379	Computer Related Services, N.E.C.	$12.5
7381	Detective, Guard and Armored Car Services	$6.0
7382	Security Systems Services	$6.0
7383	News Syndicates	$3.5
7384	Photofinishing Laboratories	$3.5
7389	Business Services, N.E.C.	$3.5
	Major Group 75-Automotive Repair, Services, and Garages	
7513	Truck Rental and Leasing, Without Drivers	$12.5
7514	Passenger Car Rental, Without Drivers	$12.5
7515	Passenger Car Leasing, Without Drivers	$12.5
7519	Utility Trailer and Recreational Vehicle Rental	$3.5
7521	Automobile Parking	$3.5
7532	Top, Body, and Upholstery Repair, and Paint Shops	$3.5
7533	Motor Vehicle Exhaust Systems Repair Shops	$3.5
7534	Tire Retreading and Repair Shops	$7.0
7536	Motor Vehicle Glass Replacement Shops	$3.5
7537	Motor Vehicle Transmission Repair Shops	$3.5
7538	General Automotive Repair Shops	$3.5
7539	Automotive Repair Shops, N.E.C.	$3.5
7542	Car Washes	$3.5
7549	Automotive Services, Except Repair and Car Washes	$3.5
	Major Group 76-Miscellaneous Repair Services	
7622	Radio and Television Repair Shops	$3.5
7623	Refrigeration and Air Conditioning Service and Repair Shops	$3.5
7629	Electrical and Electronic Repair Shops, N.E.C.	$3.5
7631	Watch, Clock, and Jewelry Repair	$3.5
7641	Reupholstery and Furniture Repair	$3.5
7692	Welding Repair	$3.5
7694	Armature Rewinding Shops	$3.5
7699	Repair Shops and Related Services, N.E.C.[18]	$3.5
	Major Group 78-Motion Pictures	
7812	Motion Picture Production	$14.5

Notes: Size standards preceded by a dollar sign ($) are in millions of dollars. All others are in number of employees unless specified otherwise.
N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
7819	Services Allied to Motion Picture Production	$14.5
7822	Motion Picture and Tape Distribution	$14.5
7829	Services Allied to Motion Picture Distribution	$3.5
7832	Motion Picture Theaters, Except Drive-in	$3.5
7833	Drive-in Motion Picture Theaters	$3.5
7841	Video Tape Rental	$3.5
	Major Group 79-Amusement and Recreation Services, Except Motion Pictures	
7911	Dance Halls, Studios, and Schools	$3.5
7922	Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services	$3.5
7929	Bands, Orchestras, Actors, and Other Entertainers and Entertainment Groups	$3.5
7933	Bowling Alleys	$3.5
7941	Professional Sports Clubs and Promoters	$3.5
7991	Physical Fitness Facilities	$3.5
7993	Coin-Operated Amusement Devices	$3.5
7996	Amusement Parks	$3.5
7997	Membership Sports and Recreation Clubs	$3.5
7999	Amusement and Recreation Services, N.E.C.	$3.5
	Major Group 80-Health Services	
8011	Offices and Clinics of Doctors of Medicine	$3.5
8021	Offices and Clinics of Dentists	$3.5
8031	Offices of Osteopathic Physicians	$3.5
8041	Offices of Chiropractors	$3.5
8042	Offices of Optometrists	$3.5
8043	Offices of Podiatrists	$3.5
8049	Offices of Health Practitioners, N.E.C.	$3.5
8051	Skilled Nursing Care Facilities	$3.5
8052	Intermediate Health Care Facilities	$3.5
8059	Nursing and Personal Care Facilities, N.E.C.	$3.5
8062	General Medical and Surgical Hospitals	$3.5
8063	Psychiatric Hospitals	$3.5
8069	Specialty Hospitals, Except Psychiatric	$3.5
8071	Medical Laboratories	$3.5
8072	Dental Laboratories	$3.5
8082	Home Health Care Agencies	$3.5
8092	Kidney Dialysis Centers	$3.5
8093	Specialty Outpatient Clinics, N.E.C.	$3.5
8099	Health and Allied Services, N.E.C.	$3.5
	Major Group 81-Legal Services	
8111	Legal Services	$3.5
	Major Group 82-Educational Services	
8211	Elementary and Secondary Schools	$3.5
8221	Colleges and Universities, N.E.C.	$3.5
8222	Junior Colleges	$3.5
8231	Libraries and Information Centers	$3.5
8243	Data Processing Schools	$3.5
8244	Business and Secretarial Schools	$3.5
8249	Vocational Schools, N.E.C.	$3.5
8299	Schools and Educational Services, N.E.C.	$3.5
8299	Flight Training Services	$12.5
	Major Group 83-Social Services	
8322	Individual and Family Social Services	$3.5
8331	Job Training and Related Services	$3.5
8351	Child Day Care Services	$3.5
8361	Residential Care	$3.5
8399	Social Services, N.E.C.	$3.5
	Major Group 84-Museums, Botanical, Zoological Gardens	
8412	Museums and Art Galleries	$3.5
8422	Botanical and Zoological Gardens	$3.5
	Major Group 86-Membership Organizations	
8611	Business Associations	$3.5
8621	Professional Organizations	$3.5
8631	Labor Organizations	$3.5
8641	Civic and Social Associations	$3.5
8651	Political Organizations	$3.5
8661	Religious Organizations	$3.5
8699	Membership Organizations, N.E.C.	$3.5
	Major Group 87-Miscellaneous Services	
8711	Engineering Services:	
	Military and Aerospace Equipment and Military Weapons	$13.5
	Marine Engineering and Naval Architecture	$9.0
	Other Engineering Services	$2.5
8712	Architectural Services (Other Than Naval)	$2.5
8713	Surveying Services	$2.5
8721	Accounting, Auditing, and Bookkeeping Services	$4.0
8731	Commercial Physical and Biological Research	[19]500
	Aircraft	1,500
	Aircraft Parts, and Auxiliary Equipment, Aircraft Engines and Engines Parts	1,000

Note: Size standards preceded by a dollar sign ($) are in millions of dollars. All others are in number of employees unless specified otherwise.
N.E.C.: Not Elsewhere Classified.

SIC	DESCRIPTION	SIZE
	Space Vehicles and Guided Missiles, their Propulsion Units, their Propulsion Unit Parts, and their Auxiliary Equipment and Parts	1,000
	Other Commercial Physical and Biological Research	500
8732	Commercial Economic, Sociological and Educational Research	$3.5
8733	Noncommercial Research Organizations	$3.5
8734	Testing Laboratories	$3.5
8741	Management Services	$3.5
8742	Management Consulting Services, N.E.C.	$3.5
8743	Public Relations Services	$3.5
8744	Facilities Support Management Services	[20]$3.5
--	Base Maintenance[17]	$13.5
8748	Business Consulting Services, N.E.C.	$3.5
	Major Group 89-Miscellaneous Services	
8999	Services, N.E.C.	$3.5

FOOTNOTES

[1] Reserved.

[2] *SIC-1629:* To be considered small, a firm must perform the dredging of at least 40 percent of the yardage with its own dredging equipment or equipment owned by another small dredging concern.

[3] *SIC Division D—Manufacturing:* "Rebuilding on a factory basis or equivalent." For rebuilding machinery or equipment on a factory basis, use SIC code applicable for new manufactured product. The appropriate size standard is not limited to manufacturers. Ordinary repair services or preservation operations, however, are not considered rebuilding activities.

[4] *SIC-2033:* For purposes of Government procurement for food canning and preserving under SIC-2033, the standard of 500 employees shall be exclusive of agricultural labor as defined in section (k) of the Federal Unemployment Tax Act, 68A Stat. 454, 26 U.S.C. (I.R.C. 1954) 3306.

[5] *SIC-2911:* For purposes of Government procurement, the firm may not have more than 1,500 employees, nor may it have more than 50,000 barrels per day capacity. This capacity may be measured in terms of either crude oil or bona fide feedstocks or both, but the sum total of the various petroleum-based inputs in the process may not exceed 50,000 barrels. In addition to the direct owned capacity of the concern in question, counted capacity will include any leased facilities or any facilities made available to the concern under an arrangement such as (but not limited to) an exchange agreement or a throughput, or other form, or processing agreement (whereby another party processes the concern's own crude or feedstocks). Such an arrangement would have the same effect as though such facilities had been leased, and this would have to be included in the concern's own capacity. The total product to be delivered in the performance of the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

[6] *SIC-3011:* For purposes of Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census Classification Codes 30111 and 30112, provided that (1) the value of tires within Census Classification Codes 30111 and 30112 which it manufactured in the United States during the previous calendar year is more than 50 percent of the value of its total worldwide manufacture, (2) the value of pneumatic tires within Census Classification Codes 30111 and 30112 which it manufactured worldwide during the preceding calendar year was less than 5 percent of the value of all such tires manufactured in the United States during said period, and (3) the value of the principal products which it manufactured or otherwise produced, or sold worldwide during the preceding calendar year is less than 10 percent of the total value of such products manufactured or otherwise produced or sold in the United States during said period.

[7] *SIC-4212*: The Component "Garbage and Refuse, Collecting and Transporting, Without Disposal" shall have a size standard of $6.0 million. This is the same size standard as SIC-4953, Refuse Systems.

[8] *Offshore Marine Services (Major Groups 44 and 45):* The applicable size standard shall be $14 million for firms furnishing specific transportation services to concerns engaged in offshore oil and/or natural gas exploration, drilling production, or marine research; such services encompass passenger and freight transportation, anchor handling, and related logistical services to and from the work site or at sea.

[9] *SIC-4512, 4513, and 4522:* Includes passenger or cargo transportation requiring the use of one or more helicopters or fixed-wing aircraft. This does not include offshore marine transportation services as defined in footnote[8].

[10] *SIC-4724 and 6531:* As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received would be included as revenue.

[11] *SIC-4953:* "Garbage and Refuse, Collecting and Transportation: Without Disposal," a component of SIC-4212, has the same size standard as SIC-4953.

[12] *SIC-5599*: For retail firms whose principal line of business is the retail sale of aircraft, a $5 million size standard shall apply.

[13] *Most industries in Division H*—Finance, Insurance, and Real Estate—are excluded from SBA assistance.

[14] *SIC-6021, 6022, 6029, 6035, 6036:* Millions of dollars, as measured by total assets.

[15] *Leasing of building space to the Federal Government by owners* — For the purpoce of Government procurement, a size standard of $10 million in gross receipts is established for owners of building space that is leased to the Federal Government. The standard for these procurements shall apply to the owner of the property and not to those acting as an agent for the owner. There is no size standard concerning the agent.

[16] For all industries not specifically listed in this division, the size standard is $3.5 million.

[17] *If one of the activities in base maintenance, as defined in SIC-8744*, can be identified with a separate industry, and that activity (or industry) accounts for 50 percent or more of the value of an entire contract, then the proper size standard shall be that for the particular industry, and not the base maintenance size standard.

"Base maintenance" constitutes three or more separate activities. The activities may be either service or special trade construction related activities. As services, these activities must each be in a separate industry. These activities may include, but are not limited to such separate maintenance activities as Janitorial and Custodial Service, Protective Guard Service, Commissary Service, Fire Prevention Service, the Safety Engineering Service, Messenger Service, and Grounds Maintenance and Landscaping Service. If the contract involves the use of special trade contractors (plumbing, painting, plastering, carpentering, etc.), all such specialized trade construction activities will be considered a single activity, which is Base Housing Maintenance. This is only one activity of base maintenance and two additional activities must be present for the contract to be considered base maintenance. The size standard for Base Housing Maintenance is $7 million, the same size standard as for Special Trade Contractors.

[18] *SIC-3728, 7699:* Contracts for this rebuilding or overhaul of aircraft ground support equipment on a contract basis will be classified under SIC-3728.

[19] *SIC-8731:* For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard to use is that of the manufacturing industry in which the specific product is classified.

Research and development, as defined in the SIC Manual, means laboratory or other physical research and development on a contract or fee basis. Research and development for purposes of size determinations does not include the following: economic, educational, engineering, operations, systems, or other nonphysical research or computer programming, data processing, commercial and/or medical laboratory testing.

For purposes of the Small Business Innovation and Research (SBIR) program, SBA has adopted a different definition. See Part 121.7 of 13 CFR.

Research and development for guided missiles and space vehicles includes evaluation and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

[20] *Facilities Management, a component of Facilities Support Management Services (SIC-8744), has the following definition:*

Establishments, not elsewhere classified, which provide overall management and the personnel to perform a variety of related support services in operating a complete facility in or around a specific building, or within another business or Government establishment. Facilities management means furnishing three or more personnel supply services which may include, but are not limited to secretarial services, typists, telephone answering, reproduction, or mimeograph service, mailing service, financial or business management, public relations, conference planning, travel arrangements, word processing, maintaining files and/or libraries, switchboard operation, writers, bookkeeping, minor office equipment maintenance and repair, use of information systems (not programming), etc.

[21] *SIC-4911:* Measured in millions of megawatt hours.

[48 FR 42240, Sept. 19, 1983 as amended 51 FR 2652, Jan. 17, 1986; 51 FR 27489, July 31, 1986; 51 FR 31426, Sept. 3, 1986; 52 FR 21887, June 9, 1987; 52 FR 30076, Aug. 12, 1987; 53 FR 661, Jan. 11, 1988; 53 FR 34227, Sept. 2, 1988; 53 FR 43390, Oct. 26, 1988, 54 FR 5055, Jan. 31, 1989, 54 FR 13023, Mar. 29, 1989, 54 FR 25062, June 12, 1989; 55 FR 3882, Feb. 5, 1990; 55 FR 25529, June 21, 1990]

Subpart 19.2—Policies

19.201 General policy.

(a) It is the policy of the Government to place a fair proportion of its acquisitions, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems, with small business concerns and small disadvantaged business concerns. Such concerns shall also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

(b) Heads of contracting activities are responsible for effectively implementing the Small Business and Small Disadvantaged Business Utilization Programs within their activities, including achieving program goals. They are to ensure that contracting and technical personnel maintain knowledge of small and small disadvantaged business program requirements and take all reasonable action to increase small business participation in their activities' contracting processes.

(c) The Small Business Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization (see section (k) of the Small Business Act and 13 CFR 125.4(g)(7)). Management of the office shall be the responsibility of an officer or employee of the agency who shall, in carrying out the purposes of the Act—

(1) Be known as the Director of Small and Disadvantaged Business Utilization;

(2) Be appointed by the agency head;

(3) Be responsible to and report directly to the agency head or the deputy to the agency head;

(4) Be responsible for the agency carrying out the functions and duties in sections 8 and 15 of the Small Business Act;

(5) Assist small business concerns in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions;

(6) Have supervisory authority over agency personnel to the extent that their functions and duties relate to sections 8 and 15 of the Small Business Act;

(7) Assign a small business technical advisor to each contracting activity within the agency to which the SBA has assigned a representative (see 19.402)—

(i) Who shall be a full-time employee of the contracting activity, well qualified, technically trained, and familiar with the supplies or services contracted for by the activity; and

(ii) Whose principal duty is to assist the SBA's assigned representative in performing functions and duties relating to sections 8 and 15 of the Small Business Act.

(8) Cooperate and consult on a regular basis with the SBA in carrying out the agency's functions and duties in sections 8 and 15 of the Small Business Act.

(9) Make recommendations in accord with agency regulations as to whether a particular acquisition should be awarded under subpart 19.5 as a set-aside (including those involving Labor Surplus Areas), under subpart 19.8 as a section 8(a) award, or under a procedure authorized by section 1207 of Pub. L. 99-661, if applicable.

(d) Small and Disadvantaged Business Utilization Specialists shall be appointed and act in accord with agency regulations.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 27562, July 3, 1985; 51 FR 27116, July 29, 1986; 54 FR 13333, Mar. 31, 1989; 54 FR 25062, June 12, 1989]

19.202 Specific policies.

In order to further the policy in 19.201(a), contracting officers shall comply with the specific policies listed below and shall consider recommendations of the agency Director of Small and Disadvantaged Business Utilization, or the Director's designee, as to whether a particular acquisition should be awarded under subparts 19.5, 19.8, or under a procedure authorized by section 1207 of Pub. L. 99-

661. The contracting officer shall document the contract file whenever the Director's recommendations are not accepted.

[54 FR 25062, June 12, 1989]

19.202–1 Encouraging small business participation in acquisitions.

Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:

(a) Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.

(b) Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by SBA against loss under 15 U.S.C. 694b.

(c) Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government.

(d) Encourage prime contractors to subcontract with small business concerns (see subpart 19.7).

19.202–2 Locating small business sources.

The contracting officer shall, to the extent practicable, encourage maximum participation by small business concerns, small disadvantaged business concerns, and women-owned small business concerns in acquisitions by taking the following actions:

(a) Include on mailing lists all established and potential small business sources, including those located in labor surplus areas, if the concerns have submitted acceptable applications or appear from other representations to be qualified small business concerns.

(b) Before issuing solicitations, make every reasonable effort to find additional small business concerns, unless lists are already excessively long and only some of the concerns on the list will be solicited. This effort should include contacting the agency SBA procurement center representative, or if there is none, the SBA.

(c) Publicize solicitations and contract awards in the "Commerce Business Daily" (see subparts 5.2 and 5.3).

19.202–3 Equal low bids.

In the event of equal low bids, awards shall be made first to small business concerns which are also labor surplus area concerns, and second to small business concerns which are not also labor surplus area concerns.

19.202–4 Solicitation.

The contracting officer shall encourage maximum response to solicitations by small business, small disadvantaged business concerns, and women-owned small business concerns by taking the following actions:

(a) Allow the maximum amount of time practicable for the submission of offers.

(b) Furnish specifications, plans, and drawings with solicitations, or furnish information as to where they may be obtained or examined.

(c) Send solicitations to (1) all small business concerns on the solicitation mailing list, or (2) a pro rata number of small business concerns when less than a complete list is used.

(d) Provide to any small business concern, upon its request, a copy of bid sets and specifications with respect to any contract to be let, the name and telephone number of an agency contact to answer questions related to such prospective contract and adequate citations to each major Federal law or agency rule with which such business concern must comply in performing such contract other than laws or agency rules with which the small business must comply when doing business with other than the Government.

19.202–5 Data collection and reporting requirements.

Agencies shall measure the extent of small business participation in their acquisition programs by taking the following actions:

(a) Require each prospective contractor to represent whether it is a small business, small disadvantaged business concern, or women-owned small business (see the provisions at 52.219-1, Small Business Concern Representation, 52.219-2, Small Disadvantaged Business Concern Representation, and 52.219-3, Women-Owned Small Business Representation).

(b) Accurately measure the extent of participation by small business concerns, small disadvantaged business concerns, and women-owned small businesses in Government acquisitions in terms of the total value of contracts placed with small business concerns during each fiscal year, and report data to the SBA at the end of each fiscal year (see subpart 4.6).

19.202-6 Determination of fair market price.

Agencies shall determine the fair market price of small business set-aside and 8(a) contracts as follows:

(a) For total and partial small business set-aside contracts, the fair market price shall be the price achieved in accordance with the reasonable price guidelines in 15.805-2.

(b) For 8(a) contracts, both with respect to meeting the requirement at 19.806(b) and in order to accurately estimate the current fair market price, contracting officers shall follow the procedures at 19.807.

[52 FR 38189, Oct. 14, 1987, as amended at 53 FR 43390, Oct. 26, 1988; 54 FR 46005, Oct. 31, 1989]

Subpart 19.3—Determination of Status as a Small Business Concern

19.301 Representation by the offeror.

(a) To be eligible for award as a small business, an offeror must represent in good faith that it is a small business at the time of written self certification. An offeror may represent that it is a small business concern in connection with a specific solicitation if it meets the definition of a small business concern applicable to the solicitation and has not been determined by the Small Business Administration (SBA) to be other than a small business.

(b) The contracting officer shall accept an offeror's representation in a specific bid or proposal that it is a small business unless (1) another offeror or interested party challenges the concern's small business representation or (2) the contracting officer has a reason to question the representation. Challenges of and questions concerning a specific representation shall be referred to the SBA in accordance with 19.302.

(c) An offeror's representation that it is a small business is not binding on the SBA. If an offeror's small business status is challenged, the SBA will evaluate the status of the concern and make a determination, which will be binding on the contracting officer, as to whether the offeror is a small business. A concern cannot become eligible for a specific award by taking action to meet the definition of a small business concern after the SBA has determined that it is not a small business.

(d) If the SBA determines that the status of a concern as a *small business* or a *small disadvantaged business* has been misrepresented in order to obtain a set-aside contract, an 8(a) subcontract, a subcontract that is to be included as part or all of a goal contained in a subcontracting plan, or a prime or subcontract to be awarded as a result, or in furtherance of any other provision of Federal law that specifically references section 8(d) of the Small Business Act for a definition of program eligibility, the SBA may take action as specified in section 16(d) of the Act. If the SBA declines to take action, the agency may initiate the process. The SBA's regulations on penalties for misrepresentations and false statements are contained in 13 CFR 124.6.

[48 FR 42240, Sept. 19, 1983, as amended at 55 FR 3882, Feb. 5, 1990]

19.302 Protesting a small business representation.

(a) Any offeror or other interested party may protest the small business representation of an offeror in a specific offer.

(b) Any time after offers are opened, the contracting officer may question the small business representation of any offeror in a specific offer by filing a contracting officer's protest (see paragraph (c) below).

(c) (1) Any contracting officer who receives a protest, whether timely or not, or who, as the contracting officer, wishes to protest the small business representation of an offeror, shall promptly forward the protest to the SBA Regional Office for the geographical area where the principal office of the concern in question is located.

(2) The protest, or confirmation if the protest was initiated orally, shall be in writing and shall contain the basis for the protest with specific, detailed evidence to support the allegation that the offeror is not small. The SBA will dismiss any protest that does not contain specific grounds for the protest.

(d) In order to affect a specific solicitation, a protest must be timely. SBA's regulations on timeliness are contained in 13 CFR 121.9.

(1) To be timely, a protest by any concern or other interested party must be received by the contracting officer (see (i) and (ii) below) by the close of business of the 5th business day after bid opening (in sealed bid acquisitions) or receipt of the special notification from the contracting officer that identifies the apparently successful offeror (in negotiated acquisitions) (see 15.1001(b)(2)).

(i) A protest may be made orally if it is confirmed in writing either within the 5-day period or by letter postmarked no later than 1 day after the oral protest.

(ii) A protest may be made in writing if it is delivered to the contracting officer by hand, telegram, or letter within the 5-day period.

(2) A contracting officer's protest is always considered timely whether filed before or after award.

(3) A protest under a Multiple Award Schedule will be timely if received by SBA at any time prior to the expiration of the contract period, including renewals.

(e) Upon receipt of a protest from or forwarded by the Contracting Office, the SBA will—

(1) Notify the contracting officer and the protestant of the date it was received, and that the size of the concern being challenged is under consideration by the SBA; and

(2) Furnish to the concern whose representation is being protested a copy of the protest and a blank SBA Form 355, Application for Small Business Determination, by certified mail, return receipt requested.

(f) Within 3 business days after receiving a copy of the protest and the form, the challenged offeror must file with the SBA a completed SBA Form 355 and a statement answering the allegations in the protest, and furnish evidence to support its position. If the offeror does not submit the required material within the 3 business days or another period of time granted by the SBA, the SBA may assume that the disclosure would be contrary to the offeror's interests.

(g) (1) Within 10 business days after receiving a protest, the challenged offeror's response, and other pertinent information, the SBA will determine the size status of the challenged concern and notify the contracting officer, the protestant, and the challenged offeror of its decision by certified mail, return receipt requested.

(2) The SBA Regional Administrator will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of the determination. Award may be made on the basis of that determination. This determination is final unless it is appealed in accordance with paragraph (i) below, and the contracting officer is notified of the appeal before award. If an award was made before the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid.

(h) (1) After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until (i) the SBA has made a size determination or (ii) 10 business days have expired since SBA's receipt of a protest, whichever occurs first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

(2) After the 10-day period has expired, the contracting officer may,

when practical, continue to withhold award until the SBA's determination is received, unless further delay would be disadvantageous to the Government.

(3) Whenever an award is made before the receipt of SBA's size determination, the contracting officer shall notify SBA that the award has been made.

(4) If a protest is received that challenges the small business status of an offeror not being considered for award, the contracting officer is not required to suspend contracting action. The contracting officer shall forward the protest to the SBA (see 19.302(c)(1)) with a notation that the concern is not being considered for award, and shall notify the protestant of this action.

(i) An appeal from an SBA size determination may be filed by (1) any concern or other interested party whose protest of the small business representation of another concern has been denied by an SBA Regional Administrator, (2) any concern or other interested party that has been adversely affected by a Regional Administrator's decision, or (3) the SBA Associate Administrator for the SBA program involved. The appeal must be filed with the Office of Hearings and Appeals, Small Business Administration, Washington, DC 20416, within the time limits and in strict accordance with the procedures contained in 13 CFR 121.11. The SBA will inform the contracting officer of its ruling on the appeal. The SBA decision, if received before award, will apply to the pending acquisition. SBA rulings received after award shall not apply to that acquisition.

(j) A protest which is not timely, even though received before award, shall be forwarded to the Small Business Administration regional office (see 19.302(c)(1) above), with a notation on it that the protest is not timely. The protestant shall be notified that the protest cannot be considered on the instant acquisition but has been referred to SBA for its consideration in any future actions. A protest received by a contracting officer after award of a contract shall be forwarded to the Small Business Administration regional office with a notation that award has been made. The protestant shall be notified that the award has been made and that the protest has been forwarded to SBA for its consideration in future actions.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52426, Dec. 23, 1985; 51 FR 2664, Jan. 17, 1986]

19.303 Determining product or service classifications.

(a) The contracting officer shall determine the appropriate product or service classification and related small business size standard and include them in solicitations, except when small purchase procedures are used.

(b) If different products or services are required in the same solicitation, the solicitation shall identify the appropriate small business size standard for each product or service.

(c) The contracting officer's determination is final unless appealed as provided below.

(1) If the solicitation period is longer than 30 days, the appeal must be filed not less than 10 business days before the bid opening or proposal submission date. If the solicitation period is 30 days or is shorter than 30 days, the appeal must be filed not less than 5 business days before the bid opening or proposal submission date.

(2) The appeal shall be in writing and shall be addressed to the Office of Hearings and Appeals, Small Business Administration, Washington, DC 20416. No particular form is prescribed for the appeal. However, time limits and procedures set forth in SBA's regulations at 13 CFR 121.11 are strictly enforced. The appellant shall submit an original and one legible copy of the appeal. In the case of telegraphic appeals, the telegraphic notice shall be confirmed by the next day mailing of a written appeal, in duplicate. The written appeal must contain the following certification: "I have read this document and, under penalty of perjury and the sanctions imposed under 18 U.S.C. 1001, of which I am aware, I certify that, to the best of my knowledge, the statements made therein are true and correct, and that this document is not being filed for the purpose

of delay or harassment." The appeal shall include—

(i) The substance and date of the determination being appealed;

(ii) The number and date of the solicitation, and the name, address, and telephone number of the contracting officer;

(iii) The reasons why the contracting officer's determination is alleged to be erroneous;

(iv) Documentary evidence to support the allegation; and

(v) The name, address, and telephone number of the appellant; and

(vi) A statement certifying that copies of the appeal have been provided the contracting officer.

(3) The Office of Hearings and Appeals will notify the contracting officer of the date it received the appeal and the docket number assigned. The contracting officer's response, if any, to the appeal must include appropriate argument and evidence, must include the certification in paragraph (c)(2) above, and must be filed with the Office of Hearings and Appeals no later than 5 business days after receipt of the appeal. The Office of Hearings and Appeals, if possible, will inform the contracting officer of its ruling on the appeal before the end of the solicitation period. SBA rulings received after the due date shall not apply to the pending acquisition, but shall apply to future acquisitions of the product or service.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 55 FR 38516, Sept. 18, 1990]

19.304 Solicitation provisions.

(a) The contracting officer shall insert the provision at 52.219-1, Small Business Concern Representation, in solicitations when the contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

(b) The contracting officer shall insert the provision at 52.219-2, Small Disadvantaged Business Concern Representation, in solicitations (other than those for small purchases), when the contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

(c) The contracting officer shall insert the provision at 52.219-3, Women-Owned Small Business Representation, in solicitations (other than those for small purchases), when the contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

Subpart 19.4—Cooperation With the Small Business Administration

19.401 General.

(a) The Small Business Act is the authority under which the Small Business Administration (SBA) and agencies consult and cooperate with each other in formulating policies to ensure that small business and small disadvantaged business interests will be recognized and protected.

(b) The Director of Small and Disadvantaged Business Utilization serves as the agency focal point for interfacing with SBA.

19.402 Small Business Administration procurement center representatives.

(a) The SBA may assign one or more procurement center representatives to any contracting activity or contract administration office to carry out SBA policies and programs. Assigned SBA procurement center representatives are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its procurement center representatives security clearances required by the contracting agency.

(b) Upon their request and subject to applicable acquisition and security regulations, contracting officers shall give SBA procurement center representatives access to all reasonably obtainable contract information that is directly pertinent to their official duties.

(c) The duties assigned by SBA to its procurement center representatives include the following:

(1) Reviewing proposed acquisitions to recommend (i) the setting aside of selected acquisitions not unilaterally set aside by the contracting officer, (ii) new qualified small and small disadvantaged business sources, and (iii) breakout of components for competitive acquisitions.

(2) Recommending concerns for inclusion on solicitation mailing lists or on a list of concerns to be solicited in a specific acquisition.

(3) Appealing to the chief of the contracting office any contracting officer's determination not to solicit a concern recommended by the SBA for a particular acquisition, when not doing so results in no small business being solicited.

(4) Conducting periodic reviews of the contracting activity to which assigned to ascertain whether it is complying with the small business policies in this regulation.

(5) Sponsoring and participating in conferences and training designed to increase small business participation in the contracting activities of the office.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 19715, May 30, 1986]

19.403 Small Business Administration breakout procurement center representatives.

(a) The SBA is required by section 403 of Pub. L. 98-577 to assign a breakout procurement center representative to each major procurement center. A major procurement center means a procurement center that, in the opinion of the administrator, purchases substantial dollar amounts of other than commercial items, and which has the potential to incur significant savings as a result of the placement of a breakout procurement representative. The SBA breakout procurement center representative is an advocate for (1) the appropriate use of full and open competition, and (2) the breakout of items, when appropriate and while maintaining the integrity of the system in which such items are used. The SBA breakout procurement center representative is in addition to the SBA procurement center representative (see 19.402). When an SBA breakout procurement center representative is assigned, the SBA is required to assign at least two collocated small business technical advisors. Assigned SBA breakout procurement center representatives and technical advisors are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its breakout procurement center representatives and technical advisors security clearances required by the contracting agency.

(b) Contracting officers shall comply with 19.402(b) in their relationships with SBA breakout procurement center representatives and SBA small business technical advisors.

(c) The SBA breakout procurement center representative is authorized to—

(1) Attend any provisioning conference or similar evaluation session during which determinations are made as to whether requirements are to be acquired using other than full and open competition and make recommendations with respect to such requirements to the members of such conference or session;

(2) Review, at any time, restrictions on competition previously imposed on items through acquisition method coding or similar procedures and recommend to personnel of the appropriate activity the prompt reevaluation of such limitations;

(3) Review restrictions on competition arising out of restrictions on the rights of the United States in technical data and, when appropriate, recommend that personnel of the appropriate activity initiate a review of the validity of such an asserted restriction;

(4) Obtain from any governmental source, and make available to personnel of the appropriate center, technical data necessary for the preparation of a competitive solicitation package for any item of supply or service previously acquired noncompetitively due to the unavailability of such technical data;

(5) Have access to procurement records and other data of the procurement center commensurate with the level of such representative's approved security clearance classification;

(6) Receive unsolicited engineering proposals and, when appropriate—

(i) Conduct a value analysis of such proposal to determine whether it, if adopted, will result in lower costs to the United States without substantially impeding legitimate acquisition objectives and forward to personnel of the appropriate center recommendations with respect to such proposal; or

(ii) Forward such proposals without analysis to personnel of the center responsible for reviewing them who shall furnish the breakout procurement center representative with information regarding the proposal's disposition;

(7) Review the systems that account for the acquisition and management of technical data within the procurement center to ensure that such systems provide the maximum availability and access to data needed for the preparation of offers to sell to the United States those supplies to which such data pertain which potential offerors are entitled to receive;

(8) Appeal the failure by the procurement center to act favorably on any recommendation made pursuant to subparagraphs (c) (1) through (7) of this section. Such appeal must be in writing and shall be filed and processed in accordance with the appeal procedures set out in 19.505;

(9) Conduct familiarization sessions for contracting officers and other appropriate personnel of the procurement center to which assigned. Such sessions shall acquaint the participants with the duties and objectives of the representative and shall instruct them in the methods designed to further the breakout of items for procurement through full and open competition; and

(10) Prepare and personally deliver an annual briefing and report to the head of the procurement center to which assigned. Such briefing and report shall detail the past and planned activities of the representative and shall contain recommendations for improvement in the operation of the center as may be appropriate. The head of such center shall personally receive the briefing and report and shall, within 60 calendar days after receipt, respond, in writing, to each recommendation made by the representative.

(d) The duties of the SBA small business technical advisors are to assist the SBA breakout procurement center representative in carrying out the activities described in (c) (1) through (7) of this section and to assist the SBA procurement center representatives (see FAR 19.402).

[51 FR 19715, May 30, 1986, as amended at 54 FR 25062, June 12, 1989]

Subpart 19.5—Set-Asides for Small Business

19.501 General.

(a) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A "set-aside for small business" is the reserving of an acquisition exclusively for participation by small business concerns. A set-aside may be open to all small businesses or, except for the Department of Defense, restricted to small businesses located in labor surplus areas. A set-aside of a single acquisition or a class of acquisitions may be total or partial.

(b) The determination to make a set-aside may be unilateral or joint. A unilateral determination is one which is made by the contracting officer. A joint determination is one which is recommended by the Small Business Administration (SBA) procurement center representative and concurred in by the contracting officer.

(c) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small and disadvantaged business utilization program and documenting why a set-aside is inappropriate when the acquisition is not set aside. If the acquisition is set aside based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs. In automated contracting systems, all proposed acquisitions which are not small business-small purchase set-asides will be considered for small business set-asides in accordance with 19.502-2. If necessary, the screening for set-asides will be accomplished before entering such requirements into the system.

(d) At the request of an SBA procurement center representative, the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative's security clearance) all proposed acquisitions in excess of $10,000 that have not been unilaterally set aside for small business.

(e) To the extent practicable, unilateral determinations initiated by a contracting officer shall be used as the basis for small business set-asides rather than joint determinations by an SBA procurement center representative and a contracting officer.

(f) (1) Consistent with the requirements of Pub. L. 95-507, a special category of set-asides, identified as small business-small purchase set-asides, has been established for acquisitions of supplies or services that have an anticipated dollar value of $25,000 or less and are subject to small purchase procedures (see 13.105 and 19.508).

(2) A small nonmanufacturer responding to a small business-small purchase set-aside may furnish any domestically produced or manufactured product.

(g) Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall, if required by agency regulations, be acquired on the basis of a repetitive set-aside. This procedure will be followed unless the contracting officer determines that there is not a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (2) Awards will be made at fair market prices. Withdrawal of a repetitive set-aside will be in accordance with 19.506.

(h) If a proposed small business set-aside is estimated to exceed $1,000,000 in value and a bond is required, the contracting officer shall, to the extent practicable, divide requirements so as to allow more than one concern to perform the work.

(i) All solicitations involving set-asides must specify the applicable small business size standard and product classification (see 19.303).

(j) Except as authorized by law, a contract may not be awarded as a result of a set-aside if the cost to the awarding agency exceeds the fair market price.

(k) Section 133 of Pub. L. 100-590 authorizes public and private organizations for the handicapped to participate for fiscal years 1989 through 1993 in acquisitions set-aside for small business concerns. An interested party may file a protest of an organization's status within 5 days after announcement of an award. Within 10 days after announcement of an award to an organization for the handicapped, any small business concern which experiences or is likely to experience severe economic injury as a result of the award may file an appeal of the award. Such protests and appeals shall be filed with the Associate Administrator for Procurement Assistance, Small Business Administration, whose decision will be final, with a copy to the contracting officer. After receipt of notice of a protest or appeal, the contracting officer shall not award the contract until (1) SBA has made a decision or (2) 10 business days have expired since receipt of the protest or appeal, whichever occurs first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2664, Jan. 17, 1986; 52 FR 21902, June 9, 1987; 52 FR 38189, Oct. 14, 1987; 53 FR 17858, May 18, 1988; 53 FR 43390, Oct. 26, 1988; 54 FR 25063, June 11, 1988]

19.502 Setting aside acquisitions.

19.502-1 Requirements for setting aside acquisitions.

Using the order of precedence in 19.504, the contracting officer shall set aside an individual acquisition or class of acquisitions when it is determined to be in the interest of

(a) Maintaining or mobilizing the Nation's full productive capacity,

(b) War or national defense programs, or

(c) Assuring that a fair proportion of Government contracts in each industry category is placed with small business concerns, and when the circumstances described in 19.502-2 or 19.502-3(a) exist.

[48 FR 42240, Sept. 19, 1983, as amended at 52 FR 38189, Oct. 14, 1987]

19.502-2 Total set-asides.

(a) The entire amount of an individual acquisition or class of acquisitions, including contracts for architect-engineer services, research, development, test and evaluation, maintenance repair, and construction except small business-small purchase set-asides, shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (but see paragraph (b) of this subsection); and (2) awards will be made at fair market prices. Total set-asides shall not be made unless such a reasonable expectation exists (but see 19.502-3 as to partial set asides). Although past acquisition history of the item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists. In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small business the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

(b) In industries where the SBA finds that there are no small business manufacturers, it may waive the nonmanufacturers rule for regular dealers (see 19.102(f)(5)). This would permit small business regular dealers to provide any domestically produced product. In these cases, the contracting officer's determination in subparagraph (a)(1) of this subsection will be based on offers from at least two responsible small business regular dealers offering the products of different domestic concerns.

[48 FR 42240, Sept. 19, 1983, as amended at 53 FR 43390, Oct. 26, 1988; 54 FR 25063, June 12, 1989; 55 FR 25525, June 21, 1990]

19.502-3 Partial set-asides.

(a) The contracting officer shall set aside a portion of an acquisition, except for construction, for exclusive small business participation when—

(1) A total set-aside is not appropriate (see 19.502-2);

(2) The requirement is severable into two or more economic production runs or reasonable lots;

(3) One or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price;

(4) The acquisition is not subject to small purchase procedures; and

(5) A partial set-aside shall not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond with offers unless authorized by the head of a contracting activity on a case-by-case basis. Similarly, a class of acquisitions, not including construction, may be partially set aside. Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures.

(b) When the contracting officer determines that a portion of an acquisition is to be set aside, the requirement shall be divided into a set-aside portion and a non-set-aside portion, each of which shall (1) be an economic production run or reasonable lot and (2) have terms and a delivery schedule comparable to the other. When practicable, the set-aside portion should make maximum use of small business capacity.

(c) (1) The contracting officer shall award the non-set-aside portion using normal contracting procedures.

(2) (i) After all awards have been made on the non-set-aside portion, the contracting officer shall negotiate with eligible concerns on the set-aside portion, as provided in the solicitation,

and make award. Negotiations shall be conducted only with those offerors who have submitted responsive offers on the non-set-aside portion. Negotiations shall be conducted with small business concerns in the order of priority as indicated in the solicitation (but see (ii) below). The set-aside portion shall be awarded as provided in the solicitation. An offeror entitled to receive the award for quantities of an item under the non-set-aside portion and who accepts the award of additional quantities under the set-aside protion shall not be requested to accept a lower price because of the increased quantities of the award, nor shall negotiation be conducted with a view to obtaining such a lower price based solely upon receipt of award of both portions of the acquisition. This does not prevent acceptance by the contracting officer of voluntary reductions in the price from the low eligible offeror before award, acceptance of voluntary refunds, or the change of prices after award by negotiation of a contract modification.

(ii) If equal low offers are received on the non-set-aside portion from concerns eligible for the set-aside portion, the concern that is awarded the non-set-aside part of the acquisition shall have first priority with respect to negotiations for the set-aside.

[48 FR 42240, Sept. 19, 1989, as amended at 53 FR 43390, Oct. 26, 1988]

19.502-4 Methods of conducting set-asides.

(a) Total and partial small business set-asides may be conducted by using sealed bids (see part 14) or competitive proposals (see part 15). (See part 6 for competition requirements.)

(b) Except for offers on the non-set-aside portion of partial set-asides, offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected.

[50 FR 1743, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985]

19.502-5 Insufficient causes for not setting aside an acquisition.

None of the following is, in itself, sufficient cause for not setting aside an acquisition:

(a) A large percentage of previous contracts for the required item(s) has been placed with small business concerns.

(b) The item is on an established planning list under the Industrial Readiness Planning Program. However, a total set-aside shall not be made when the list contains a large business Planned Emergency Producer of the item(s) who has conveyed a desire to supply some or all of the required items.

(c) The item is on a Qualified Products List. However, a total set-aside shall not be made if the list contains the products of large business unless none of the large businesses desires to participate in the acquisition.

(d) A period of less than 30 days is available for receipt of offers.

(e) The contract is classified.

(f) Small business concerns are already receiving a fair proportion of the agency's contracts for supplies and services.

(g) A class set-aside of the item or service has been made by another contracting activity.

(h) A "brand name or equal" product description will be used in the solicitation.

19.503 Setting aside a class of acquisitions.

(a) A class of acquisitions of selected products or services, or a portion of the acquisitions, may be set aside for exclusive participation by small business concerns if individual acquisitions in the class will meet the criteria in 19.502-1, 19.502-2, or 19.502-3(a). The determination to make a class set-aside shall not depend on the existence of a current acquisition if future acquisitions can be clearly foreseen.

(b) The determination to set aside a class of acquisitions may be either unilateral or joint.

(c) Each class set-aside determination shall be in writing and must—

(1) Specifically identify the product(s) and service(s) it covers;

(2) Provide that the set-aside does not apply to any acquisition accomplished using small purchase procedures;

(3) Provide that the set-aside applies only to the (named) contracting office(s) making the determination; and

(4) Provide that the set-aside does not apply to any individual acquisition if the requirement is not severable into two or more economic production runs or reasonable lots, in the case of a partial class set-aside.

(d) The contracting officer shall review each individual acquisition arising under a class set-aside to identify any changes in the magnitude of requirements, specifications, delivery requirements, or competitive market conditions that have occurred since the initial approval of the class set-aside. If there are any changes of such a material nature as to result in probable payment of more than a fair market price by the Government or in a change in the capability of small business concerns to satisfy the requirements, the contracting officer may withdraw or modify (see 19.506(a)) the unilateral or joint set-aside by giving written notice to the SBA procurement center representative (if one is assigned), stating the reasons.

[48 FR 42240, Sept. 19, 1983, as amended at 53 FR 43390, Oct. 26, 1988]

19.504 Set-aside program order of precedence.

(a) In carrying out small business set-aside programs, contracting officers of agencies other than the Department of Defense (DOD) shall award contracts and encourage placement of subcontracts in the following order of precedence (see 15 U.S.C. 644(e) and (f) and Pub. L. 96-302):

(1) A total set-aside for small business concerns located in labor surplus areas.

(2) A total set-aside for small business concerns.

(3) A partial set-aside for small business concerns located in labor surplus areas.

(4) A partial set-aside for small business concerns.

(5) Total labor surplus area set-aside for concerns that are not small businesses.

(b) Set-aside priorities of DOD are different from the above and are set forth in the DOD FAR Supplement.

19.505 Rejecting Small Business Administration recommendations.

(a) If the contracting officer rejects a recommendation of the SBA procurement center representative or breakout procurement center representative, written notice shall be furnished to the appropriate SBA center representative within 5 business days of the contracting officer's receipt of the recommendation.

(b) The SBA procurement center representative may appeal the contracting officer's rejection to the head of the contracting activity (or designee) within 2 business days after receiving the notice. The head of the contracting activity (or designee) shall render a decision in writing, and provide it to the SBA representative within 7 business days. Pending issuing the decision to the SBA procurement center representative, the contracting officer shall suspend action on the acquisition.

(c) If the head of the contracting activity agrees that the contracting officer's rejection was appropriate, the SBA procurement center representative may—

(1) Within 1 business day, request the contracting officer to suspend action on the acquisition until the SBA Administrator appeals to the agency head (see paragraph (f) below); and

(2) The SBA shall be allowed 15 business days after making such a written request, within which the Administrator of SBA (i) may appeal to the Secretary of the Department concerned, and (ii) shall notify the contracting officer whether the further appeal has, in fact, been taken. If notification is not received by the contracting officer within the 15-day period, it shall be deemed that the SBA request to suspend contracting action has been withdrawn and that an appeal to the Secretary was not taken.

(d) When the contracting officer has been notified within the 15-day period that the SBA has appealed to the agency head, the head of the contracting activity (or designee) shall forward justification for its decision to the agency head. The contracting officer shall suspend contract action until notification is received that the SBA appeal has been settled.

(e) The agency head shall reply to the SBA within 30 business days after receiving the appeal. The decision of the agency head shall be final.

(f) A request to suspend action on an acquisition need not be honored if the contracting officer determines that proceeding to contract award and performance is in the public interest. The contracting officer shall include in the contract file a statement of the facts justifying the determination, and shall promptly notify the SBA representative of the determination and provide a copy of the justification.

[48 FR 42240, Sept. 19, 1983, as amended at 54 FR 25063, June 12, 1989]

19.506 Withdrawing or modifying set-asides.

(a) If, before award of a contract involving a set-aside for small business, the contracting officer considers that award to a small business concern would be detrimental to the public interest (e.g., payment of more than a fair market price), the contracting officer may withdraw the set-aside determination whether it was unilateral or joint. The contracting officer shall initiate a withdrawal of an individual set-aside by giving written notice to the agency small and disadvantaged business utilization specialist and the SBA procurement center representative, if one is assigned, stating the reasons. In a similar manner, the contracting officer may modify a unilateral or joint class set-aside to withdraw one or more individual acquisitions.

(b) If the agency small and disadvantaged business utilization representative does not agree to a withdrawal or modification, the case shall be promptly referred to the SBA representative (if one is assigned) for review. If an SBA representative is not assigned, disagreements between the agency small and disadvantaged business utilization representative and the contracting officer shall be resolved using agency procedures. However, the procedures are not applicable to automatic dissolutions of set-asides (see 19.507) or dissolution of small business-small purchase set-asides (see 13.105).

(c) The contracting officer shall prepare a written statement supporting any withdrawal or modification of a set-aside and include it in the contract file.

[48 FR 42240, Sept. 19, 1939, as amended at 53 FR 43390, Oct. 26, 1988]

19.507 Automatic dissolution of a set-aside.

(a) If a set-aside acquisition or portion of an acquisition is not awarded, the unilateral or joint determination to set the acquisition aside is automatically dissolved for the unawarded portion of the set-aside. The required supplies and/or services for which no award was made may be acquired by sealed bidding or negotiation, as appropriate.

(b) Before issuing a solicitation for the items called for in a small business set-aside that was dissolved, the contracting officer shall ensure that the delivery schedule is realistic in the light of all relevant factors, including the capabilities of small business concerns.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

19.508 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.219-4, Notice of Small Business-Small Purchase Set-Aside, in each written solicitation of quotations or offers to provide supplies and/or services when (1) the contract is to be performed inside the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands, (2) the contract amount is expected to be $25,000 or less, and (3) the acquisition is subject to small purchase procedures, unless purchase on an unrestricted basis is appropriate, as specified in 13.105(d).

(b) (This paragraph (b) does not apply to DOD.) The contracting officer shall insert the clause at 52.219-5, Notice of Total Small Business-Labor

Surplus Area Set-Aside, in solicitations and contracts involving total small business-labor surplus area set-asides (see 19.504(a)(1)). The clause at 52.219-5 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration hs determined that there are not small business manufacturers in the Federal market in accordance with 19.502-2(b).

(c) The contracting officer shall insert the clause at 52.219-6, Notice of Total Small Business Set-Aside, in solicitations and contracts involving total small business set-asides (see 19.504(a)(2)). The clause at 52.219-6 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has determined that there are not small business manufacturers in the Federal market in accordance with 19.502-2(b).

(d) The contracting officer shall insert the clause at 52.219-7, Notice of Partial Small Business Set-Aside, in solicitations and contracts involving partial small business set-asides (see 19.504(a)(4)). The clause at 52.219-7 with its Alternate I will be used when the acquisition is for a product in a class for which the Small Business Administration has determined that there are not small business manufacturers in the Federal market in accordance with 19.502-2(b).

(e) The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business or if the contract is to be awarded under subpart 19.8, except those awarded using small purchase procedures in part 13.

(f) The contracting officer shall insert the clause at 52.219-15, Notice of Participation by Organizations for the Handicapped, in solicitations and contracts issued through September 30, 1993, involving total or partial small business set-asides.

[48 FR 42240, June 9, 1987, as amended at 52 FR 21902, June 9, 1987; 52 FR 38189, Oct. 14, 1987; 53 FR 27464, July 20, 1988; 53 FR 43390, Oct. 26, 1988; 54 FR 25063, June 12, 1989; 55 FR 25529, June 21, 1990; 55 FR 38516, Sept. 18, 1990]

Subpart 19.6—Certificates of Competency and Determinations of Eligibility

19.601 General.

(a) A Certificate of Competency is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including but not limited to capability, competency, capacity, credit, integrity, perseverance, and tenacity) for the purpose of receiving and performing a specific Government contract.

(b) The COC program empowers the Small Business Administration (SBA) to certify to Government contracting officers as to all elements of responsibility of any small business concern to receive and perform a specific Government contract. The COC program does not extend to questions concerning regulatory requirements imposed and enforced by other Federal agencies.

(c) Under this program, SBA may certify to Government contracting officers that an otherwise qualified small business concern is an eligible Government contractor under the Walsh-Healey Public Contracts Act. Requirements of the Walsh-Healey Public Contracts Act are covered in subpart 22.6. For information regarding the contracting officer's responsibility to determine that a contractor is eligible or ineligible, see 22.608-2(f)(3).

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 54 FR 34754, Aug. 21, 1989]

19.602 Procedures.

19.602-1 Referral.

(a) Upon determining and documenting that a responsive small business lacks certain elements of responsibility (including, but not limited to, competency, capability, capacity, credit, integrity, perseverance, and tenacity), the contracting officer shall—

(1) Withhold contract award (see 19.602-3); and

(2) Refer the matter to the cognizant SBA Regional Office in accord-

ance with agency procedures, except that referral is not necessary if the small business concern—

(i) Is determined to be unqualified and ineligible because it does not meet the standard in 9.104-1(g); *provided*, that the determination is approved by the chief of the contracting office; or

(ii) Is suspended or debarred under Executive Order 11246 or subpart 9.4.

(b) If a partial set-aside is involved, the contracting officer shall refer to the SBA the entire quantity to which the concern may be entitled, if responsible.

(c) The referral shall consist of—

(1) A notice that a small business concern has been determined to be nonresponsible, specifying the elements of responsibility the contracting officer found lacking; and

(2) If applicable, a copy of the solicitation, drawings and specifications, preaward survey findings, pertinent technical and financial information, abstract of bids (if available) and any other pertinent information that supports the contracting officer's determination.

(d) For any single acquisition, the contracting officer shall make only one referral at a time regarding a determination of nonresponsibility.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 27489, July 31, 1986]

19.602-2 Issuing or denying a certificate of competency (COC).

(a) Within 15 business days (or a longer period agreed to by the SBA and the contracting agency) after receiving a notice that a small business concern lacks certain elements of responsibility, the SBA will take the following actions:

(1) Inform the small business concern of the contracting officer's determination and offer it an opportunity to apply to the SBA for a certificate of competency (COC). (A concern wishing to apply for a COC should notify the SBA Regional Office for the geographical area where it is located.)

(2) Upon timely receipt of the application and required documentation, send an SBA team to visit the concern to investigate it only for the specific elements of responsibility that the agency notice specified as lacking, and to make recommendations to the SBA Regional Administrator.

(3) If the Regional Administrator plans to issue or recommend issuance of a COC, provide advance notice of the proposed action to the contracting officer together with a brief statement of the reasons for it. If the contracting officer disagrees with the proposal, resolve the disagreement as provided in 19.602-3.

(b) The SBA Regional Administrator will—

(1) Notify the concern and the contracting officer that the COC is denied;

(2) If the contract is for $500,000 or less, issue the COC; or

(3) If the contract is for more than $500,000 forward a recommendation to the SBA Central Office that a COC be issued.

(c) Upon receipt of a recommendation from the Regional Administrator to issue a COC, the SBA Central Office may—

(1) Notify the concern and the contracting officer that the COC is denied; or

(2) Send the COC to the contracting officer and advise the concern, through the Regional Office, of the action.

19.602-3 Resolving differences between the agency and the Small Business Administration.

(a) When disagreements arise about a concern's ability to perform, the contracting officer and the SBA shall make every effort to reach a resolution before the SBA takes final action on a COC. This shall be done through the complete exchange of information and in accordance with agency procedures. If agreement cannot be reached between the contracting officer and the SBA Regional Office, the contracting officer shall request that the Regional Office suspend action and refer the matter to the SBA Central Office for review.

(b) The SBA Central Office, upon receiving a referral, shall—

(1) Inform the contracting officer that it does not concur with its Regional Office; or

(2) Inform the contracting officer that it concurs with its Regional Office.

In either case, the initial notification shall be by telephone to the contracting officer, followed by written confirmation.

(c) If the agency intends to file a formal appeal, it shall notify the SBA Central Office within 10 business days (or a period acceptable to both) after receiving the Central Office's written position on the matter. The agency shall file any formal appeal within 10 business days after SBA is informed that an appeal will be taken, or within a period acceptable to both.

(d) The SBA Central Office shall make the final determination.

19.602-4 Awarding the contract.

(a) If new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible to perform the contract, and award has not already been made under paragraph (c) below, the contracting officer shall reverse the determination of nonresponsibility, notify the SBA of this action, withdraw the referral, and proceed to award the contract.

(b) The contracting officer shall award the contract to the concern in question if the SBA issues a COC after receiving the referral. An SBA-certified concern shall not be required to meet any other requirements of responsibility. SBA COC's are conclusive with respect to all elements of responsibility of prospective small business contractors.

(c) The contracting officer shall proceed with the acquisition and award the contract to another appropriately selected and responsible offeror if the SBA has not issued a COC within 15 business days (or a longer period of time agreed to with the SBA) after receiving the referral.

Subpart 19.7—Subcontracting With Small Business and Small Disadvantaged Business Concerns

19.701 Definitions.

Failure to make a good faith effort to comply with the subcontracting plan, as used in this subpart, means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

Small business subcontractor means any concern that—

(a) In connection with subcontracts of $10,000 or less if, including its affiliates, its number of employees does not exceed 500 persons; and

(b) In connection with subcontracts exceeding $10,000, if its number of employees or average annual receipts, including its affiliates, does not exceed the size standard under section 19.102 for the product or service it is providing on the subcontract.

Subcontract, as used in this subpart, means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for contract performance, contract modification, or subcontract.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 54 FR 30709, July 21, 1989]

19.702 Statutory requirements.

Any contractor receiving a contract for more than $10,000 shall agree in the contract that small business concerns and small disadvantaged business concerns shall have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

(a) Except as stated in paragraph (b) below, the Small Business Act imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans.

(1) In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, which individually is expected to exceed $500,000 ($1,000,000 for construction) and that has subcontracting possibili-

ties shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.

(2) In sealed bid acquisitions, each invitation for bids to perform a contract or contract modification, which individually is expected to exceed $500,000 ($1,000,000 for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award.

(b) Subcontracting plans (see subparagraphs (a)(1) and (2) above) are not required—

(1) From small business concerns;

(2) For personal services contracts;

(3) For contracts or contract modifications that will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; or

(4) For modifications to contracts that do not contain the clause at 52.219-8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (or equivalent prior DAR, FPR, or NASA clauses) e.g., contracts awarded before Pub. L. 95-507 and which are within the scope of the contract.

(c) As stated in 15 U.S.C. 637(d)(8), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 50 FR 27562, July 3, 1985; 51 FR 27116, July 29, 1986; 54 FR 30709, July 21, 1989]

19.703 Eligibility requirements for participating in the program.

(a) To be eligible as a subcontractor under the program, a concern must represent itself as a small business concern or small disadvantaged business concern.

(1) To represent itself as a small business concern, a concern must meet the definition in 19.001.

(2) To represent itself as a small disadvantaged business concern, a concern must meet the definition in 19.001. Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) may represent themselves as socially and economically disadvantaged. Individuals who are not members of named groups may also represent themselves, and participate in the program, as socially and economically disadvantaged if they are qualified by the SBA under the procedures in 13 CFR 124.105(c)). Concerns who certify that they are tribally-owned entities or Native Hawaiian Organizations may represent themselves as socially and economically disadvantaged if they qualify under the requirements of 13 CFR 124.112 or 13 CFR 124.113 respectively. The Office of Minority Small Business and Capital Ownership Development in the SBA has the final authority to determine the eligibility of a concern to be designated as a small disadvantaged business concern, and will answer inquiries from contractors and others regarding eligibility. Formal protests of a subcontractor's eligibility as a small disadvantaged business may be initiated only by the contracting officer responsible for the prime contract or by the SBA. Such protests will be processed in accordance with 13 CFR 124.6. Other small business subcontractors and the prime contractor may submit information to the contracting officer in an effort to persuade the contracting officer to initiate a protest. Such protests, in order to be considered timely, must be received by the contracting officer prior to completion of performance by the intended subcontractor.

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as either a small business concern or a small disadvantaged business concern.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 55 FR 3882, Feb. 5, 1990]

19.704 Subcontracting plan requirements.

(a) Each subcontracting plan required under 19.702(a)(1) and (2) must include—

(1) Separate percentage goals for using small business concerns and small disadvantaged business concerns as subcontractors;

(2) The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;

(3) A description of the efforts the offeror will make to ensure that small business concerns and small disadvantaged business concerns will have an equitable opportunity to compete for subcontracts;

(4) Assurances that the offeror will include the clause at 52.219-8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (see 19.708(b)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of $500,000 ($1,000,000 for construction) to adopt a plan similar to the plan required by the clause at 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan (see 19.708(c));

(5) Assurances that the offeror will (i) cooperate in any studies or surveys as may be required, (ii) submit periodic reports in order to allow the Government to determine the extent of compliance by the offeror with the subcontracting plan, and (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and SF 295, Summary Subcontract Report, in accordance with the instructions on the forms.

(6) A recitation of the types of records the offeror will maintain to demonstrate procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small and small disadvantaged business concerns and to award subcontracts to them.

(b) Contractors may establish, on a plant or division-wide basis, a master subcontracting plan which contains all the elements required by the clause at 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan, except goals. Master plans shall be effective for a 1-year period after approval by the contracting officer; however, a master plan when incorporated in an individual plan shall apply to that contract throughout the life of the contract.

(c) For contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (see 19.705-2(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by 19.704(a) and shall contain separate parts, one for the basic contract and one for each option.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 54 FR 29281, July 11, 1989]

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

19.705-1 General support of the program.

The contracting officer may encourage the development of increased subcontracting opportunities in negotiated acquisition by providing monetary incentives such as payments based on actual subcontracting achievement or award fee contracting (see the clause at 52.219-10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns, and 19.708(c)). When using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the subcontracting plan, the contracting officer must ensure that (a) the goals are realistic and (b) any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended. Incentive provisions should normally be negotiated after reaching final agreement with the contractor on the subcontracting plan.

19.705-2 Determining the need for a subcontracting plan.

The contracting officer shall take the following actions to determine whether a proposed contractual action requires a subcontracting plan:

(a) Determine whether the proposed contractual action will meet the dollar threshold in 19.702(a)(1) or (2). If the action includes options or similar provisions, include their value in determining whether the threshold is met.

(b) Determine whether subcontracting possibilities exist by considering relevant factors such as—

(1) Whether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance of part of the work or maintain sufficient in-house capability to perform the work;

(2) Whether there are likely to be product prequalification requirements; and

(c) If it is determined that there are no subcontracting possibilities, the determination must be approved at a level above the contracting officer and placed in the contract file.

(d) Due to their unique circumstances, major system acquisition programs, as well as other complex or sensitive acquisitions involving formal source selection procedures, may necessitate negotiating subcontracting plans with all firms in a competitive range in order to afford the maximum practicable opportunity for small business and small disadvantaged business concerns to participate and preserve the integrity of the competitive process. When the simultaneous negotiation of such plans is necessary, the solicitation (1) may require offerors to include proposed subcontracting plans in their initial proposals and (2) may indicate that subcontracting plans will be negotiated concurrently with cost, technical, and management proposals.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 51 FR 19716, May 30, 1986]

19.705-3 Preparing the solicitation.

The contracting officer shall provi the Small Business Administratio (SBA's) resident procurement cent representative, if any, a reasonab period of time to review any solicit tion requiring submission of a subco tracting plan and to submit advisor findings before the solicitation issued.

19.705-4 Reviewing the subcontracti plan.

The contracting officer shall revie the subcontracting plan for adequacy ensuring that the required informa tion, goals, and assurances are includ ed (see 19.704).

(a) No detailed standards apply t every subcontracting plan. Instead the contracting officer must conside each plan in terms of the circum stances of the particular acquisition including—

(1) Previous involvement of smal business concerns as prime contractors or subcontractors in similar acquisi tions;

(2) Proven methods of involving small business concerns as subcontrac tors in similar acquisitions; and

(3) The relative success of method the contractor intends to use to mee the goals and requirements of th plan, as evidenced by records main tained by contractors.

(b) If, under a sealed bid solicitation a bidder submits a plan that does no cover each of the six required ele ments (see 19.704), the contracting of ficer shall advise the bidder of the de ficiency and request submission of revised plan by a specific date. If th bidder does not submit a plan which incorporates the six required elements within the time allotted, the bidde shall be ineligible for award. If th plan, although responsive, evidences the bidder's intention not to comply with its obligations under the clause a 52.219-8, Utilization of Small Busines Concerns and Small Disadvantage Business Concerns, the contracting of ficer may find the bidder nonrespons ble.

(c) In negotiated acquisitions, th contracting officer shall determin whether the plan is acceptable base on the negotiation of each of the six elements of the plan (see 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small and small disadvantaged subcontractors to the maximum practicable extent. Particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns) may be used when additional and unique contractor effort could significantly increase subcontract awards to small or small disadvantaged businesses.

(d) In determining the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

(1) Evaluate the offeror's past performance in awarding subcontracts for the same or similar products or services to small and small disadvantaged business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance.

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that the goals offered are attainable in relation to—

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

(3) Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

(4) Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the products or services to be subcontracted, the known availability of small and small disadvantaged business concerns in the geographical area where the work will be performed, and the potential contractor's longstanding contractual relationship with its suppliers.

(5) Advise the offeror of available sources of information on potential small and small disadvantaged business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offeror's proposed goals are questionable, the contracting officer shall emphasize that the information should be used to develop realistic and acceptable goals.

(6) Obtain advice and recommendations from the SBA procurement center representative (if any) and the agency small and disadvantaged business utilization representative.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 19716, May 30, 1986; 54 FR 30709, July 21, 1989]

19.705-5 Awards involving subcontracting plans.

(a) In making an award that requires a subcontracting plan, the contracting officer shall be responsible for the following:

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility.

(2) Assure that a subcontracting plan was submitted when required.

(3) Notify the SBA resident procurement center representative of the opportunity to review the proposed contract (including the plan and supporting documentation). The notice shall be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the contracting officer. Failure of the representative to respond in a reasonable

period of time shall not delay contract award.

(4) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan.

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

(b) Letter contracts and similar undefinitized instruments, which would otherwise meet the requirements of 19.702(a)(1) and (2), shall contain at least a preliminary basic plan addressing the requirements of 19.704 and in such cases require the negotiation of the final plan within 90 days after award or before definitization, whichever occurs first.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded, the contracting officer is responsible for the following:

(a) Notifying the SBA of the award by sending a copy of the award document to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contract will be performed.

(b) Forwarding a copy of each plan and any associated approvals to the Assistant Regional Administrator for Procurement Assistance in the SBA region where the contractor's headquarters is located, if any companywide plans were received from offerors of commercial products.

(c) Giving to the assigned SBA resident procurement center representative (if any) a copy of—

(1) Any subcontracting plan submitted in response to a sealed bid solicitation; and

(2) The final negotiated subcontracting plan that was incorporated into a negotiated contract or contract modification.

(d) Notifying the SBA resident procurement center representative of the opportunity to review subcontracting plans in connection with contract modifications.

(e) Forwarding a copy of each plan, or a determination that there is no requirement for a subcontracting p
to the cognizant contract adminis
tion office.

(f) Initiating action to assess li
dated damages in accordance w
19.705-7 upon a recommendation
the administrative contracting off
or receipt of other reliable evidence
indicate that such action is warrant

[48 FR 42240, Sept. 19, 1983, as amended
52 FR 19803, May 27, 1987; 53 FR 27
July 20, 1988; 53 FR 34228, Sept. 2, 1988;
FR 30709, July 21, 1989]

19.705-7 Liquidated damages.

(a) Maximum practicable utilizat
of small and small disadvantaged bu
ness concerns as subcontractors
Government contracts is a matter
national interest with both social a
economic benefits. When a contract
fails to make a good faith effort
comply with a subcontracting pl
these objectives are not achieved,
15 U.S.C. 637(d)(4)(F) directs that l
uidated damages shall be paid by t
contractor.

(b) The amount of damages attribu
able to the contractor's failure
comply shall be an amount equal
the actual dollar amount by which t
contractor failed to achieve each su
contract goal or, in the case of a co
mercial products plan, shall be th
portion of the dollar amount allocab
to Government contracts by which t
contractor failed to achieve each su
contract goal.

(c) If, at contract completion, or
the case of a commercial produc
plan, at the close of the fiscal year f
which the plan is applicable, a co
tractor has failed to meet its subco
tracting goals and the contracting of
cer decides in accordance with pa
graph (d) of this subsection that t
contractor failed to make a good fai
effort to comply with its subcontrac
ing plan, the contracting officer sh
give the contractor written noti
specifying the failure, advising t
contractor of the possibility that t
contractor may have to pay to t
Government liquidated damages, a
providing a period of 10 days (
longer period as necessary) with
which to respond. The notice sh
give the contractor an opportunity

demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter.

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business and small disadvantaged business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following may be considered as indicia of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award, small business or small disadvantaged business concerns; a failure to designate a company official to administer the subcontracting program; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; and the adoption of company policies or procedures which have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

(f) With respect to commercial products plans, i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in the contract entitled Small Business and Small Disadvantaged Business Subcontracting Plan, the contracting officer of the agency that originally approved the plan will exercise the functions of the contracting officer under this subsection on behalf of all agencies that awarded contracts covered by that commercial products plan.

(g) Liquidated damages shall be in addition to any other remedies that the Government may have.

[54 FR 30709, July 21, 1989]

19.706 Responsibilities of the cognizant administrative contracting officer.

(a) The administrative contracting officer is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract. The contract administration office shall provide the necessary information and advice to support the contracting officer, as appropriate, by furnishing—

(1) Documentation on the contractor's performance and compliance with subcontracting plans under previous contracts;

(2) Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small and small disadvantaged business concerns;

(3) Information on whether the contractor's efforts to ensure the participation of small and small disadvantaged business concerns are in accordance with its subcontracting plan;

(4) Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans;

(5) Immediate notice if, during performance, the contractor is failing to meet its commitments under the clause prescribed in 19.708(b) or the subcontracting plan; and

(6) Immediate notice and rationale if, during performance, the contractor

is failing to comply in good faith with the subcontracting plan.

(b) If the contractor does not comply in good faith with the subcontracting plan, the administrative contracting officer shall, upon contract completion, make appropriate recommendations that contracting officers may use for future contracts.

[48 FR 42240, Sept. 19, 1983, as amended at 54 FR 30710, July 21, 1989]

19.707 The Small Business Administration's role in carrying out the program.

(a) Under the program, the SBA may—

(1) Assist both Government agencies and contractors in carrying out their responsibilities with regard to subcontracting plans;

(2) Review (within 5 working days) any solicitation that meets the dollar threshold in 19.702(a)(1) or (2) before the solicitation is issued;

(3) Review (within 5 working days) before execution any negotiated contractual document requiring a subcontracting plan, including the plan itself, and submit recommendations to the contracting officer, which shall be advisory in nature; and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to (1) prescribe the extent to which any contractor or subcontractor shall subcontract, (2) specify concerns to which subcontracts will be awarded, or (3) exercise any authority regarding the administration of individual prime contracts or subcontracts.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986]

19.708 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 52.219-8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns, in solicitations and contracts when the contract amount is expected to be over $10,000 unless—

(1) A personal services contract is contemplated (see 37.104); or

(2) The contract, together with all its subcontracts, is to be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b)(1) The contracting officer shall, when contracting by negotiation, insert the clause at 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan, in solicitations and contracts that (i) offer subcontracting possibilities, (ii) are expected to exceed $500,000 ($1,000,000 for construction of any public facility), and (iii) are required to include the clause at 52.219-8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns, unless the acquisition has been set aside for small business or is to be accomplished under the 8(a) program. When contracting by sealed bidding rather than by negotiation, the contracting officer shall use the clause with its Alternate I.

(2) The contracting officer shall insert the clause at 52.219-16, Liquidated Damages-Small Business Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219-9, Small Business and Small Disadvantaged Business Subcontracting Plan, or its Alternate I.

(c)(1) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts a clause substantially the same as the clause at 52.219-10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns, when a subcontracting plan is required (see 19.702(a)(1)), and inclusion of a monetary incentive is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for small and disadvantaged business concerns, and is commensurate with the efficient and economical performance of the contract; unless the conditions in (c)(3) below are applicable. The contracting officer may vary the terms of the clause as specified in (c)(2) below.

(2) Various approaches may be used in the development of small and small disadvantaged business concerns' subcontracting incentives. They can take many forms, from a fully quantified

schedule of payments based on actual subcontract achievement to an award fee approach employing subjective evaluation criteria (see (c)(3) below). The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program.

(3) As specified in (c)(2) above, the contracting officer may include small and small disadvantaged business subcontracting as one of the factors to be considered in determining the award-fee in a cost-plus-award-fee contract; in such cases, however, the contracting officer shall not use the clause at 52.219-10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2664, Jan. 17, 1986; 54 FR 30710, July 21, 1989]

Subpart 19.8—Contracting With the Small Business Administration (the 8(a) Program)

SOURCE: 54 FR 46005, Oct. 31, 1989, unless otherwise noted.

19.800 General.

(a) Section 8(a) of the Small Busines Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and let subcontracts for performing those contracts to firms eligible for program participation. The SBA's subcontractors are referred to as *8(a) contractors.*

(b) Contracts may be awarded to the SBA for performance by eligible 8(a) firms on either a sole source or competitive basis.

(c) When, acting under the authority of the program, the SBA certifies to an agency that the SBA is competent and responsible to perform a specific contract, the contracting officer is authorized, in the contracting officer's discretion, to award the contract to the SBA based upon mutually agreeable terms and conditions.

19.801 Definitions.

Local buy requirement, as used in this subpart, means a supply or service purchased to meet the specific needs of one user in one location.

National buy requirement, as used in this subpart, means a supply or service purchased to meet the needs of one or more users in two or more locations where supply control, inventory management, or acquisition responsibility have been assigned to a central contracting activity.

19.802 Selecting concerns for the 8(a) Program.

Selecting concerns for the 8(a) Program is the responsibility of the SBA and is based on the criteria established in 13 CFR 124.101-113.

19.803 Selecting acquisitions for the 8(a) Program.

Through their cooperative efforts, the SBA and an agency match the agency's requirements with the capabilities of 8(a) concerns to establish a basis for the agency to contract with the SBA under the program. Selection is initiated in one of three ways—

(a) The SBA advises an agency contracting activity through a search letter of an 8(a) firm's capabilities and asks the agency to identify acquisitions to support the firm's business plans. In these instances, the SBA will provide at least the following information in order to enable the agency to match an acquisition to the firm's capabilities.

(1) Identification of the concern and its owners.

(2) Background information on the concern, including any and all information pertaining to the concern's technical ability and capacity to perform.

(3) The firm's present production capacity and related facilities. From August 15, 1988, through October 1, 1992, the SBA is authorized to grant 8(a) firms exemptions from the requirements of sectjon 1(a) of the Walsh-Healey Act in accordance with 13 CFR 124.304.

(4) The extent to which contracting assistance is needed in the present and the future, described in terms that will

enable the agency to relate the concern's plans to present and future agency requirements.

(5) If construction is involved, the request shall also include the following:

(i) The concern's capabilities in and qualifications for accomplishing various categories of maintenance, repair, alteration, and construction work in specific categories such as mechanical, electrical, heating and air conditioning, demolition, building, painting, paving, earth work, waterfront work, and general construction work.

(ii) The concern's capacity in each construction category in terms of estimated dollar value (e.g., electrical, up to $100,000).

(b) The SBA identifies a specific requirement for a particular 8(a) firm or firms and asks the agency contracting activity to offer the acquisition to the 8(a) Program for the firm(s). In these instances, in addition to the information in paragraph (a) of this section, the SBA will provide—

(1) A clear identification of the acquisition sought; e.g., project name or number;

(2) A statement as to how any additional needed facilities will be provided in order to ensure that the firm will be fully capable of satisfying the agency's requirements;

(3) If construction, information as to the bonding capability of the firm(s); and

(4) Either—

(i) If sole source request—

(A) The reasons why the firm is considered suitable for this particular acquisition; e.g., previous contracts for the same or similar supply or service; and

(B) A statement that the firm is eligible in terms of SIC code, business support levels, and business activity targets; or,

(ii) If competitive, a statement that at least two 8(a) firms are considered capable of satisfying the agency's requirements and a statement that the firms are also eligible in terms of the SIC code, business support levels, and business activity targets. If requested by the contracting activity, SBA will identify at least two such firms and provide information concerning the firms' capabilities.

(c) Agencies may also review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA. Where agencies independently, or through the self marketing efforts of an 8(a) firm, identify a requirement for the 8(a) Program, they may offer on behalf of a specific 8(a) firm, for the 8(a) Program in general, or for 8(a) competition.

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3882, Feb. 5, 1990]

19.804 Evaluation, offering, and acceptance.

19.804-1 Agency evaluation.

In determining the extent to which a requirement should be offered in support of the 8(a) Program, the agency should evaluate—

(a) Its current and future plans to acquire the specific items or work that 8(a) contractors are seeking to provide, identified in terms of—

(1) Quantities required or the number of construction projects planned; and

(2) Performance or delivery requirements, including required monthly production rates, when applicable.

(b) Its current and future plans to acquire items or work similar in nature and complexity to that specified in the business plan;

(c) Problems encountered in previous acquisitions of the items or work from the 8(a) contractors and/or other contractors;

(d) The impact of any delay in delivery;

(e) Whether the items or work have previously been acquired using small business set-asides; and

(f) Any other pertinent information about known 8(a) contractors, the items, or the work. This includes any information concerning the firms' capabilities. When necessary, the contracting agency shall make an independent review of the factors in 19.803(a) and other aspects of the firms' capabilities which would ensure the satisfactory performance of the requirement being considered for commitment to the 8(a) Program.

19.804-2 Agency offering.

(a) After completing its evaluation, the agency shall notify the SBA of the extent of its plans to place 8(a) contracts with the SBA for specific quantities of items or work. The notification must identify the timeframes within which prime contract and subcontract actions must be completed in order for the agency to meet its responsibilities. The notification must also contain the following information applicable to each prospective contract:

(1) A description of the work to be performed or items to be delivered, and a copy of the statement of work, if available.

(2) The estimated period of performance.

(3) The SIC code that applies to the principal nature of the acquisition.

(4) The anticipated dollar value of the requirement, including options, if any.

(5) Any special restrictions or geographical limitations on the requirement (for construction and services include the location of the work to be performed).

(6) Any special capabilities or disciplines needed for contract performance.

(7) The type of contract anticipated.

(8) The acquisition history, if any, of the requirement, including the names and addresses of any small business contractors which have performed this requirement during the previous 24 months.

(9) A statement that no solicitation for this specific acquisition has been issued as a small business set-aside or a small disadvantaged business set-aside, and that no other public communication (such as a notice in the Commerce Business Daily) has been made evidencing the contracting agency's clear intention to set aside the acquisition for small business or small disadvantaged business.

(10) Identification of any particular 8(a) concern designated for consideration, including a brief justification, such as—

(i) The 8(a) concern, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) Program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent.

(11) Bonding requirements, if applicable.

(12) Identification of all known 8(a) concerns which have expressed an interest in this specific requirement as a result of self-marketing, response to sources sought, or publication of advanced acquisition requirements.

(13) Identification of all SBA district or regional offices which have asked for the acquisition for the 8(a) Program.

(14) A recommendation, if appropriate, as to whether the acquisition should be competitive or sole source; and

(15) Any other pertinent and reasonably available data.

(b) An agency offering a local buy requirement should submit it to the SBA Regional Office for the geographical area where the user is located. An agency offering a national buy requirement should submit it to the Office of Program Development, Office of Minority Small Business and Capital Ownership Development, Small Business Administration, 1441 L Street, NW., Washington, DC 20416.

19.804-3 SBA acceptance.

(a) Upon receipt of the contracting agency's offer, the SBA will determine whether to accept the requirement for the 8(a) Program. The SBA's decision whether to accept the requirement will be transmitted to the contracting agency in writing within 15 working days of receipt of the offer, unless the SBA requests, and the contracting agency grants, an extension.

(b) If the acquisition is accepted as a sole source, the SBA will advise the contracting activity of the 8(a) firm selected for negotiation. Generally, the SBA will accept a contracting activity's recommended source.

(c) If the acquisition is accepted for competition—(1) as a local buy requirement, the SBA will advise as to which of the SBA districts or regions the competition is restricted and provide the list of the 8(a) firms in those districts or regions which are eligible for the designated SIC code; or (2) as a national buy requirement, the SBA, if requested by the contracting activity, will identify at least two eligible sources and the contracting officer, in coordination with the small business specialist, will augment the source list based on results of the synopsis (see 5.205(e)) and other available information. The SBA will advise of any program participation stage restrictions. The SBA may limit competition to 8(a) concerns in the developmental stage of program participation; may limit competition to 8(a) concerns in the transitional stage; or may permit competition among firms in either stage.

19.804-4 Repetitive acquisitions.

In order for repetitive acquisitions to be awarded through the 8(a) Program, there must be separate offers and acceptances. This allows the SBA to revalidate a firm's eligibility, to evaluate the suitability of each acquisition as a competitive 8(a), and to determine whether the requirement should continue under the 8(a) Program.

19.805 Competitive 8(a).

19.805-1 General.

(a) Except as provided in paragraph (b) of this subsection, an acquisition offered to the SBA under the 8(a) Program shall be awarded on the basis of competition limited to eligible 8(a) firms if—

(1) There is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and that award can be made at a fair market price; and

(2) The anticipated award price of the contract, including options, will exceed $5,000,000 for acquisitions assigned manufacturing standard industrial classification (SIC) codes and $3,000,000 for all other acquisitions.

(b) Where an acquisition exceeds the competitive threshold, the SBA may accept the requirement for a sole source 8(a) award if—

(1) There is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offer at a fair market price; or

(2) The SBA determines that an 8(a concern owned and controlled by a economically disadvantaged Indian tribe is eligible and responsible and needs the acquisition for its busines development.

(c) The SBA Association Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD) may approve an agency recommendation for a competitive 8(a) award below the competitive thresholds. Such recommendations will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) firms are available for competition. In determining whether a recommendation to compete below the threshold will be approved, AA/MSB&COD will, in part, consider the extent to which the requesting agency is supporting the 8(a) Program on a noncompetitive basis. Agency recommendations for competition below the threshold may be included in the offering letter or may be submitted by separate correspondence through the SBA region or headquarters, depending upon whether the acquisition is a local or national buy requirement.

19.805-2 Procedures.

(a) Competitive 8(a) acquisitions shall be conducted by contracting agencies by using sealed bids (see part 14) or competitive proposals (see part 15).

(b) Offers shall be solicited from those sources identified in accordance with the SBA instructions provided under 19.804-3.

(c) The SBA will determine the eligibility of the firms for award of the contract. Eligibility will be determined by the SBA as of the time of submission of initial offers which include price. Eligibility is based on section 8(a) Program criteria, e.g., whether the firm has the SIC code for the acquisition in its approved business plan, whether the firm is currently a small business under the SIC code, whether the firm is in the developmental or transitional stage (if the acquisition is restricted by stage), whether the firm is in conformance with the 8(a) support limitation set forth in its business plan, and whether the firm is in conformance with its 8(a) business activity targets.

(1) In sealed bid acquisitions, upon receipt of offers, the contracting officer will provide the SBA a copy of the solicitation, the estimated fair market price, and a list of offerors ranked in the order of their standing for award (i.e., first low, second low, etc.) with the total evaluated price for each offer, differentiating between basic requirements and any options. The SBA will consider the eligibility of the first low offeror. If the first low offeror is not determined to be eligible, the SBA will consider the eligibility of the next low offeror until an eligible offeror is identified. The SBA will determine the eligibility of the firms and advise the contracting officer within 5 working days after its receipt of the list of bidders. Once eligibility has been established by the SBA, the successful offeror will be determined by the contracting activity in accordance with normal contracting procedures.

(2) In negotiated acquisition, the SBA will determine eligibility when the successful offeror has been established by the agency and the contract transmitted for signature unless a referral has been made under 19.809, in which case the SBA will determine eligibility at that point.

(d) In any case in which a firm is determined to be ineligible, the SBA will notify the firm of that determination.

(e) The eligibility of an 8(a) firm for a competitive 8(a) award may not be challenged or protested by another 8(a) firm or any other party as part of a solicitation or proposed contract award. Any party with information concerning the eligibility of an 8(a) firm to continue participation in the 8(a) Program may submit such information to the SBA in accordance with 13 CFR 124.111(c).

19.806 Pricing the 8(a) contract.

(a) The contracting officer shall price the 8(a) contract in accordance with subpart 15.8. If required by subpart 15.8, the SBA shall obtain certified cost or pricing data from the 8(a) contractor. If the SBA requests audit assistance to determine the reasonableness of the proposed price in a sole source acquisition, the contracting activity shall furnish it to the extent it is available.

(b) An 8(a) contract, sole source or competitive, may not be awarded if the price of the contract results in a cost to the contracting agency which exceeds a fair market price.

(c) If requested by the SBA, the contracting officer shall make available the data used to estimate the fair market price.

(d) The negotiated contract price and the estimated fair market price are subject to the concurrence of the SBA. In the event of a disagreement between the contracting officer and the SBA, the SBA may appeal in accordance with 19.810.

19.807 Estimating fair market price.

(a) The contracting officer shall estimate the fair market price of the work to be performed by the 8(a) contractor.

(b) In estimating the fair market price for an acquisition other than those covered in paragraph (c) of this section, the contracting officer shall use cost or price analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including cost or pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency.

(c) In estimating a fair market price for a repeat purchase, the contracting officer shall consider recent award prices for the same items or work if there is comparability in quantities, conditions, terms, and performance times. The estimated price should be adjusted to reflect differences in specifications, plans, transportation costs, packaging and packing costs, and other circumstances. Price indices may be used as guides to determine the changes in labor and material costs. Comparison of commercial prices for similar items may also be used.

19.808 Contract negotiation.

19.808-1 Sole source.

(a) The SBA is responsible for initiating negotiations with the agency within the time established by the agency. If the SBA does not initiate negotiations within the agreed time and the agency cannot allow additional time, the agency may, after notifying the SBA, proceed with the acquisition from other sources.

(b) The SBA's contractor should participate, whenever practicable, in negotiating the contracting terms. When mutually agreeable, the SBA may authorize the contracting activity to negotiate directly with the 8(a) contractor. Whether or not direct negotiations take place, the SBA is responsible for approving the resulting contract before award and determining whether the 8(a) contractor shall be required to provide bonds. For construction contracts not exceeding $3 million (including options), from August 15, 1988, through October 1, 1992, the SBA is authorized to exempt its contractor from Miller Act requirements for performance and payment bonds in accordance with 13 CFR 124.305. When an exemption is being favorably considered, the SBA will request and heavily weigh the written views of the contracting activity in determining whether to grant a bond exemption.

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3883, Feb. 5, 1990]

19.808-2 Competitive.

In competitive 8(a) acquisitions subject to part 15, the contracting officer conducts negotiations directly with the competing 8(a) firms.

19.809 Preaward considerations.

The contracting officer should request a preaward survey of the 8(a) contractor whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the firm's ability to perform, the contracting officer should refer the matter to the SBA for its consideration in deciding whether SBA should certify that it is competent and responsible to perform. This is not a referral for Certificate of Competency consideration under subpart 19.6. Within 15 working days of the receipt of the referral or a longer period agreed to by the SBA and the contracting activity, the SBA Assistant Regional Administrator for Minority Small Business and Capital Ownership Development in the regional office which services the 8(a) firm will advise the contracting officer as to the SBA's willingness to certify its competency to perform the contract using the 8(a) concern in question as its subcontractor. The contracting officer shall proceed with the acquisition and award the contract to another appropriately selected 8(a) offeror if the SBA has not certified its competency within 15 working days (or a longer mutually agreeable period.)

19.810 SBA appeals.

(a) The following matters may be submitted by the SBA Administrator for determination to the agency head if the SBA and the contracting officer fail to agree on them:

(1) The decision not to make a particular acquisition available for award under the 8(a) Program.

(2) The terms and conditions of a particular sole source acquisition to be awarded under the 8(a) Program.

(3) The estimated fair market price.

(b) Notification of a proposed referral to the agency head by the SBA must be received by the contracting officer within 5 working days after the SBA is formally notified of the contracting officer's decision. The SBA shall provide the agency Director for Small and Disadvantaged Business Utilization a copy of this notification. The SBA must provide the request for determination to the agency head within 20 working days of the SBA's receipt of the adverse decision. Pending issuance of a decision by the agency head, the contracting officer shall suspend action on the acquisition. Action on the acquisition need not be suspended if the contracting officer makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for a decision.

(c) If the SBA appeal is denied, the decision of the agency head shall specify the reasons for the denial, including the reasons why the selected firm was determined incapable of performance, if appropriate. The decision shall be made a part of the contract file.

19.811 Preparing the contracts.

19.811-1 Sole source.

(a) The contract to be awarded by the agency to the SBA shall be prepared in accordance with agency procedures and in the same detail as would be required in a contract with a business concern. The contracting officer shall use the Standard Form 26 as the award form, except for construction contracts, in which case the Standard Form 1442 shall be used as required in 36.701(b).

(b) The agency shall prepare the contract that the SBA will award to the 8(a) contractor in accordance with agency procedures, as if the agency were awarding the contract directly to the 8(a) contractor, except for the following.

(1) The award form shall cite 41 U.S.C. 253(c)(5) or 10 U.S.C. 2304(c)(5) (as appropriate) as the authority for use of other than full and open competition.

(2) Appropriate clauses shall be included, as necessary, to reflect that the contract is between the SBA and the 8(a) contractor.

(3) The following items shall be inserted by the SBA—

(i) The SBA contract number.

(ii) The effective date.

(iii) The typed name of the SBA's contracting officer.

(iv) The signature of the SBA's contracting officer.

(v) The date signed.

(4) The SBA will obtain the signature of the 8(a) contractor prior to signing and returning the prime contract to the contracting officer for signature. The SBA will make every effort to obtain signatures and return the contract, and any subsequent bilateral modification, to the contracting officer within a maximum of 10 working days.

(5) If the contract is for construction work, it shall include requirements of the Miller Act with respect to performance and payment bonds (see part 28), unless SBA has granted an exemption from the bonding requirement.

(c) Except in procurements where the SBA will make advance payments to its 8(a) contractor, the agency contracting officer may, as an alternative to the procedures in 19.811-1(a) and (b), use a single contract document for both the prime contract between the agency and the SBA and its 8(a) contractor. The single contract document shall contain the information in 19.811-1(b) (1), (2), (3), and (5). Appropriate blocks on the Standard Form (SF) 26 or 1442 will be asterisked and a continuation sheet appended which includes the following:

(1) Agency acquisition office, prime contract number, name of agency contracting officer and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA contract number, name of the SBA contracting officer, and lines for signature and date signed.

(3) Name and lines for the 8(a) contractor's signature and date signed.

(d) Prior to award of contract actions in excess of $100,000, the SBA shall provide the contracting activity with the competing contractor certifications required by 3.104-9 from its 8(a) contractor. The contracting activity's contracting officer shall maintain the list required by 3.104-9 and complete the contracting officer certification.

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3883, Feb. 5, 1990]

19.811-2 Competitive.

(a) The contract will be prepared in accordance with 14.407-1(d), except that appropriate blocks on the Standard Form 26 or 1442 will be asterisked and a continuation sheet appended which includes the following:

(1) The agency contracting activity, prime contract number, name of agency contracting officer, and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA subcontract number, name of the SBA con-

tracting officer and lines for signature and date signed.

(b) For contract actions in excess of $100,000, the contracting activity's contracting officer shall obtain the competing contractor certifications as required by 3.104-9 directly from the 8(a) firm(s). The contracting activity's contracting officer shall maintain the list required by 3.104-9 and complete the contracting officer certification.

(c) The process for obtaining signatures shall be as specified in 19.811-1(b)(4).

19.811-3 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219-11, Special 8(a) Contract Conditions, in contracts between the SBA and the agency when the acquisition is accomplished using the procedures of 19.811-1(a) and (b). Use the clause with its Alternate I if the contract is for construction and SBA has exempted it from the performance and payment bond requirements of the Miller Act.

(b) The contracting officer shall insert the clause at 52.219-12, Special 8(a) Subcontract Conditions, in contracts between the SBA and its 8(a) contractor when the acquisition is accomplished using the procedures of 19.811-1 (a) and (b). Use the clause with its Alternate I if the contract is for construction and SBA has exempted it from the performance and payment bond requirements of the Miller Act.

(c) The contracting officer shall insert the clause at 52.219-17, Section 8(a) Award, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805 and in sole source awards which utilize the alternative procedure in 19.811-1(c).

(d) The contracting officer shall insert the clause at 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805.

(1) The clause at 52.219-18 with its Alternate I will be used when competition is to be limited to 8(a) concerns within one or more specific SBA districts/regions pursuant to 19.804-3.

(2) The clause at 52.219-18 with its Alternate II will be used when competition is to be limited to 8(a) concerns within a specific stage of 8(a) Program participation (i.e., developmental or transitional) pursuant to 19.804-3.

(3) The clause at 52.219-18 with its Alternate III will be used when the acquisition is for a product in a class for which the Small Business Administration has determined that there are not small business manufacturers in the Federal market in accordance with 19.502-2(b).

(e) the contracting officer shall insert the clause at 52.219-14, Limitations or Subcontracting, in any solicitation and contract resulting from this subpart.

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3883, Feb. 5, 1990; 55 FR 25529, June 21, 1990]

19.812 Contract administration.

(a) The contracting officer shall assign contract administration functions, as required, based on the location of the 8(a) contractor (see DoD Directory of Contract Administration Services Components (DoD 4105.59-H)).

(b) The agency shall distribute copies of the contract(s) in accordance with part 4. All contracts and modifications, if any, shall be distributed to both the SBA and the firm in accordance with the timeframes set forth in 4.201.

(c) To the extent consistent with the contracting activity's capability and resources, 8(a) contractors furnishing requirements shall be afforded production and technical assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable.

(d) Section 407 of Pub. L. 100-656 requires that an 8(a) contract be terminated for convenience if the 8(a) concern to which it was awarded transfers ownership or control of the firm, unless the Administrator of the SBA, on a nondelegable basis, waives the requirement for contract termination. The Administrator may waive the termination requirement only if certain conditions exist. Moreover, a waiver of the statutory requirement for termination is permitted only if the 8(a) firm's request for waiver is made to the SBA prior to the actual relinquishment of ownership or control. The clauses in the contract entitled "Special 8(a) Contract Conditions" and "Special 8(a) Subcontract Conditions" require the SBA and the 8(a) subcontractor to notify the contracting officer when ownership of the firm is being transferred. When the contracting officer receives information that an 8(a) contractor is planning a transfer of ownership or control, action must be taken immediately to preserve the option of waiving the termination requirement. The contracting officer should determine the timing of the proposed transfer and its effect on contract performance and mission support. If the contracting officer determines that the SBA does not intend to waive the termination requirement, and termination of the contract would severely impair attainment of the agency's program objectives or mission, the contracting officer should immediately notify the SBA in writing that the agency is requesting a waiver. Within 15 business days thereafter, or such longer period as agreed to by the agency and the SBA, the agency head shall either confirm or withdraw the request for waiver. Unless a waiver is approved by the SBA, the contracting officer shall terminate the contract for convenience upon receipt of a written request by the SBA. This statutory requirement for a convenience termination does not affect the Government's right to terminate for default if the cause for termination of an 8(a) contract is other than the transfer of ownership or control.

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3883, Feb. 5, 1990; 55 FR 25530, June 21, 1990]

Subpart 19.9—Contracting Opportunities for Women-Owned Small Businesses

19.901 Policy.

In response to the need to aid and stimulate women's business enterprise, Executive Order 12138, May 18, 1979 directs agencies to take appropriate action to facilitate, preserve, and strengthen women's business enterprise and to ensure full participation by women in the free enterprise system. Appropriate action includes the award of subcontracts under Federal prime contracts.

19.902 Contract clause.

To encourage the use of women-owned small businesses in subcontracting, the contracting officer shall insert the clause at 52.219-13, Utilization of Women-Owned Small Businesses, in solicitations and contracts when the contract amount is expected to exceed the small purchase limitation, except—

(a) Contracts that, including all subcontracts thereunder, are to be performed entirely outside the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands; and

(b) Contracts for personal services.

[51 FR 31426, Sept. 3, 1986]

Subpart 19.10—Small Business Competitiveness Demonstration Program

Source: 54 FR 5055, Jan. 31, 1989, unless otherwise noted.

19.1001 General.

The Small Business Competitiveness Demonstration Program was established by Title VII of the "Business Opportunity Development Reform Act of 1988," Pub. L. 100-656. The program consists of two major components: (a) a test of unrestricted competition in four designated industry groups, and (b) a test of enhanced small business participation in 10 agency targeted industry categories. The program will be conducted over a period of 4 years, from January 1, 1989, through December 31, 1992. The procedures for implementing the test are set forth in the Office of Federal Procurement Policy (OFPP) policy directive and test plan as published in the Federal Register on December 29, 1988 (53 FR 52889), and in any participating agency supplements. Pursuant to sec. 713(a) of Pub. L. 100-656, the requirements of the FAR that are inconsistent with the OFPP policy directive and test plan are waived.

[54 FR 5055, Jan. 31, 1989, as amended at 55 FR 38516, Sept. 18, 1990]

19.1002 Definition.

Emerging small business, as used in this subpart, means a small business concern whose size is no greater than 50 percent of the numerical size standard applicable to the standard industrial classification code assigned to a contracting opportunity.

19.1003 Purpose.

The purpose of the demonstration program is to—

(a) Test the ability of small businesses to compete successfully in certain industry categories without competition being restricted by the use of small business set-asides. This portion of the program is limited to the four designated industry groups listed in section 19.1005.

(b) Measure the extent to which awards are made to a new category of small businesses known as emerging small businesses (ESB's), and to provide for certain acquisitions to be reserved for ESB participation only.

(c) Expand small business participation in 10 targeted industry categories through continued use of set-aside procedures, increased management attention, and specifically tailored acquisition procedures, as implemented through agency procedures.

19.1004 Participating agencies.

The following agencies have been identified as participants in the demonstration program:

The Department of Agriculture.

The Department of Defense, except the Defense Mapping Agency.

The Department of Energy.

The Department of Health and Human Services.

The Department of Interior.

The Department of Transporatation.

The Department of Veterans Affairs.

The Environmental Protection Agency.

The General Services Administration.

The National Aeronautics and Space Administration.

[54 FR 5055, Jan. 31, 1989, as amended at 54 FR 29281, July 11, 1989; 55 FR 38516, Sept. 18, 1990]

19.1005 Applicability.

(a) *Designated industry groups*. The following industry groups have been designated to demonstrate whether the competitive capabilities of small business firms in certain industry groups will enable them to successfully compete on an unrestricted basis for Federal contracts:

(1) Construction contracts under standard industrial classification (SIC) codes that comprise Major Groups 15, 16, and 17 (excluding dredging-Federal Procurement Data System (FPDS) service codes Y216 and Z216).

(2) Refuse systems and related services contracts under SIC code 4212 or 4953, limited to FPDS service code S205.

(3) Architectural and engineering services (including surveying and matping) under SIC codes 7389, 8711, 8712, or 8713 (limited to FPDS service codes C111 through C219, T002, T004, T008, T009, T014, and R404).

(4) Nonnuclear ship repair.

(b) *Targeted industry categories*. Each participating agency shall designate its own targeted industry categories.

PART 20—LABOR SURPLUS AREA CONCERNS

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42256, Sept. 19, 1983, unless otherwise noted.

20.000 Scope of part.

This part prescribes policies and procedures for aiding labor surplus areas in the United States, its territories and possessions, the Commonwealth of Puerto Rico, and the Trust Territory of the Pacific Islands. It implements Defense Manpower Policy No. 4B, May 23, 1980 (44 CFR part 331), U.S. Department of Labor Regulations (20 CFR part 654, subpart A), and the Small Business Act (15 U.S.C. 644(d), (e), and (f)).

Subpart 20.1—General

20.101 Definitions.

Labor surplus area means a geographical area identified by the Department of Labor in accordance with 20 CFR part 654, subpart A, as an area of concentrated unemployment or underemployment or an area of labor surplus.

Labor surplus area concern means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas. Performance is substantially in labor surplus areas if the costs incurred under the contract on account of manufacturing, production, or performance of appropriate services in labor surplus areas exceed 50 percent of the contract price.

20.102 General policy.

Subject to the order of precedence in 19.504, the Government shall award appropriate contracts to eligible labor surplus area (LSA) concerns and encourage contractors to place subcontracts with LSA concerns.

20.103 Contract clause.

(a) In contracts not set aside for LSA concerns, the offeror's status as an LSA concern may affect entitlement to award in the case of tie offers or evaluation in accordance with the Buy American Act. Therefore, offerors shall be afforded an opportunity to establish status as LSA concerns.

(b) The contracting officer shall insert the clause at 52.220-1, Preference for Labor Surplus Area Concerns, in solicitations and contracts that (1) exceed the appropriate small purchase limitation in part 13 and (2) are not set aside for LSA concerns.

20.104 Specific policies.

When a proposed contract is estimated to exceed the appropriate small purchase limitation in part 13, the agency shall—

(a) Set aside the acquisition as provided in subpart 20.2;

(b) Promptly disseminate available publications and information that identify LSA's to acquisition personnel;

(c) Consider Department of Labor classifications of LSA's as conclusive for each contracting action;

(d) Give LSA concerns, which are on appropriate solicitation lists, the opportunity to submit offers on any acquisition for which they are qualified, unless the acquisition is otherwise restricted (e.g., total small business set-aside);

(e) Solicit all prospective LSA concerns, when less than a complete solicitation list is used;

(f) Give preference to LSA concerns as prescribed in 14.407-6, when equal low bids are received;

(g) Encourage subcontracting with LSA concerns (see subpart 20.3);

(h) Assist depressed industries (see 20.105);

(i) Cooperate with the Departments of Labor and Commerce, the Small Business Administration, and the Federal Emergency Management Agency (FEMA) to achieve the objectives of this part 20; and

(j) See 25.104 regarding purchases from qualifying countries where LSA set-asides are involved.

20.105 Depressed industries.

When an entire industry is depressed, FEMA under Defense Manpower Policy No. 4B may establish appropriate measures on an industry wide, rather than on an area-wide, basis. Designations of depressed industries are made by FEMA notifications. Contracting officers shall give industries special treatment as specified in the notification. No price differentials shall be paid to carry out the policies of these notifications.

20.106 Records and reports.

Agencies shall maintain records of contracts performed in LSA's as necessary to prepare required reports (see subpart 4.6).

Subpart 20.2—Set-Asides

20.201 Set-asides for labor surplus area concerns.

20.201-1 Total set-asides.

Subject to the order of precedence in 19.504, and in accordance with any applicable agency procedure, the contracting officer shall set aside the entire amount of an individual acquisition or class of acquisitions for LSA concerns when there is a reasonable expectation that offers will be obtained from a sufficient number of responsible LSA concerns so that awards will be made at reasonable prices. Past acquisition history of the item or similar items is not the only controlling factor that agencies shall consider in determining whether a reasonable expectation exists.

20.201-2 Department of Defense set-asides.

(a) Except as noted in paragraph (b) below, this part 20 does not apply to contracts awarded by Department of Defense (DOD) components. This exemption results from 10 U.S.C. 2392, which precludes payment by DOD of a price differential in contracts awarded for purposes of relieving economic dislocations, and from special provisions in annual Defense Appropriation Acts. Detailed implementation by DOD of Defense Manpower Policy 4B is contained in the DOD FAR Supplement and applicable agency procedures.

(b) Contracts funded by Military Construction Appropriation Acts, and any other Defense contracts that are not subject to a limitation on payment of a price differential for relieving economic dislocation are subject to 20.201-1.

20.202 Contract clause.

The contracting officer shall insert the clause at 52.220-2, Notice of Total Labor Surplus Area Set-Aside, in solicitations and contracts estimated to exceed the appropriate small purchase limitation in part 13 that are totally set aside for LSA concerns.

20.203 Rejection of set-asides.

The contracting officer may not base the rejection of an LSA set-aside on any of the following:

(a) A large part of the previous acquisition of the required item was placed with LSA concerns.

(b) The item is on an established planning list under the Industrial Preparedness Planning Program.

(c) The item is on a Qualified Products List (see subpart 9.2).

(d) A period of less than 30 days from the date of issuance of the solicitation is prescribed for the submission of offers.

(e) The acquisition is classified.

20.204 Award procedures.

(a) The contracting officer shall award contracts involving total LSA set-asides by using sealed bids (see part 14) or competitive proposals (see part 15). See part 6 for competition requirements.

(b) Offers received from concerns that do not qualify as LSA concerns shall be considered nonresponsive and shall be rejected.

[48 FR 42256, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

20.205 Withdrawal of set-asides.

(a) If before contract award the contracting officer considers that a set-aside is detrimental to the public interest (e.g., because of unreasonable prices), the contracting officer shall withdraw the set-aside and, if desired complete the acquisition by sealed bidding or negotiation, as appropriate.

(b) The contracting officer shall include in the contract file a record of the reasons for any withdrawal of a set-aside.

[48 FR 42256, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

Subpart 20.3—Labor Surplus Area Subcontracting Program

20.301 General.

(a) In contracts that exceed the appropriate small purchase limitation in part 13 but do not exceed $500,000, contractors are required to use their best efforts to subcontract with LSA concerns when such subcontracting is (1) consistent with the efficient performance of the contract and (2) at prices no higher than are obtainable elsewhere.

(b) In contracts that may exceed $500,000, contractors are required to take affirmative actions to subcontract with LSA concerns when such subcontracting is (1) consistent with efficient performance of the contract and (2) at prices no higher than are obtainable elsewhere. Contractors are also required to impose similar responsibilities on major subcontractors.

0.302 Contract clauses.

(a) The contracting officer shall nsert the clause at 52.220-3, Utiliza-ion of Labor Surplus Area Concerns, n solicitations and contracts, when it s estimated that the contract will xceed the appropriate small purchase mitation in part 13, except—

(1) Contracts with foreign contrac-ors that, including all related subcon-racts, are to be performed entirely utside the United States, its territo-es and possessions, Puerto Rico, and e Trust Territory of the Pacific Is-nds; and

(2) Contracts for services that are rsonal in nature.

(b) The contracting officer shall sert the clause at 52.220-4, Labor rplus Area Subcontracting Program, solicitations and contracts that (1) ay exceed $500,000, (2) contain the use at 52.220-3, Utilization of Labor Surplus Area Concerns, and (3) in the opinion of the contracting officer, offer substantial subcontracting possibilities. In addition, the contracting officer shall urge contractors that will receive negotiated contracts that may not exceed $500,000 but that meet the criteria in (2) and (3) above, to accept the clause at 52.220-4.

20.303 Review of subcontracting program.

(a) Agencies shall review the adequacy of the contractor's LSA subcontracting program through individual agency reviews or cross-servicing arrangements (see subpart 42.1 Interagency Contract Administration and Audit Services).

(b) To carry out the Government's objectives, contractors and subcontractors having LSA subcontracting programs must be informed of (1) the Government's evaluation of their programs, (2) any deficiencies, and (3) any areas of outstanding achievement. The contracting officer shall document, for use in evaluating future offers, any evaluation and remarks to the contractor, including areas of suggested improvement and areas where the contractor has exceeded contractual requirements.

PART 21—[RESERVED]

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42258, Sept. 19, 1983, unless otherwise noted.

22.000 Scope of part.

This part—

(a) Deals with general policies regarding contractor labor relations as they pertain to the acquisition process;

(b) Prescribes contracting policy and procedures for implementing pertinent labor laws; and

(c) Prescribes contract clauses with respect to each pertinent labor law.

22.001 Definition.

Administrator or *Administrator, Wage and Hour Division,* as used in this part, means the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210 or an authorized representative.

[53 FR 4935, Feb. 18, 1988]

Subpart 22.1—Basic Labor Policies

22.101 Labor relations.

22.101-1 General.

(a) Agencies shall maintain sound relations with industry and labor to ensure (1) prompt receipt of information involving labor relations that may adversely affect the Government acquisition process and (2) that the Government obtains needed supplies and services without delay. All matters regarding labor relations shall be handled in accordance with agency procedures.

(b) Agencies shall remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a labor dispute. To the extent practicable, agencies should ensure that the parties to the dispute use all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, the National Mediation Board and other appropriate Federal, State, local, or private agencies.

(c) Agencies should, when practicable, exchange information concerning labor matters with other affected agencies to ensure a uniform Government approach concerning a particular plant or labor-management dispute.

(d) Agencies should take other actions concerning labor relations problems to the extent consistent with their acquisition responsibilities. For example, agencies should—

(1) Notify the agency responsible for conciliation, mediation, arbitration, or other related action of the existence of any labor dispute affecting or threatening to affect agency acquisition programs;

(2) Furnish to the parties to a dispute factual information pertinent to the dispute's potential or actual adverse impact on these programs, to the extent consistent with security regulations; and

(3) Seek a voluntary agreement between management and labor, notwithstanding the continuance of the dispute, to permit uninterrupted acquisition of supplies and services. This shall only be done, however, if the attempt to obtain voluntary agreement does not involve the agency in the merits of the dispute and only after consultation with the agency responsible for conciliation, mediation, arbitration, or other related action.

(e) The head of the contracting activity may designate programs or requirements for which it is necessary that contractors be required to notify the Government of actual or potential labor disputes that are delaying or threaten to delay the timely contract performance (see 22.103-5(a)).

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22.101-2 Contract pricing and administration.

(a) Contractor labor policies and compensation practices, whether or not included in labor-management agreements, are not acceptable bases for allowing costs in cost-reimbursement contracts or for recognition of costs in pricing fixed-price contracts if they result in unreasonable costs to the Government. For a discussion of allowable costs resulting from labor-management agreements, see 31.205-6(c).

(b) Labor disputes may cause work stoppages that delay the performance of Government contracts. Contracting officers shall impress upon contractors that each contractor shall be held accountable for reasonably avoidable delays. Standard contract clauses dealing with default, excusable delays, etc., do not relieve contractors or subcontractors from the responsibility for delays that are within the contractors' or their subcontractors' control. A delay caused by a strike that the contractor or subcontractor could not reasonably prevent can be excused; however, it cannot be excused beyond the point at which a reasonably diligent contractor or subcontractor could have acted to end the strike by actions such as—

(1) Filing a charge with the National Labor Relations Board to permit the Board to seek injunctive relief in court.

(2) Using other available Government procedures.

(3) Using private boards or organizations to settle disputes.

(c) Strikes normally result in changing patterns of cost incurrence and therefore may have an impact on the allowability of costs for cost-reimbursement contracts or for recognition of costs in pricing fixed-price contracts. Certain costs may increase because of strikes; e.g., guard services and attorney's fees. Other costs incurred during a strike may not fluctuate (e.g., *fixed costs* such as rent and depreciation), but because of reduced production, their proportion of the unit cost of items produced increases. All costs incurred during strikes shall be carefully examined to ensure recognition of only those costs necessary for performing the contract in accordance with the Government's essential interest.

(d) If during a labor dispute, the inspectors' safety is not endangered, the normal functions of inspection at the plant of a Government contractor shall be continued without regard to the existence of a labor dispute, strike, or picket line.

22.101-3 Reporting labor disputes.

The office administering the contract shall report, in accordance with agency procedures, any potential or actual labor disputes that may interfere with performing any contracts under its cognizance. If a contract contains the clause at 52.222-1, Notice to the Government of Labor Disputes, the contractor also must report any actual or potential dispute that may delay contract performance.

22.101-4 Removal of items from contractors' facilities affected by work stoppages.

(a) Items shall be removed from contractors' facilities affected by work stoppages in accordance with agency procedures. Agency procedures should allow for the following:

(1) Determine whether removal of items is in the Government's interest. Normally the determining factor is the critical needs of an agency program.

(2) Attempt to arrange with the contractor and the union representative involved their approval of the shipment of urgently required items.

(3) Obtain appropriate approvals from within the agency.

(4) Determine who will remove the items from the plant(s) involved.

(b) Avoid the use or appearance of force and prevent incidents that might detrimentally affect labor-management relations.

(c) When two or more agencies' requirements are or may become involved in the removal of items, the contract administration office shall ensure that the necessary coordination is accomplished.

22.102 Federal and State labor requirements.

22.102-1 Policy.

Agencies shall cooperate, and encourage contractors to cooperate, with Federal and State agencies responsible for enforcing labor requirements concerning matters such as—

(a) Safety;

(b) Health and sanitation;

(c) Maximum hours and minimum wages;

(d) Equal employment opportunity;

(e) Child and convict labor;

(f) Age discrimination;

(g) Disabled and Vietnam veteran employment; and

(h) Employment of the handicapped.

22.102-2 Administration.

(a) Agencies shall cooperate with, and encourage contractors to use to the fullest extent practicable, the United States Employment Service (USES) and its affiliated local State Employment Service offices in meeting contractors' labor requirements. These requirements may be to staff new or expanding plant facilities, including requirements for workers in all occupations and skills from local labor market areas or through the Federal-State employment clearance system.

(b) Local State employment offices are operated throughout the United States, Puerto Rico, Guam, and the Virgin Islands. In addition to providing recruitment assistance to contractors, cooperation with the local State Employment Service offices will further the national program of maintaining continuous assessment of manpower requirements and resources on a national and local basis.

22.103 Overtime.

22.103-1 Definitions.

Normal workweek, as used in this subpart, means, generally, a workweek of 40 hours. Outside the United States, its possessions, and Puerto Rico, a workweek longer than 40 hours shall be considered normal if:

(a) The workweek does not exceed the norm for the area, as determined by local custom, tradition, or law; and

(b) The hours worked in excess of 40 in the workweek are not compensated at a premium rate of pay.

Overtime means time worked by a contractor's employee in excess of the employee's normal workweek.

Overtime premium means the difference between the contractor's regular rate of pay to an employee for the shift involved and the higher rate paid for overtime. It does not include shift premium.

Shift premium means the difference between the contractor's regular rate of pay to an employee and the higher rate paid for extra-pay-shift work.

[48 FR 42258, Sept. 19, 1983 as amended at 51 FR 12293, Apr. 9, 1986]

22.103-2 Policy.

Contractors shall perform all contracts, so far as practicable, without using overtime, particularly as a regular employment practice, except when lower overall costs to the Government will result or when it is necessary to meet urgent program needs. Any approved overtime, extra-pay shifts, and multishifts should be scheduled to achieve these objectives.

22.103-3 Procedures.

(a) Solicitations normally shall not specify delivery or performance schedules that may require overtime at Government expense.

(b) In negotiating contracts, contracting officers should, consistent with the Government's needs, attempt to (1) ascertain the extent that offers are based on the payment of overtime and shift premiums and (2) negotiate contract prices or estimated costs without these premiums or obtain the requirement from other sources.

(c) When it becomes apparent during negotiations of applicable contracts (see 22.103-5(b)) that overtime will be required in contract performance, the contracting officer shall secure from the contractor a request for all overtime to be used during the life of the contract, to the extent that the overtime can be estimated with reasonable certainty. The contractor's request shall contain the information required by paragraph (b) of the clause at 52.222-2, Payment for Overtime Premiums.

22.103-4 Approvals.

(a) The contracting officer shall review the contractor's request for overtime. Approval of the use of overtime may be granted by an agency approving official after determining in writing that overtime is necessary to—

(1) Meet essential delivery or performance schedules;

(2) Make up for delays beyond the control and without the fault or negligence of the contractor; or

(3) Eliminate foreseeable extended production bottlenecks that cannot be eliminated in any other way.

(b) Approval by the designated official of use and total dollar amount of overtime is required before inclusion of an amount in paragraph (a) of the clause at 52.222-2, Payment for Overtime Premiums. This clause is to be inserted in cost-reimbursement contracts over $100,000, except for those exempted under 22.103-5(b).

(c) Contracting officer approval of payment of overtime premiums is required for time-and-materials and labor-hour contracts (see paragraph (a)(3) of the clause at 52.232-7, Payments Under Time-and-Materials and Labor-Hour Contracts).

(d) No approvals are required for paying overtime premiums under other types of contracts.

(e) Approvals by the agency approving official (see 22.103-4(a)) may be for an individual contract, project, program, plant, division, or company, as practical.

(f) During contract performance, contractor requests for overtime exceeding the amount authorized by paragraph (a) of the clause at 52.222-2, Payment for Overtime Premiums, shall be submitted as stated in paragraph (b) of the clause to the office administering the contract. That office will review the request and if it approves, send the request to the contracting officer. If the contracting officer determines that the requested overtime should be approved in whole or in part, the contracting officer shall request the approval of the agency's designated approving official and modify paragraph (a) of the clause to reflect any approval.

(g) Overtime premiums at Government expense should not be approved when the contractor is already obligated, without the right to additional compensation, to meet the required delivery date.

(h) When the use of overtime is authorized under a contract, the office administering the contract and the auditor should periodically review the use of overtime to ensure that it is allowable in accordance with the criteria in part 31. Only overtime premiums for work in those departments, sections, etc., of the contractor's plant that have been individually evaluated and the necessity for overtime confirmed shall be considered for approval.

(i) Approvals for using overtime shall ordinarily be prospective, but, if justified by emergency circumstances, approvals may be retroactive.

22.103-5 Contract clauses.

(a) The contracting officer shall insert the clause 52.222-1, Notice to the Government of Labor Disputes, in solicitations and contracts that involve programs or requirements that have been designated under 22.101-1(e).

(b) The contracting officer shall include the clause at 52.222-2, Payment for Overtime Premiums, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contract amount is expected to be over $100,000; unless (a) a cost-reimbursement contract for operation of vessels is contemplated, or (b) a cost-plus-incentive-fee contract that will provide a swing from the target fee of at least plus or minus 3 percent and a contractor's share of at least 10 percent is contemplated.

Subpart 22.2—Convict Labor

22.201 General.

The policies and procedures controlling the employment of prison inmates in the performance of Government contracts are based on the following:

(a) Public Law 89-176 (18 U.S.C. 4082(c)(2)), that empowers the Attorney General to authorize Federal prisoners to work at paid employment in the community during their terms of imprisonment under conditions that protect against both the exploitation of convict labor and unfair competition with free labor.

(b) Executive Order 11755, December 29, 1973, that states: "The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society. Meaningful employment serves to develop those skills. It is also true, however, that care must be exercised to avoid either the exploitation of convict labor or any unfair competition between convict labor and free labor in the production of goods and services." The Executive order does not prohibit the contractor, in performing the contract, from employing—

(1) Persons on parole or probation;

(2) Persons who have been pardoned or who have served their terms;

(3) Federal prisoners authorized by the Attorney General under 18 U.S.C. 4082(c)(2) to work at paid employment in the community during the term of their imprisonment, if—

(i) The worker is paid or is in an approved work training program on a voluntary basis;

(ii) Representatives of local union central bodies or similar labor union organizations have been consulted;

(iii) Paid employment will not (A) result in the displacement of employed workers; (B) be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or (C) impair existing contracts for services; and

(iv) The rates of pay and other conditions of employment will not be less than those for work of a similar nature in the locality where the work is being performed; or

(4) Nonfederal prisoners under the conditions in 22.201(b) above if the Attorney General has certified that the work-release laws or regulations of the jurisdiction involved conform to the requirements of Executive Order 11755. The Executive order provides that, after notice and opportunity for hearing, the Attorney General shall revoke the certification if it is found that the jurisdiction's work-release program is not being conducted in conformance with the order or with its intention or purpose.

22.202 Contract clause.

The contracting officer shall insert the clause at 52.222-3, Convict Labor, in solicitations and contracts when the contract is to be performed in any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands; unless—

(a) The contract will be subject to the Walsh-Healey Public Contracts Act (see subpart 22.6), which contains a separate prohibition against the employment of convict labor;

(b) The supplies or services are to be purchased from Federal Prison Industries, Inc. (see subpart 8.6); or

(c) The acquisition involves the purchase, from any State prison, of finished supplies that may be secured in the open market or from existing stocks, as distinguished from supplies requiring special fabrication.

Subpart 22.3—Contract Work Hours and Safety Standards Act

22.300 Scope of subpart.

This subpart prescribes policies and procedures for applying the requirements of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333) (the Act) to contracts that may require or involve laborers or mechanics. In this subpart, the term *laborers or mechanics* includes apprentices, trainees, helpers, watchmen, guards, firefighters, fireguards, and workmen who perform services in connection with dredging or rock excavation in rivers or harbors, but does not include any employee employed as a seaman.

[51 FR 12293, Apr. 9, 1986]

22.301 Statutory requirement.

The Act requires that certain contracts contain a clause specifying that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 40 hours in any workweek unless paid for all such overtime hours at not less than 1 ½ times the basic rate of pay.

[48 FR 42258, Sept. 19, 1983 as amended at 51 FR 12293, Apr. 9, 1986]

22.302 Liquidated damages and overtime pay.

(a) As set forth in the Act, when an overtime computation discloses underpayments, the contractor and any subcontractor responsible therefor shall be liable to the affected employee for the emplolyee's unpaid wages and shall, in addition, be liable to the Government for liquidated damages. Liquidated damages shall be computed for each affected employee in the sum of $10 for each calendar day on which such employee was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by the Act.

(b) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Act, if the funds withheld by Federal agencies for labor standards violations are not sufficient to pay fully both the unpaid wages due laborers and mechanics and the liquidated damages due the Government, the available funds shall be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, shall be used for the payment of liquidated damages.

(c) If the head of an agency or a designee finds that the administratively determined liquidated damages due under section 104(c) of the Contract Work Hours and Safety Standards Act are incorrect, or that the contractor or subcontractor inadvertently violated the provisions of the Act notwithstanding the exercise of due care, the agency head or a designee may—

(1) Make an adjustment in, or release the contractor or subcontractor from the liability for, liquidated damages of $500 or less; or

(2) Make a recommendation to the Secretary of Labor for an adjustment in or release from the liability when the liquidated damages are over $500.

(d) Upon final administrative determination, funds withheld or collected for liquidated damages shall be disposed of in accordance with agency procedures.

[51 FR 12293, Apr. 9, 1986, as amended at 53 FR 4935, Feb. 18, 1988]

22.303 Administration and enforcement.

The procedures and reports required for construction contracts in subpart 22.4 also apply to investigations of alleged violations of the Act on other than construction contracts.

22.304 Variations, tolerances, and exemptions.

(a) The Secretary of Labor under 40 U.S.C. 331, upon the Secretary's initiative or at the request of any Federal agency, may provide reasonable limitations and allow variations, tolerances, and exemptions to and from any or all provisions of the Act (see 29 CFR 5.15).

(b) The Secretary of Labor may make variations, tolerances, and exemptions from the regulatory requirements of applicable parts of 29 CFR when the Secretary finds that such action is necessary and proper in the public interest or to prevent injustice and undue hardship (see 29 CFR 5.14).

[51 FR 12293, Apr. 9, 1986]

22.305 Contract clause.

The contracting officer shall insert the clause at 52.222-4, Contract Work Hours and Safety Standards Act—Overtime Compensation, in solicitations and contracts (including, for this purpose, basic ordering and blanket purchase agreements) when the contract may require or involve the employment of laborers or mechanics. However, the contracting officer shall not include the clause in solicitations and contracts if it is contemplated that the contract will be in one of the following categories:

(a) Construction contracts of $2,000 or less.

(b) Contracts, other than construction contracts, of $2,500 or less. Indefinite quantity or requirements contracts, including basic ordering agreements and blanket purchase agreements are exempt, if it can be determined in advance that the aggregate amount of all orders estimated to be placed thereunder for one year after the effective date of the agreement will not exceed $2,500. A determination shall be made annually thereafter if the contract or agreement is extended and the contract or agreement modified if necessary.

(c) Contracts for supplies, materials, or articles ordinarily available in the open market.

(d) Contracts for transportation by land, air, or water, or for the transmission of intelligence.

(e) Contracts to be performed solely within a foreign country or within a territory under United States jurisdiction other than a State, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331), American Samoa, Guam, Wake Island, and Johnston Island.

(f) Contracts requiring work to be done solely in accordance with the Walsh-Healey Public Contracts Act (see subpart 22.6).

(g) Contracts (or portions of contracts) for supplies in connection with which any required services are merely incidental to the contract and do not require substantial employment of laborers or mechanics.

(h) Any other contracts exempt under regulations of the Secretary of Labor (29 CFR 5.15).

[51 FR 12293, Apr. 9, 1986, as amended at 53 FR 661, Jan. 11, 1988]

Subpart 22.4—Labor Standards for Contracts Involving Construction

SOURCE: 53 FR 4935, Feb. 18, 1988, unless otherwise noted.

22.400 Scope of subpart.

This subpart implements the statutes which prescribe labor standards requirements for contracts in excess of $2,000 for construction, alteration, or repair, including painting and decorating, of public buildings and public works. (See definition of *Construction* in section 22.401.) Labor relations r quirements prescribed in other su parts of part 22 may also apply.

22.401 Definitions.

Building or *work*, as used in th subpart generally means constructio activity as distinguished from man facturing, furnishing of materials, o servicing and maintenance work. Th terms include, without limitatio buildings, structures, and improv ments of all types, such as bridge dams, plants, highways, parkway streets, subways, tunnels, sewer mains, power lines, pumping station heavy generators, railways, airport terminals, docks, piers, wharves, way lighhouses, buoys, jetties, breakwater levees, canals, dredging, shoring, reha bilitation and reactivation of plant scaffolding, drilling, blasting, excava ing, clearing, and landscaping. Th manufacture or furnishing of mater als, articles, supplies, or equipmen (whether or not a Federal or Stat agency acquires title to such materials articles, supplies, or equipment durin the course of the manufacture or fur nishing, or owns the materials fro which they are manufactured or fur nished) is not *building* or *work* withi the meaning of the regulations in thi subpart unless conducted in connec tion with and at the site of such build ing or work as is described in the fore going sentence, or under the Unite States Housing Act of 1937 and th Housing Act of 1949 in the construc tion or development of the project.

Construction, alteration, or repair, as used in this subpart, means al types of work done on a particular building or work at the site thereof including without limitation, altering remodeling, installation (if appropriate) on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work by persons employed by the contractor or subcontractor.

Laborers or mechanics, as used in this subpart, includes—

(a) Those workers, utilized by a contractor or subcontractor at any tier, whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial;

(b) Apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchman and guards;

(c) Working foremen who devote more than 20 percent of their time during a workweek performing duties of a laborer or mechanic, and who do not meet the criteria of 29 CFR part 541, for the time so spent; and

(d) Every person performing the duties of a laborer or mechanic, regardless of any contractual relationship alleged to exist between the contractor and those individuals. The terms exclude workers whose duties are primarily executive, supervisory (except as provided in paragraph (c) of this definition), administrative, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or machanics.

Public building or *public work,* as used in this subpart, means building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

Site of the work, as used in this subpart, is defined as follows:

(a) The *site of the work* is limited to the physical place or places where the construction called for in the contract will remain when work on it is completed, and nearby property, as described in paragraph (b) of this definition, used by the contractor or subcontractor during construction that, because of proximity, can reasonably be included in the *site.*

(b) Except as provided in paragraph (c) of this definition, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are parts of the *site of the work;* provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

(c) The *site of the work* does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the *site of the work.* Such permanent, previously established facilities are not a part of the *site of the work,* even if the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Wages, as used in this subpart, means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness, insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

22.402 Applicability.

(a) *Contracts for construction work.* (1) The requirements of this subpart apply—

(i) Only if the construction work is, or reasonably can be foreseen to be, performed at a particular site so that wage rates can be determined for the locality, and only to construction work that is performed by laborers and mechanics at the site of the work;

(ii) To dismantling, demolition, or removal of improvements if a part of the construction contract, or if construction at that site is anticipated by another contract as provided in subpart 37.3;

(iii) To the manufacture or fabrication of construction materials and components conducted in connection with the construction and on the site of the work by the contractor or a subcontractor under a contract otherwise subject to this subpart; and

(iv) To painting of public buildings or public works, whether performed in connection with the original construction or as alteration or repair of an existing structure.

(2) The requirements of this subpart do not apply to—

(i) The manufacturing of components or materials off the site of the work or their subsequent delivery to the site by the commercial supplier or materialman;

(ii) Contracts requiring construction work that is so closely related to research, experiment, and development that it cannot be performed separately, or that is itself the subject of research, experiment, or development (see paragraph (b) of this section for applicability of this subpart to research and development contracts or portions thereof involving construction, alteration, or repair of a public building or public work);

(iii) Employees of railroads operating under collective bargaining agreements that are subject to the Railway Labor Act; or

(iv) Employees who work at contractors' or subcontractors' permanent home offices, fabrication shops, or tool yards not located at the site of the work. However, if the employees go to the site of the work and perform construction activities there, the requirements of this subpart are applicable for the actual time so spent, not including travel unless the employees transport materials or supplies to or from the site of the work.

(b) *Nonconstruction contracts involving some construction work.* (1) The requirements of this subpart apply to construction work to be performed as part of nonconstruction contracts (supply, service, research and development, etc.) if—

(i) The construction work is to be performed on a public building or public work;

(ii) The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the Davis Bacon Act (the word *substantial* relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract); and

(iii) The construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract.

(2) The requirements of this subpart do not apply if—

(i) The construction work is incidental to the furnishing of supplies, equipment, or services (for example, the requirements do not apply to simple installation or alteration at a public building or public work that is incidental to furnishing supplies or equipment under a supply contract; however, if a substantial and segregable amount of construction, alteration, or repair is required, such as for installation of heavy generators or large refrigerator systems or for plant modification or rearrangement, the requirements of this subpart apply); or

(ii) The construction work is so merged with nonconstruction work or so fragmented in terms of the locations or time spans in which it is to be performed, that it is not capable of being segregated as a separate contractual requirement.

22.403 Statutory and regulatory requirements.

22.403-1 Davis-Bacon Act.

The Davis-Bacon Act (40 U.S.C. 276a-276a-7) provides that contracts in excess of $2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works within the United States, shall contain a clause (see 52.222-6) that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor.

22.403-2 Copeland Act.

The Copeland (Anti-Kickback) Act (18 U.S.C. 874 and 40 U.S.C. 276c) makes it unlawful to induce, by force, intimidation, threat of procuring dismissal from employment, or otherwise, any person employed in the construction or repair of public buildings or public works, financed in whole or in part by the United States, to give up any part of the compensation to which that person is entitled under a contract of employment. The Copeland Act also requires each contractor and subcontractor to furnish weekly a statement of compliance with respect to the wages paid each employee during the preceding week. Contracts subject to the Copeland Act shall contain a clause (see 52.222-10) requiring contractors and subcontractors to comply with the regulations issued by the Secretary of Labor under the Copeland Act.

22.403-3 Contract Work Hours and Safety Standards Act.

The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333) requires that certain contracts (see 22.305) contain a clause (see 52.222-4) specifying that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 40 hours in any workweek unless paid for all additional hours at not less than 1½ times the basic rate of pay (see 22.301).

22.403-4 Department of Labor regulations.

Under the statutes referred to in this 22.403 and Reorganization Plan No. 14 of 1950 (3 CFR 1949-53 Comp., p. 1007), the Secretary of Labor has issued regulations in Title 29, Subtitle A, Code of Federal Regulations, prescribing standards and procedures to be observed by the Department of Labor and the Federal contracting agencies. Those standards and procedures applicable to contracts involving construction are implemented in this subpart. The Department of Labor regulations include—

(a) Part 1, relating to Davis-Bacon Act minimum wage rates;

(b) Part 3, relating to the Copeland (Anti-Kickback) Act and requirements for submission of weekly statements of compliance and the preservation and inspection of weekly payroll records;

(c) Part 5, relating to enforcement of the Davis-Bacon Act, Contract Work Hours and Safety Standards Act, and Copeland (Anti-Kickback) Act;

(d) Part 6, relating to rules of practice for appealing the findings of the Administrator, Wage and Hour Division, in enforcement cases under the Davis-Bacon Act, Contract Work Hours and Safety Standards Act, Copeland (Anti-Kickback) Act, and Service Contract Act, and by which Administrative Law Judge hearings are held; and

(e) Part 7, relating to rules of practice by which contractors and other interested parties may appeal to the Department of Labor Wage Appeals Board, decisions issued by the Administrator, Wage and Hour Division, or administrative law judges under the Davis-Bacon Act, Contract Work Hours and Safety Standards Act, or Copeland (Anti-Kickback) Act. All questions relating to the application and interpretation of wage determinations (including the classifications therein) and the interpretation of the Department of Labor regulations in this subsection shall be referred to the Administrator, Wage and Hour Division.

22.404 Davis-Bacon Act wage determinations.

The Department of Labor is responsible for issuing wage determinations reflecting prevailing wages, including fringe benefits. The wage determinations apply only to those laborers and mechanics employed by a contractor upon the site of the work including drivers who transport to or from the site materials and equipment used in the course of contract operations. Determinations are issued for different types of construction, such as building, heavy, highway, and residential (referred to as rate schedules), and apply only to the types of construction designated in the determination.

22.404-1 Types of wage determinations.

(a) *General wage determinations.*

(1) A general wage determination contains prevailing wage rates for the types of construction designated in the determination, and is used in contracts performed within a specified geographical area. General wage determinations contain no expiration date and remain valid until modified, superseded, or canceled by a notice in the FEDERAL REGISTER by the Department of Labor. Once incorporated in a contract, a general wage determination normally remains effective for the life of the contract. These determinations shall be used whenever possible. They are issued at the discretion of the Department of Labor either upon receipt of an agency request or on the Department of Labor's own initiative.

(2) General wage determinations are published weekly in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts." Notices of general wage determinations are published in the FEDERAL REGISTER. General wage determinations are effective on the publication date of the notice or upon receipt of the determination by the contracting agency, whichever occurs first.

(3) The GPO publication is available for examination at each of the 50 Regional Government Depository Libraries and many other of the 1,400 Government Depository Libraries across the country. Subscriptions may be obtained by contacting: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. The GPO publication is divided into three volumes East, Central, and West which may be ordered separately. The States covered by each volume are as follows:

VOLUME I—EAST

Alabama
Connecticut
Delaware
Florida
Georgia
Kentucky
Maine
Maryland
Massachusetts
Mississippi
New Hampshire
New Jersey
New York
North Carolina
Pennsylvania
Rhode Island
South Carolina
Tennessee
Vermont
Virginia
West Virginia
District of Columbia
Puerto Rico
Virgin Islands

VOLUME II—CENTRAL

Arkansas
Illinois
Iowa
Indiana
Kansas
Louisiana
Michigan
Minnesota
Missouri
Nebraska
Ohio
Oklahoma
Texas
Wisconsin
New Mexico

VOLUME III—WEST

Alaska
Arizona
California
Colorado
Guam
Idaho
Montana
Nevada
North Dakota
Hawaii
South Dakota
Utah
Washington
Wyoming
Oregon

(4) On or about January 1 of each year, an annual edition will be issued that includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year regular weekly updates will be distributed providing any modifications or superseded wage determinations issued. Each volume's annual and weekly editions will be provided in loose-leaf format.

(b) *Project wage determinations.* A project wage determination is issued at the specific request of a contracting agency. It is used only when no general wage determination applies, and is effective for 180 calendar days from the date of the determination. However, if a determination expires before contract award, it may be possible to obtain an extension to the 180-day life of the determination (see 22.404-5(b)(2)). Once incorporated in a contract, a project wage determination normally remains effective for the life of the contract.

22.404-2 General requirements.

(a) The contracting officer shall ensure that only the appropriate wage determinations are incorporated in solicitations and contracts and shall designate the work to which each wage determination or part thereof applies.

(b) If the wage determination is a general wage determination or a project wage determination containing more than one rate schedule, the contracting officer shall either include only the rate schedules that apply to the particular types of construction (building, heavy, highway, etc.) or include the entire wage determination and clearly indicate the parts of the work to which each rate schedule shall be applied. Inclusion by reference is not permitted.

(c) The Wage and Hour Division has issued the following general guidelines for use in selecting the proper schedule(s) of wage rates:

(1) *Building* construction is generally the construction of sheltered enclosures with walk-in access, for housing persons, machinery, equipment, or supplies. It typically includes all construction of such structures, installation of utilities and equipment (both above and below grade level), as well as incidental grading, utilities and paving, unless there is an established area practice to the contrary.

(2) *Residential* construction is generally the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height, and typically includes incidental items such as site work, parking areas, utilities, streets and sidewalks, unless there is an established area practice to the contrary.

(3) *Highway* construction is generally the construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, parking areas, and other similar projects that are not incidental to *building*, *residential*, or *heavy* construction.

(4) *Heavy* construction includes those projects that are not properly classified as either *building*, *residential*, or *highway*, and is of a catch-all nature. Such heavy projects may sometimes be distinguished on the basis of their individual characteristics, and separate schedules issued (e.g., *dredging*, *water and sewer line*, *dams*, *flood control*, etc.).

(5) When the nature of a project is not clear, it is necessary to look at additional factors, with primary consideration given to locally established area practices. If there is any doubt as to the proper application of wage rate schedules to the type or types of construction involved, guidance shall be sought before the opening of bids, or receipt of best and final offers, from the Administrator, Wage and Hour Division. Further examples are contained in Department of Labor All Agency Memoranda Numbers 130 and 131.

22.404-3 Procedures for requesting wage determinations.

(a) *Requests for general wage determinations.* If there is a general wage determination applicable to the project, the agency may use it without notifying the Department of Labor. When necessary, a request for a general wage determination may be made by submitting Standard Form (SF) 308, Request for Determination and Response to Request, to the Administrator, Wage and Hour Division, attention: Branch of Construction Contract Wage Determinations.

(b) *Requests for project wage determinations.* A contracting agency shall submit requests for project wage determinations on SF 308 to the Department of Labor. The requests shall include the following information:

(1) The location, including the county (or other civil subdivision) and State in which the proposed project is located.

(2) The name of the project and a sufficiently detailed description of the work to indicate the types of construction involved (e.g., building, heavy, highway, residential, or other type).

(3) Any available pertinent wage payment information, unless wage pat-

terns in the area are clearly established.

(4) The estimated cost of each project.

(5) All the classifications of laborers and mechanics likely to be employed.

(c) *Time for submission of requests.* The time required by the Department of Labor for processing requests for project wage determinations varies according to the facts and circumstances in each case. An agency should expect the processing to take at least 30 days. Accordingly, agencies should submit requests to the Department of Labor at least 45 days (60 days if possible) before issuing the solicitation.

(d) *Limitations.* Project wage determinations are effective for 180 calendar days from the date of issuance and apply only to contract awards made within that time period (see 22.404-1(b)). Project wage determinations do not apply to, and shall not be included in, contracts other than those for which they are issued. Once incorporated in a contract, a project wage determination normally remains effective for the life of the contract.

(e) *Review of wage determinations.* Immediately upon receipt, the contracting agency shall examine the wage determination and inform the Department of Labor of any changes necessary or appropriate to correct errors. Private parties requesting changes should be advised to submit their requests to the Department of Labor.

22.404-4 Solicitations issued without wage determinations.

(a) If a solicitation is issued before the wage determination is obtained, a notice shall be included in the solicitation that the schedule of minimum wage rates to be paid under the contract will be issued as an amendment to the solicitation.

(b) In sealed bidding, bids may not be opened until a reasonable time after the wage determination has been furnished to all bidders.

(c) In negotiated acquisitions, the contracting officer may open proposals and conduct negotiations before obtaining the wage determination. However, the contracting officer shall incorporate the wage determination into the solicitation before submission of best and final offers.

22.404-5 Expiration of project wage determinations.

(a) The contracting officer shall make every effort to ensure that contract award is made before expiration of the project wage determination included in the solicitation.

(b) The following procedure applies when contracting by sealed bidding:

(1) If a project wage determination expires before bid opening, or if it appears before bid opening that a project wage determination may expire before award, the contracting officer shall request a new determination early enough to ensure its receipt before bid opening. If necessary, the contracting officer shall postpone the bid opening date to allow a reasonable time to obtain the determination, amend the solicitation to incorporate the new determination, and permit bidders to amend their bids. If the new determination does not change the wage rates and would not warrant amended bids, the contracting officer shall amend the solicitation to include the number and date of the new determination.

(2) If a project wage determination expires after bid opening but before award, the contracting officer shall request an extension of the project wage determination expiration date from the Administrator, Wage and Hour Division. The request for extension shall be supported by a written finding, which shall include a brief statement of factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business. If necessary, the contracting officer shall delay award to permit either receipt of the extension or receipt and processing of a new determination. If the request is granted, the contracting officer shall award the contract and modify it to apply the extended expiration date to the already incorporated project wage determination. (See 43.103(b)(1).) If the request is denied, the Administrator will proceed to issue a new project wage deter-

mination. Upon receipt, the contracting officer shall process the new determination as follows:

(i) If the new determination changes any wage rates for classifications to be used in the contract, the contracting officer may cancel the solicitation only in accordance with 14.404-1. Otherwise the contracting officer shall award the contract and incorporate the new determination to be effective on the date of contract award. The contracting officer shall equitably adjust the contract price for any increased or decreased cost of performance resulting from any changed wage rates.

(ii) If the new determination does not change any wage rates, the contracting officer shall award the contract and modify it to include the number and date of the new determination. (See 43.103(b)(1).)

(c) The following procedure applies when contracting by negotiation:

(1) If a project wage determination will or does expire before contract award, the contracting officer shall request a new wage determination from the Department of Labor. If necessary, the contracting officer shall delay award while the new determination is obtained and processed.

(2) The contracting officer need not delay opening and reviewing proposals or discussing them with the offerors while a new determination is being obtained. The contracting officer shall request offerors to extend the period for acceptance of any proposal if that period expires or may expire before receipt and full processing of the new determination.

(3) If the new determination changes any wage rates, the contracting officer shall amend the solicitation to incorporate the new determination, and furnish the wage rate information to all prospective offerors that were sent a solicitation if the closing date for receipt of proposals has not yet occurred, or to all offerors that submitted proposals if the closing date has passed. All offerors to whom wage rate information has been furnished shall be given reasonable opportunity to amend their proposals.

(4) If the new determination does not change any wage rates, the contracting officer shall amend the solicitation to include the number and date of the new determination and award the contract.

22.404-6 Modifications of wage determinations.

(a) *General.* The Department of Labor may modify a wage determination to make it current by specifying only the items being changed or by issuing a *supersedeas decision,* which is a reissuance of the entire determination with changes incorporated. All project wage determination modifications expire on the same day as the original determinaiton. The need to include a modification of a project wage determination in a solicitation is determined by the time of receipt of the modification by the contracting agency. Therefore, the modification shall be time-date stamped immediately upon receipt by the agency. The need for inclusion of a modification of a general wage determination in a solicitation is determined by the publication date of the notice in the Federal Register, or by the time of receipt of the modification (time-date stamped immediately upon receipt) by the contracting agency, whichever occurs first. (Note the distinction between receipt by the agency (modification is effective) and receipt by the contracting officer, which may occur later.)

(b) The following applies when contracting by sealed bidding:

(1) A written action modifying a wage determination shall be effective if:

(i) It is received by the contracting agency, or notice of the modification is published in the Federal Register, 10 or more calendar days before the date of bid opening, or

(ii) It is received by the contracting agency, or notice of the modification is published in the Federal Register, less than 10 calendar days before the date of bid opening, unless the contracting officer finds that there is not reasonable time available before bid opening to notify the prospective bidders. (If the contracting officer finds that there is not reasonable time to notify bidders, a written report of the finding shall be placed in the contract file and shall be made available to the Department of Labor upon request.)

(2) All written actions modifying wage determinations received by the contracting agency after bid opening, or modifications to general wage determinations, notices of which are published in the FEDERAL REGISTER after bid opening, shall not be effective and shall not be included in the solicitation (but see paragraph (b)(6) of this section).

(3) If an effective modification is received by the contracting officer before bid opening, the contracting officer shall postpone the bid opening, if necessary, to allow a reasonable time to amend the solicitation to incorporate the modification and permit bidders to amend their bids. If the modification does not change the wage rates and would not warrant amended bids, the contracting officer shall amend the solicitation to include the number and date of the modification.

(4) If an effective modification is received by the contracting officer after bid opening, but before award, the contracting officer shall follow the procedures in 22.404-5(b)(2)(i) or (ii).

(5) If an effective modification is received by the contracting officer after award, the contracting officer shall modify the contract to incorporate the wage modification retroactive to the date of award and equitably adjust the contract price for any increased or decreased cost of performance resulting from any changed wage rates. If the modification does not change any wage rates and would not warrant contract price adjustment, the contracting officer shall modify the contract to include the number and date of the modification.

(6) If an award is not made within 90 days after bid opening, any modification to a general wage determination, notice of which is published in the FEDERAL REGISTER before award, shall be effective for any resultant contract unless an extension of the 90-day period is obtained from the Administrator, Wage and Hour Division. An agency head or a designee may request such an extension from the Administrator. The request must be supported by a written finding, which shall include a brief statement of factual support, that the extension is necessary and proper in the public interest to prevent injustice, undue hardship, or to avoid serious impairment in the conduct of Government business. The contracting officer shall follow the procedures in 22.404-5(b)(2).

(c) The following applies when contracting by negotiation:

(1) All written actions modifying wage determinations received by the contracting agency before contract award, or modifications to general wage determinations notices of which are published in the FEDERAL REGISTER before award, shall be effective.

(2) If an effective wage modification is received by the contracting officer before award, the contracting officer shall follow the procedures in 22.404-5(c)(3) or (4).

(3) If an effective wage modification is received by the contracting officer after award, the contracting officer shall follow the procedures in 22.404-6(b)(5).

22.404-7 Correction of wage determinations containing clerical errors.

Upon the Labor Department's own initiative or at the request of the contracting agency, the Administrator, Wage and Hour Division, may correct any wage determination found to contain clerical errors. Such corrections shall be effective immediately and shall apply to any solicitation or active contract. The contracting officer shall follow the procedures in 22.404-5(b)(1) or (2)(i) or (ii) in sealed bidding, 22.404-5(c)(3) or (4) in negotiations, and 22.404-6(b)(5) after contract award.

22.404-8 Notification of improper wage determination before award.

(a) Written notification by the Department of Labor received by the contracting officer prior to award that (1) a solicitation includes the wrong wage determination or the wrong rate schedule or (2) a wage determination is withdrawn by the Department of Labor as a result of a decision by the Wage Appeals Board, shall be effective immediately without regard to 22.404-6.

(b) In sealed bidding, the contracting officer shall proceed in accordance with the following:

(1) If the notification reaches the contracting officer before bid opening, the contracting officer shall postpone the bid opening date, if necessary, to allow a reasonable time to (i) obtain the appropriate determination if a new wage determination is required, (ii) amend the solicitation to incorporate the determination (or rate schedule), and (iii) permit bidders to amend their bids. If the appropriate wage determination does not change any wage rates and would not warrant amended bids, the contracting officer shall amend the solicitation to include the number and date of the new determination.

(2) If the notification reaches the contracting officer after bid opening but before award, the contracting officer shall delay awarding the contract, if necessary, and if required, obtain the appropriate wage determination. The appropriate wage determination shall be processed in accordance with 22.404-5(b)(2)(i) or (ii).

(c) In negotiated acquisitions, the contracting officer shall delay award, if necessary, and process the notification in the manner prescribed for a new wage determination at 22.404-5(c)(3).

22.404-9 Award of contract without required wage determination.

(a) If a contract is awarded without the required wage determination (i.e., incorporating no determination, containing a clearly inapplicable general wage determination, or containing a project determination which is inapplicable because of an inaccurate description of the project or its location), the contracting officer shall initiate action to incorporate the required determination in the contract immediately upon discovery of the error. If a required wage determination (valid determination in effect on the date of award) is not available, the contracting officer shall expeditiously request a wage determination from the Department of Labor, including a statement explaining the circumstances and giving the date of the contract award.

(b) The contracting officer shall—

(1) Modify the contract to incorporate the required wage determination (retroactive to the date of award), and equitably adjust the contract price if appropriate; or

(2) Terminate the contract.

22.404-10 Posting wage determinations and notice.

The contractor is required to keep a copy of the wage determination (and any approved additional classifications) posted at the site of the work in a prominent place where it can be easily seen by the workers. The contracting officer shall furnish to the contractor, Department of Labor Form WH-1321, Notice to Employees Working on Federal and Federally Financed Construction Projects, for posting with the wage rates. The name, address, and telephone number of the Government officer responsible for the administration of the contract shall be indicated in the poster to inform workers to whom they may submit complaints or raise questions concerning labor standards.

22.404-11 Wage determination appeals.

The Secretary of Labor has established a Wage Appeals Board which decides appeals of final decisions made by the Department of Labor concerning Davis-Bacon Act wage determinations. A contracting agency or other interested party may file a petition for review under the procedures in 29 CFR Part 7 if reconsideration by the Administrator has been sought pursuant to 29 CFR 1.8 and denied.

22.405 Labor standards for construction work performed under facilities contracts.

If it is not certain at the time of contract award that construction work may be required under a facilities contract (see 45.301), the clause at 52.222-17, Labor Standards for Construction Work—Facilities Contracts (see 22.407(c)) shall be included in the contract. When covered construction work is necessary after contract award, the contracting officer shall obtain the appropriate wage determination and incorporate it in the contract and identify the item or items of construction work to which the clauses apply.

22.406 Administration and enforcement.

22.406-1 Policy.

(a) *General.* Contracting agencies are responsible for ensuring the full and impartial enforcement of labor standards in the administration of construction contracts. Contracting agencies shall maintain an effective program that shall include—

(1) Ensuring that contractors and subcontractors are informed, before commencement of work, of their obligations under the labor standards clauses of the contract;

(2) Adequate payroll reviews, on-site inspections, and employee interviews to determine compliance by the contractor and subcontractors, and prompt initiation of corrective action when required;

(3) Prompt investigation and disposition of complaints; and

(4) Prompt submission of all reports required by this subpart.

(b) *Preconstruction letters and conferences.* Before construction begins, the contracting officer shall inform the contractor of the labor standards clauses and wage determination requirements of the contract and of the contractor's and any subcontractor's responsibilities under the contract. Unless it is clear that the contractor is fully aware of the requirements, the contracting officer shall issue an explanatory letter and/or arrange a conference with the contractor promptly after award of the contract.

22.406-2 Wages, fringe benefits, and overtime.

(a) In computing wages paid to a laborer or mechanic, the contractor may include only the following items:

(1) Amounts paid in cash to the laborer or mechanic, or deducted from payments under the conditions set forth in 29 CFR 3.5.

(2) Contributions (except those required by Federal, State, or local law) the contractor makes irrevocably to a trustee or a third party under any bona fide plan or program to provide for medical or hospital care, pensions, compensation for injuries or illness resulting from occupational activity, u employment benefits, life insuranc disability and sickness insurance, acc dent insurance, or any other bona fi fringe benefit.

(3) Other contributions or anticipa ed costs for bona fide fringe benefi to the extent expressly approved b the Secretary of Labor.

(b)(1) The contractor may satis the obligation under the clause 52.222-6, Davis-Bacon Act, by provi ing wages consisting of any combin tion of contributions or costs as spec fied in paragraph (a) of this subse tion, if the total cost of the combin tion is not less than the total of th basic hourly rate and fringe benefi payments prescribed in the wage d termination for the classification of l borer or mechanic concerned.

(2) Wages provided by the contra tor and fringe benefits payments r quired by the wage determination ma include items that are not stated exact cash amounts. In these case the hourly cash equivalent of the co of these items shall be determined b dividing the employer's contributio or costs by the employee's hou worked during the period covered b the costs or contributions. For exam ple, if a contractor pays a monthl health insurance premium of $112 fo a particular employee who worked 12 hours during the month, the hourl cash equivalent is determined by divid ing $112 by 125 hours, which equal $0.90 per hour. Similarly, the calcula tion of hourly cash equivalent for nin paid holidays per year for an employ ee with an hourly rate of pay of $5.0 is determined by multiplying $5.00 b 72 (9 days at 8 hours each), and divid ing the result of $360 by the numbe of hours worked by the employe during the year. If the interested par ties (contractor, contracting office and employees or their representative cannot agree on the cash equivalent the contracting officer shall submi the question for final determination t the Department of Labor as prescribe by agency procedures. The informa tion submitted shall include—

(i) A comparison of the payment contributions, or costs in the wage de termination with those made or pro posed as equivalents by the contractor; and

(ii) The comments and recommendations of the contracting officer.

(c) In computing required overtime payments, (i.e., 1½ times the basic hourly rate of pay) the contractor shall use the basic hourly rate of pay in the wage determination, or the basic hourly rate actually paid by the contractor, if higher. The basic rate of pay includes employee contributions to fringe benefits, but excludes the contractor's contributions, costs, or payment of cash equivalents for fringe benefits. Overtime shall not be computed on a rate lower than the basic hourly rate in the wage determination.

22.406-3 Additional classifications.

(a) If any laborer or mechanic is to be employed in a classification that is not listed in the wage determination applicable to the contract, the contracting officer, pursuant to the clause at 52.222-6, Davis-Bacon Act, shall require that the contractor submit to the contracting officer, Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate, which, along with other pertinent data, contains the proposed additional classification and minimum wage rate including any fringe benefits payments.

(b) Upon receipt of SF 1444 from the contractor, the contracting officer shall review the request to determine whether it meets the following criteria:

(1) The classification is appropriate and the work to be performed by the classification is not performed by any classification contained in the applicable wage determination.

(2) The classification is utilized in the area by the construction industry.

(3) The proposed wage rate, including any fringe benefits, bears a reasonable relationship to the wage rates in the wage determination in the contract.

(c)(1) If the criteria in paragraph (b) of this section are met and the contractor and the laborers or mechanics to be employed in the additional classification (if known) or their representatives agree to the proposed additional classification, and the contracting officer approves, the contracting officer shall submit a report (including a copy of SF 1444) of that action to the Administrator, Wage and Hour Division, for approval, modification, or disapproval of the additional classification and wage rate (including any amount designated for fringe benefits); or

(2) If the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed additional classification, or if the criteria are not met, the contracting officer shall submit a report (including a copy of SF 1444) giving the views of all interested parties and the contracting officer's recommendation to the Administrator, Wage and Hour Division, for determination of appropriate classification and wage rate.

(d)(1) Within 30 days of receipt of the report, the Administrator, Wage and Hour Division, will complete action and so advise the contracting officer, or will notify the contracting officer that additional time is necessary.

(2) Upon receipt of the Department of Labor's action, the contracting officer shall forward a copy of the action to the contractor, directing that the classification and wage rate be posted in accordance with paragraph (a) of the clause at 52.222-6 and that workers in the affected classification receive no less than the minimum rate indicated from the first day on which work under the contract was performed in the classification.

22.406-4 Apprentices and trainees.

(a) The contracting officer shall review the contractor's employment and payment records of apprentices and trainees made available pursuant to the clause at 52.222-8, Payrolls and Basic Records, to ensure that the contractor has complied with the clause at 52.222-9, Apprentices and Trainees.

(b) If a contractor has classified employees as apprentices or trainees without complying with the requirements of the clause at 52.222-9, the contracting officer shall reject the classification and require the contractor to pay the affected employees at the rates applicable to the classification of the work actually performed.

22.406-5 Subcontracts.

In accordance with the requirements of the clause at 52.222-11, Subcontracts (Labor Standards), the contractor and subcontractors at any tier are required to submit a fully executed SF 1413, Statement and Acknowledgment, upon award of each subcontract.

22.406-6 Payrolls and statements.

(a) *Submission.* In accordance with the clause at 52.222-8, Payrolls and Basic Records, the contractor must submit or cause to be submitted, within 7 calendar days after the regular payment date of the payroll week covered, for the contractor and each subcontractor, (1) copies of weekly payrolls applicable to the contract, and (2) weekly payroll statements of compliance. The contractor may use the Department of Labor Form WH-347, Payroll (For Contractor's Optional Use), or a similar form that provides the same data and identical representation.

(b) *Withholding for nonsubmission.* If the contractor fails to submit copies of its or its subcontractors' payrolls promptly, the contracting officer shall, from any payment due to the contractor, withhold approval of an amount that the contracting officer considers necessary to protect the interest of the Government and the employees of the contractor or any subcontractor.

(c) *Examination.* (1) The contracting officer shall examine the payrolls and payroll statements to ensure compliance with the contract and any statutory or regulatory requirements. Particular attention should be given to—

(i) The correctness of classifications and rates;

(ii) Fringe benefits payments;

(iii) Hours worked;

(iv) Deductions; and

(v) Disproportionate employment ratios of laborers, apprentices, or trainees, to journeymen.

(2) Fringe benefits payments, contributions made, or costs incurred on other than a weekly basis shall be considered as a part of weekly payments to the extent they are creditable to the particular weekly period involved and are otherwise acceptable.

(d) *Preservation.* The contracting agency shall retain payrolls and statements of compliance for 3 years after completion of the contract and make them available when requested by the Department of Labor at any time during that period. Submitted payrolls shall not be returned to a contractor or subcontractor for any reasons, but copies thereof may be furnished to the contractor or subcontractor who submitted them, or to a higher tier contractor or subcontractor.

(e) *Disclosure of payroll records.* Contractor payroll records in the Government's possession must be carefully protected from any public disclosure which is not required by law, since payroll records may contain information in which the contractor's employees have a privacy interest, as well as information in which the contractor may have a proprietary interest that the Government may be obliged to protect. Questions concerning release of this information may involve the Freedom of Information Act (FOIA).

22.406-7 Compliance checking.

(a) *General.* The contracting officer shall make checks and investigations on all contracts covered by this subpart as may be necessary to ensure compliance with the labor standards requirement of the contract.

(b) *Regular compliance checks.* Regular compliance checking includes the following activities:

(1) Employee interviews to determine correctness of classifications, rates of pay, fringe benefits payments, and hours worked. (See Standard Form 1445.)

(2) On-site inspections to check type of work performed, number and classification of workers, and fulfillment of posting requirements.

(3) Payroll reviews to ensure that payrolls of prime contractors and subcontractors have been submitted on time and are complete and in compliance with contract requirements.

(4) Comparison of the information in this paragraph (b) with available data, including daily inspector's report

and daily logs of construction, to ensure consistency.

(c) *Special compliance checks.* Situations that may require special compliance checks include—

(1) Inconsistencies, errors, or omissions detected during regular compliance checks; or

(2) Receipt of a complaint alleging violations. If the complaint is not specific enough, the complainant shall be so advised and invited to submit additional information.

22.406-8 Investigations.

Contracting agencies are responsible for conducting labor standards investigations when available information indicates such action is warranted. In addition, the Department of Labor may conduct an investigation on its own initiative or may request a contracting agency to do so.

(a) *Contracting agencies.* The contracting agency shall conduct an investigation if a compliance check (see 22.406-7) indicates that violations may have occurred that are substantial in amount, willful, or not corrected. (See also 22.406-9(a) regarding withholding from contract payments.) The investigation shall include all aspects of the contractor's compliance with contract labor standards requirements, and shall not be limited to specific areas raised in a complaint or uncovered during compliance checks. The investigation should be made by personnel familiar with labor laws and their application to contracts. If oral or written statements are taken from employees during an investigation, the statements, or excerpts or summaries thereof, shall not be divulged to anyone other than authorized Government officials without the prior signed consent of the employee. Investigators may use the investigation and enforcement instructions issued by and available upon written request from the Administrator, Wage and Hour Division. Any available Department of Labor files pertinent to an investigation may be obtained upon written request to the Administrator, Wage and Hour Division. None of the material obtained from Labor Department files, other than computations of back wages and liquidated damages and summaries of back wages due, may be disclosed in any manner to any one other than responsible Federal officials charged with administering the contract, without obtaining the permission of the Department of Labor.

(b) *Review of the investigation report.* The contracting officer shall review the investigation report on receipt and make preliminary findings regarding the contractor. Adverse findings that are not supported by other evidence shall not normally be based solely on employee statements that have not been authorized for disclosure by the employee. However, if the investigation establishes a pattern of possible violations that are based on employees' statements that have not been authorized for disclosure, the pattern itself may constitute a suitable basis for a finding of noncompliance.

(c) *Notification to the contractor.* The contracting officer shall take the following actions upon completing the review:

(1) Provide written notice to the contractor concerning the preliminary findings, proposed corrective actions, and the contractor's right to request that the basis for the findings be made available and to submit written rebuttal information within a reasonable period of time.

(2) Upon request from the contractor, make the basis for the findings available. However, under no circumstances will the contractor be permitted to examine the investigation report. Also, the contracting officer shall not disclose the identity of any employee who filed a complaint or who was interviewed, without the prior consent of the employee.

(3)(i) If the contractor submits a rebuttal, reconsider the preliminary findings based on information brought out by the rebuttal and notify the contractor of the final findings.

(ii) If no rebuttal is submitted within a reasonable time, the preliminary findings shall be considered final.

(4) Request the contractor to make restitution for underpaid wages and liquidated damages determined by the contracting officer to be due, whether the violation is considered willful or nonwillful. If the request includes liquidated damages, it shall contain a

written statement that the contractor may within 60 days request relief from such assessment.

(d) *Contracting officer's report.* (1) After taking the actions prescribed in paragraphs (b) and (c) of this section, the contracting officer shall prepare and forward a report of violations including findings and supporting evidence to the agency head or designee. Standard Form 1446, Labor Standards Investigation Summary Sheet, shall be completed and attached as the first page of the report.

(2) After reviewing the contracting officer's report, the agency head or the agency head's designee, shall process the report as follows:

(i) A detailed enforcement report shall be submitted to the Administrator, Wage and Hour Division within 60 days after completion of the investigation, if—

(A) Underpayments by a contractor or subcontractor total $1,000 or more;

(B) There is reason to believe that the violations are aggravated or willful (or, also, in the case of the Davis-Bacon Act, there is reason to believe that the contractor has disregarded its obligations to employees and subcontractors);

(C) Restitution has not been effected; or

(D) Future compliance has not been assured.

(ii) If none of the conditions in paragraph (d)(2)(i) of this section is present but the investigation was expressly requested by the Department of Labor, only a summary report shall be submitted to the Administrator, Wage and Hour Division. The report shall summarize any violations, including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed under the Contract Work Hours and Safety Standards Act, corrective measures taken and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages.

(iii) If none of the conditions in paragraph (d)(2) (i) or (ii) of this section is present, the case shall be closed and the report retained in the appropriate contract file.

(iv) If substantial evidence is found that violations are willful and in violation of a criminal statute (generally 18 U.S.C. 874 or 1001) the report (supplemented if necessary) also shall be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases, the Administrator, Wage and Hour Division, shall be informed simultaneously of the action taken.

(e) *Department of Labor investigations.* In investigations conducted by the Department of Labor which disclose (1) underpayments totaling $1,000 or more, (2) aggravated/willful violations (or, in the case of the Davis-Bacon Act, there is reason to believe that the contractor has disregarded its obligations to employees and subcontractors), or (3) potential assessment of liquidated damages under the Contract Work Hours and Safety Standards Act, the Department of Labor will furnish the concerned contracting agency an enforcement report detailing violations found and any action taken by the contractor to correct such violations, including any payment of back wages. In investigations disclosing other than in this paragraph (e), the agency will be furnished a letter of notification summarizing the findings of the investigation.

22.406-9 Withholding from or suspension of contract payments.

(a) *Withholding from contract payments.* If the contracting officer believes a violation exists (see 22.406-8), or upon request of the Department of Labor, the contracting officer shall withhold from payments due the contractor an amount equal to the estimated wage underpayment as well as any estimated liquidated damages due the United States under the Contract Work Hours and Safety Standards Act. (See 22.302.)

(1) Pursuant to the clauses at 52.222-4, Contract Work Hours and Safety Standards Act—Overtime Compensation, and 52.222-7, Withholding of Funds, cross-withholding of funds from any current Federal contract with the same prime contractor, or from any Federally assisted contract with the same prime contractor which

is subject to either Davis-Bacon prevailing wage requirements or Contract Work Hours and Safety Standards Act requirements, respectively, is authorized.

(2) If subsequent investigation confirms violations, the contracting officer shall adjust the withholding as necessary. If the withholding was requested by the Department of Labor, the contracting officer shall not reduce or release the withholding without written approval of the Department of Labor.

(3) The withheld funds shall be used as provided in paragraph (c) of this section to satisfy assessed liquidated damages and, unless the contractor makes restitution, validated wage underpayments.

(b) *Suspension of contract payments.* If a contractor or subcontractor fails or refuses to comply with the labor standards clauses of the Davis-Bacon Act and Related Statutes, the agency upon its own action or upon the written request of an authorized representative of the Department of Labor, shall suspend or cause to be suspended any further payment, advance, or guarantee of funds until the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled, and to cover any liquidated damages which may be due.

(c) *Disposition of contract payments withheld or suspended*—(1) *Forwarding wage underpayments to the Comptroller General.* Upon final administrative determination, if restitution has not been made by the contractor or subcontractor, the contracting officer shall forward to the appropriate disbursing office Standard Form (SF) 1093, Schedule of Withholdings Under the Davis-Bacon Act (40 U.S.C. 276a) and/or Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333). The contracting officer shall include with the SF 1093 a listing of the name, social security number, and last known address of each affected employee; the amount due each employee; employee claims if feasible; and a brief statement of the reason for requiring restitution. Also, the contracting officer shall indicate if restitution was not made because the employee could not be located. Underpaid employees may be assisted in the preparation of their claims. The disbursing office shall submit the SF 1093 with attached additional data and the funds withheld (by check) to the Comptroller General (Claims Division).

(2) *Returning of withheld funds to contractor.* When funds withheld are no longer necessary or exceed the amount required to satisfy validated wage underpayments and assessed liquidated damages, these funds shall be paid the contractor in an expeditious manner.

(3) *Limitation on forwarding or returning funds.* If the withholding was requested by the Department of Labor or if the findings are disputed (see 22.406-10(e)), the contracting officer shall not forward the funds to the Comptroller General, Claims Division, or return them to the contractor without approval by the Department of Labor.

(4) *Liquidated damages.* Upon final administrative determination, funds withheld or collected for liquidated damages shall be disposed of in accordance with agency procedures.

22.406-10 Disposition of disputes concerning construction contract labor standards enforcement.

(a) The areas of possible differences of opinion between contracting officers and contractors in construction contract labor standards enforcement include—

(1) Misclassification of workers;

(2) Hours of work;

(3) Wage rates and payment;

(4) Payment of overtime;

(5) Withholding practices; and

(6) The applicability of the labor standards requirements under varying circumstances.

(b) Generally, these differences are settled administratively at the project level by the contracting agency. If necessary, these differences may be settled with assistance from the Department of Labor.

(c) When requesting the contractor to take corrective action in labor violation cases, the contracting officer shall inform the contractor of the following:

(1) Disputes concerning the labor standards requirements of the contract are handled under the contract clause at 52.222-14, Disputes Concerning Labor Standards, and not under the clause at 52.233-1, Disputes.

(2) The contractor may appeal the contracting officer's findings or part thereof by furnishing the contracting officer a complete statement of the reasons for the disagreement with the findings.

(d) The contracting officer shall promptly transmit the contracting officer's findings and the contractor's statement to the Administrator, Wage and Hour Division.

(e) The Administrator, Wage and Hour Division, will respond directly to the contractor or subcontractor, with a copy to the contracting agency. The contractor or subcontractor may appeal the Administrator's findings in accordance with the procedures outlined in Labor Department Regulations (29 CFR 5.11). Hearings before administrative law judges are conducted in accordance with 29 CFR part 6, and hearings before the Labor Department Wage Appeals Board are conducted in accordance with 29 CFR part 7.

(f) The Administrator, Wage and Hour Division, may institute debarment proceedings against the contractor or subcontractor if the Administrator finds reasonable cause to believe that the contractor or subcontractor has committed willful or aggravated violations of the Contract Work Hours and Safety Standards Act or the Copeland (Anti-Kickback) Act, or any of the applicable statutes listed in 29 CFR 5.1 other than the Davis-Bacon Act, or has committed violations of the Davis-Bacon Act that constitute a disregard of its obligations to employees or subcontractors under section 3(a) of that Act.

22.406-11 Contract terminations.

If a contract or subcontract is terminated for violation of the labor standards clauses, the contracting agency shall submit a report to the Administrator, Wage and Hour Division, and the Comptroller General. The repor shall include—

(a) The number of the terminat contract;

(b) The name and address of the te minated contractor or subcontractor,

(c) The name and address of the con tractor or subcontractor, if any, who to complete the work;

(d) The amount and number of th replacement contract, if any; and

(e) A description of the work.

22.406-12 Cooperation with the Depar ment of Labor.

(a) The contracting agency shall co operate with representatives of th Department of Labor in the inspectio of records, interviews with worker and all other aspects of investigatio undertaken by the Department o Labor. When requested, the contract ing agency shall furnish to the Secre tary of Labor any available informa tion on contractors, subcontractor current and previous contracts, an the nature of the contract work.

(b) If a Department of Labor repre sentative undertakes an investigatio at a construction project, the contrac ing officer shall inquire into the scop of the investigation, and request to b notified immediately of any violatio discovered under the Davis-Bacon Ac the Contract Work Hours and Safet Standards Act, or the Copeland (Ant Kickback) Act.

22.406-13 Semiannual enforcement r ports.

A semiannual report on complian with and enforcement of the constru tion labor standards requirements the Davis-Bacon Act and Contra Work Hours and Safety Standards A is required from each contracti agency. The reporting periods are O tober 1 through March 31 and April through September 30. The repor shall only contain information as the enforcement actions of the co tracting agency and shall be prepar as prescribed in Department of Lab memoranda and submitted to the D partment of Labor within 30 da after the end of the reporting peri This report has been assigned inte agency report control number 1482-DOL-SA.

22.407 Contract clauses.

(a) The contracting officer shall insert the following clauses in solicitations and contracts in excess of $2,000 for construction within the United States:

(1) The clause at 52.222-6, Davis-Bacon Act.

(2) The clause at 52.222-7, Withholding of Funds.

(3) The clause at 52.222-8, Payrolls and Basic Records.

(4) The clause at 52.222-9, Apprentices and Trainees.

(5) The clause at 52.222-10, Compliance with Copeland Act Requirements.

(6) The clause at 52.222-11, Subcontracts (Labor Standards).

(7) The clause at 52.222-12, Contract Termination—Debarment.

(8) The clause at 52.222-13, Compliance with Davis-Bacon and Related Act Regulations.

(9) The clause at 52.222-14, Disputes Concerning Labor Standards.

(10) The clause at 52.222-15, Certification of Eligibility.

(b) The contracting officer shall insert the clause at 52.222-16, Approval of Wage Rates, in solicitations and contracts in excess of $2,000 for cost-reimbursement construction to be performed within the United States, except for contracts with a State or political subdivision thereof.

(c) A contract that is not primarily for construction may contain a requirement for some construction work to be performed in the United States. If under 22.402(b) the requirements of this subpart apply to the construction work, the contracting officer shall insert in such solicitations and contracts the applicable construction labor standards clauses required in this section and identify the item or items of construction work to which the clauses apply.

(d) The contracting officer shall insert the clause at 52.222-17, Labor Standards for Construction Work—Facilities Contracts, in solicitations and contracts, if a facilities contract (see 45.301) may require covered construction work (see 22.402(b)) to be performed in the United States.

Subpart 22.5—[Reserved]

Subpart 22.6—Walsh-Healey Public Contracts Act

22.601 Definitions.

Assembly, as used in this subpart, means the piecing or bringing together of various interdependent or interrelated parts or components so as to make an operable whole or unit.

Manufacturer, as used in this subpart, means a person that owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

Person, as used in this subpart, includes associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

Regular dealer, as used in this subpart, means a person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

22.602 Statutory requirements.

Except for the exemptions at 22.604, all contracts subject to the Walsh-Healey Public Contracts Act (the Act) (41 U.S.C. 35-45) and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation (all the stock of which is beneficially owned by the United States) for the manufacture or furnishing of materials, supplies, articles, and equipment (referred to in this subpart as 'supplies) in any amount exceeding $10,000, shall—

(a) Be with manufacturers or regular dealers in the supplies manufactured or used in performing the contract; and

(b) Include or incorporate by reference the representation that the contractor is a manufacturer or a regular dealer of the supplies offered, and the stipulations required by the Act pertaining to such matters as minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions.

22.603 Applicability.

The requirements in 22.602 apply to contracts (including for this purpose, indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements) and subcontracts under Section 8(a) of the Small Business Act, for the manufacture or furnishing of supplies that are to be performed within the United States, Puerto Rico, or the Virgin Islands, and which exceed or may exceed $10,000, unless exempted under 22.604.

22.604 Exemptions.

22.604-1 Statutory exemptions.

Contracts for acquisition of the following supplies are exempt from the Act:

(a) Any item in those situations where the contracting officer is authorized by the express language of a statute to purchase *in the open market* generally; or where a specific purchase is made under the conditions described in 6.302-2 in circumstances where immediate delivery is required by the public exigency.

(b) Perishables, including dairy, livestock, and nursery products.

(c) Agricultural or farm products processed for first sale by the original producers.

(d) Agricultural commodities or the products thereof purchased under contract by the Secretary of Agriculture.

[48 FR 42258, Sept. 19, 1983, as amended at 53 FR 4944, Feb. 18, 1988]

22.604-2 Regulatory exemptions.

(a) Contracts for the following acquisitions are fully exempt from the Act (see 41 CFR 50-201.603):

(1) Public utility services.

(2) Supplies manufactured outside the United States, Puerto Rico, or the Virgin Islands.

(3) Purchases against the account of a defaulting contractor where the stipulations of the Act were not included in the defaulted contract.

(4) Newspapers, magazines, or periodicals, contracted for with sales agents or publisher representatives, which are to be delivered by the publishers thereof.

(b) Contracts of the following type are partially exempt from the Act (see 41 CFR 50-201.604):

(1) Contracts with certain coal dealers.

(2) Certain commodity exchange contracts.

(3) Contracts with certain export merchants.

(4) Contracts with small business defense production pools, and small business research and development pools.

(5) Contracts with public utilities for the acquisition of certain uranium products.

(c) (1) Upon the request of the agency head, the Secretary of Labor may exempt specific contracts or classes of contracts from the inclusion or application of one or more of the Act's stipulations; *provided*, that the request includes a finding by the agency head stating the reasons why the conduct of Government business will be seriously impaired unless the exemption is granted.

(2) Those requests for exemption that relate solely to safety and health standards shall be transmitted to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210. All other requests shall be transmitted to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

22.605 Rulings and interpretations of the Act.

(a) As authorized by the Act, the Secretary of Labor has issued rulings and interpretations concerning the administration of the Act (see 41 CFR 50-206). The substance of certain rulings and interpretations is as follows:

(1) If a contract for $10,000 or less is subsequently modified to exceed $10,000, the contract becomes subject

to the Act for work performed after the date of the modification.

(2) If a contract for more than $10,000 is subsequently modified by mutual agreement to $10,000 or less, the contract is not subject to the Act for work performed after the date of the modification.

(3) If a contract awarded to a prime contractor contains a provision whereby the prime contractor is made an agent of the Government, the prime contractor is required to include the stipulations of the Act in contracts in excess of $10,000 awarded for and on behalf of the Government for supplies that are to be used in the construction and equipment of Government facilities.

(4) If a contract subject to the Act is awarded to a contractor operating Government-owned facilities, the stipulations of the Act affect the employees of that contractor the same as employees of contractors operating privately owned facilities.

(5) Indefinite-delivery contracts, including basic ordering agreements and blanket purchase agreements, are subject to the Act unless it can be determined in advance that the aggregate amount of all orders estimated to be placed thereunder for 1 year after the effective date of the agreement will not exceed $10,000. A determination shall be made annually thereafter if the contract or agreement is extended, and the contract or agreement modified if necessary.

(b) [Reserved]

22.606 Eligibility as a manufacturer or regular dealer.

22.606-1 Manufacturer.

(a) An offeror qualifies as a manufacturer under the criteria in 41 CFR 50-206.51 and 50-206.52 if it shows before the award that it is—

(1) An established manufacturer—

(i) Of the particular supplies of the general character sought by the Government; and

(ii) That has a plant, equipment, and personnel to manufacture on the premises the items called for under the contract; or

(2) Newly entering into a manufacturing activity and has made all necessary arrangements and commitments for—

(i) Manufacturing space;

(ii) Equipment; and

(iii) Personnel to perform on its own premises the manufacturing operations required for the fulfillment of the contract.

(b) An offeror that is newly entering into a manufacturing activity must show under the criteria in 41 CFR 50-206.51(b) that the offeror—

(1) Has made written, legally binding arrangements or commitments to enter a manufacturing business. (An offeror should not be barred from receiving the award because it has not yet done any manufacturing, even if the arrangements and commitments are contingent upon the award of a Government contract);

(2) Has not been set up solely to produce on a Government contract and that its operations will not be terminated upon completion of that contract;

(3) Has established arrangements for production on a continuing basis of the particular materials, supplies, or equipment desired by the Government; and

(4) Has documentation to prove that necessary written, legally binding arrangements or commitments have been met before award.

(c) Every offeror must qualify as a manufacturer in its own rights under the criteria in 41 CFR 50-206.51(e) and (f), and must show the following:

(1) That it is currently capable of manufacturing on its premises the supplies called for under the contract or, if it is newly entering into manufacturing, that it has made written, legally binding commitments before award to enable it to produce such supplies on its premises. (The use, rent, or sharing of the manufacturing or producing establishment of another legal entity; i.e., arrangements for equipment, personnel, or space on a time-and-material or *as needed* basis, does not meet this requirement).

(2) That all evidence documenting the making of necessary prior arrangements or definite commitments is in the name of the offeror.

(d) Generally, an offeror that performs assembly operations as described in 41 CFR 50-206.52 may be considered a manufacturer, if it performs more than minimal operations, such as packaging only, upon the end item to be supplied to the Government, and it—

(1) Produces end items on its premises by assembling component parts using machines, tools, and workers, and the assembly constitutes substantial or significant fabrication or production of the end item; or

(2) Has the facilities to produce on its premises a significant portion of the required component parts needed for the end item for which the Government contracted even if it only performs assembly operations under a particular acquisition.

(e) An offeror's eligibility status as a prime contractor or a subcontractor on other contracts subject to the Act is not determinative evidence of the offeror's present eligibility as a manufacturer (see 41 CFR 50-206.51(g)).

22.606-2 Regular dealer.

(a) An offeror qualifies as a regular dealer under the criteria in 41 CFR 50-206.53 if it shows before the award that it is a regular dealer dealing in the particular supplies of the general character offered to the Government. Included in the criteria in 41 CFR 50-206.53 which an offeror must meet are the following:

(1) It has an establishment, or a leased or assigned space, in which it regularly maintains a stock of supplies in which it claims to be a dealer. If the space is in a public warehouse, it must be maintained on a continuing and not on a demand basis.

(2) The stock maintained is a true inventory from which sales are made. This requirement is not satisfied by (i) a stock of sample or display items, (ii) a stock consisting of surplus items remaining from prior orders, (iii) stock unrelated to the supplies offered, or (iv) a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made.

(3) The supplies stocked are of the same general character as those to be supplied under the contract. To be of the same general character, the items to be supplied must be either identical with those in stock or be supplies for which dealers in the same line of business would be an obvious source.

(4) Sales are made regularly from stock on a recurring basis, are not only occasional, or constitute an exception to the usual operations of the business. The proportion of sales from stock that will satisfy this requirement will depend upon the character of the business.

(5) Sales are made regularly in the usual course of business to the public, i.e., to purchasers other than Federal, State, or local Government agencies. This requirement is not satisfied if the contractor merely seeks to sell to the public but has not yet made the sales. The number and amount of sales that must be made to the public will necessarily vary with the amount of total sales and the nature of the business.

(6) The business is an established and going concern. It is not sufficient to show that arrangements have been made to set up such a business.

(b) For certain specific products (lumber and timber products, machine tools, hay, grain, feed or straw, raw cotton, green coffee, petroleum, agricultural liming materials, tea, raw or unmanufactured cotton linters, certain uranium products, used automatic data processing equipment, and specialty advertising products), there are alternate qualifications for regular dealers in which the dealer need not physically maintain a stock. The requirements under the alternative qualifications are in 41 CFR 50-201.101(a)(2) and 50-201.604.

(c) Coal dealers are exempted from the regular dealer requirements if they meet the terms and conditions prescribed by the Secretary of Labor in 41 CFR 50-201.604(a). If these terms and conditions are not met, coal dealers must meet the requirements in this subsection.

[48 FR 42258, Sept. 19, 1983, as amended at 52 FR 30076, Aug. 12, 1987]

22.607 Agents.

A *manufacturer* or *regular dealer* may bid, negotiate, and contract through an authorized agent if the agency is disclosed and the agent acts and contracts in the name of the principal (see subpart 3.4, Contingent Fees).

22.608 Procedures.

22.608-1 Offeror's representation.

For each solicitation that may result in a contract subject to the Act, the contracting officer shall obtain a representation from the prospective contractor that it is a manufacturer or regular dealer of the supplies offered (see 22.610(a)).

22.608-2 Determination of eligibility.

(a) The responsibility for applying the eligibility requirements set forth in 22.606 rests in the first instance with the contracting officer.

(b) The contracting officer shall investigate and determine the eligibility of the offeror and not rely on the offeror's representation that it is a manufacturer or regular dealer in the following circumstances:

(1) The contracting officer has knowledge that raises the question of the validity of the representation.

(2) A protest has been lodged pursuant to 22.608-3.

(3) The offeror that is in line for contract award has not previously been awarded a contract subject to the Act by the individual acquisition office.

(4) A preaward investigation or survey of the offeror's operations is otherwise made to determine the technical and production capability, plant facilities and equipment, and subcontracting and labor resources of the offeror.

(c) The Department of Labor does not conduct preaward investigations nor render final determinations of eligibility until the contracting officer initially has determined whether the requirements have been met and any negative determinations involving small businesses have been confirmed by the Small Business Administration.

(d) If the offeror's representation is not accepted, the contracting officer shall make a determination as to whether all of the applicable eligibility requirements have been met by obtaining and considering all available factual evidence including—

(1) Preaward surveys;

(2) Experience of other acquisition offices;

(3) Information available from the cognizant contract administration office;

(4) Information provided directly by the offeror; and

(5) Such other factual evidence that may be necessary to determine whether all of the applicable eligibility requirements have been met, including evidence obtained through an on site survey conducted specifically for that purpose.

(e) The contracting officer shall reject (1) offers from all offerors whose representation indicates that they are not manufacturers or regular dealers of the supplies offered and (2) offers that qualify or place a reservation on the representation and stipulations to avoid full compliance with the Act.

(f)(1) If the contracting officer determines that an apparently successful offeror that is not a small business concern is ineligible, the following procedures shall apply:

(i) The offeror shall be notified in writing that—

(A) It does not meet the eligibility requirements and the specific reasons therefore; and

(B) It may protest the determination by submitting evidence concerning its eligibility to the contracting officer within 10 working days.

(ii) If, after review of the offeror's evidence, the contracting officer's position has not changed, the offeror's protest and all pertinent material shall be forwarded, in accordance with agency procedures, to the DOL, Administrator of the Wage and Hour Division, for a final determination.

(2) If the offeror is a small business concern, the notification and protest procedures in subparagraph (1) above shall be followed except that any determination of ineligibility, whether or not the offeror protests the determination, shall be forwarded to the SBA Regional Office serving the geographical area in which the principal office of the small business concern is located, and the offeror so notified in writing. The SBA shall review the determination and—

(i) If it disagrees with the contracting officer's determination, reverse the determination and forward to the contracting officer a certification of the offeror's eligibility; or

(ii) If it agrees with the contracting officer's determination, forward the case to the DOL, Administrator of the Wage and Hour Division, for final determination.

(3) If the contracting officer forwards the case to DOL or SBA for review of eligibility, the award should normally be held in abeyance until the contracting officer receives a final determination from the DOL or a certificate of eligibility from the SBA. However, see 22.608-4 for circumstances that permit award pending final determination.

(4) The contracting officer shall notify other offerors whose offers might become eligible for award when an award is being held in abeyance, and request them to extend their acceptance period, if necessary.

[48 FR 42258, Sept. 19, 1983, as amended at 54 FR 5056, Jan. 31, 1989; 54 FR 29281, July 11, 1989; 55 FR 3883, Feb. 5, 1990]

22.608-3 Protests against eligibility.

(a) When, before award (see 22.608-6 for post-award protests), another offeror challenges the eligibility of the apparently successful offeror, the contracting officer shall—

(1) Promptly notify the apparently successful offeror of the protest;

(2) Notify both the protester and the apparently successful offeror in writing that evidence concerning the matter may be submitted to the contracting officer within 10 working days;

(3) Notify offerors whose offers might become eligible for award that the award is to be held up because of a protest, and request them to extend their acceptance period, if necessary;

(4) Make a determination based on the evidence as provided in 22.608-2(b); and

(5) Notify the protester and the apparently successful offeror of the determination and the procedure to be followed if either party disagrees with the decision.

(b) If either party disagrees with the determination, the contracting officer, in accordance with agency procedures, shall forward the determination and entire record as follows and notify the parties accordingly;

(1) If the offeror is not a small business concern, to the DOL, Administrator of the Wage and Hour Division, for a final determination; or

(2) If the offeror is a small business concern, and the contracting officer has determined the offeror ineligible, to the SBA Regional Office serving the geographical area in which the principal office of the small business concern is located; or

(3) If the offeror is a small business concern, and the contracting officer has determined the offeror to be eligible, to the DOL, Administrator of the Wage and Hour Division, without referring the matter to the SBA.

[48 FR 42258, Sept. 19, 1983, as amended at 54 FR 5056, Jan. 31, 1989; 54 FR 29281, July 11, 1989; 55 FR 3883, Feb. 5, 1990]

22.608-4 Award pending final determination.

(a)(1) If a small business offeror's eligibility case is forwarded to SBA for review under 22.608-2 or 22.608-3, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determinations of Eligibility. The contracting officer may not make award until (i) receipt of a Determination of Eligibility from SBA or (ii) receipt of notification from SBA that the case has been forwarded to DOL (but see paragraph (b) of this subsection), whichever is earlier.

(2) If there is exigency for award at the time the case is to be forwarded to SBA, the contracting officer may send with the case a brief statement of urgency and a request for earliest processing and determination.

(b)(1) If the contracting officer or the SBA has forwarded an offeror's eligibility case for review to the DOL under 22.608-2 or 22.608-3, award shall be held in abeyance until the contracting officer receives a final determination from the DOL, except that award may be made immediately if the contracting officer certifies in writing, and the certification is approved as required by agency regulation, that—

(i) The items to be acquired are urgently required; or

(ii) Delay of delivery or performance by failure to make the award promptly will result in substantial hardship to the Government.

(2) When award is made, the contracting officer shall document the contract file to explain the need for making the award before a determination of the offeror's eligibility by the DOL and give prompt written notice of the decision to award to the DOL and, as appropriate, the protester, the SBA, and other concerned parties.

[54 FR 5056, Jan. 31, 1989]

22.608-5 Award.

When a contract subject to the Act is awarded, the contracting officer, in accordance with regulations or instructions issued by the Secretary of Labor and individual agency procedures, shall furnish to the contractor DOL Publication WH-1313, Notice to Employees Working on Government Contracts.

[53 FR 27464, July 20, 1988]

22.608-6 Postaward.

(a) *Protests*. (1) If a protest is received after award, but before final contract completion, the contracting officer shall follow the procedures in 22.608-3.

(2) If the contract has been completed before receipt of the protest, the contracting officer shall notify the protester that no action will be taken on the protest.

(b) *Award made to ineligible offeror*. If the contracting officer discovers after an award that the offeror did not act in good faith in representing that it was a manufacturer or regular dealer of the supplies offered, the contracting officer, immediately upon discovery, may exercise the right, in accordance with 41 CFR 50-201.101(a)(3)(i)(B) to—

(1) Terminate the contract;

(2) Make open market purchases or enter into other contracts for completing the original contract; and

(3) Charge any additional cost to the original contractor.

(c) *Breach of stipulation*. In the event of a violation of a stipulation required under the Act, the contracting officer shall, in accordance with agency procedures, notify the appropriate regional office of the DOL, Wage and Hour Division (see 22.609), and furnish any information available.

22.609 Regional jurisdictions of the Department of Labor, Wage and Hour Division.

Geographic jurisdictions of the following regional offices of the DOL, Wage and Hour Division, are shown here, and are to be contacted by contracting officers in all situations required by this subpart, unless otherwise specified:

(a) The Region I office located in Boston, Massachusetts, has jurisdiction for Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.

(b) The Region II office located in New York, New York, has jurisdiction for New York, New Jersey, Puerto Rico, and the Virgin Islands.

(c) The Region III office located in Philadelphia, Pennsylvania, has jurisdiction for Pennsylvania, Maryland, Delaware, Virginia, West Virginia, and the District of Columbia.

(d) The Region IV office located in Atlanta, Georgia, has jurisdiction for North Carolina, South Carolina, Kentucky, Tennessee, Mississippi, Alabama, Georgia, and Florida.

(e) The Region V office located in Chicago, Illinois, has jurisdiction for Ohio, Indiana, Michigan, Illinois, Wisconsin, and Minnesota.

(f) The Region VI office located in Dallas, Texas, has jurisdiction for Louisiana, Arkansas, Oklahoma, Texas, and New Mexico.

(g) The Region VII office located in Kansas City, Missouri, has jurisdiction for Missouri, Iowa, Nebraska, and Kansas.

(h) The Region VIII office located in Denver, Colorado, has jurisdiction for North Dakota, South Dakota, Montana, Wyoming, Colorado, and Utah.

(i) The Region IX office located in San Francisco, California, has jurisdiction for Arizona, California, Nevada, Hawaii, and Guam.

(j) The Region X office located in Seattle, Washington, has jurisdiction for Washington, Oregon, Idaho, and Alaska.

[48 FR 42258, Sept. 19, 1983 as amended at 51 FR 2665, Jan. 17, 1986]

22.610 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.222-19, Walsh-Healey Public Contracts Act Representation, in solicitations that will result in contracts covered by the Act (see 22.603, 22.604 and 22.605).

(b) The contracting officer shall insert the clause at 52.222-20, Walsh-Healey Public Contracts Act, in solicitations and contracts covered by the Act (see 22.603, 22.604, and 22.605).

Subpart 22.7—[Reserved]

Subpart 22.8—Equal Employment Opportunity

22.800 Scope of subpart.

This subpart prescribes policies and procedures pertaining to nondiscrimination in employment by Government contractors and subcontractors.

22.801 Definitions.

Affirmative action program, as used in this subpart, means a contractor's program that complies with Department of Labor regulations to assure equal opportunity in employment to minorities and women.

Construction work, as used in this subpart, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

Contracting agency, as used in this subpart, means any department, agency, establishment, or instrumentality in the Executive Branch of the Government, including any wholly owned Government corporation that enters into contracts.

Contractor, as used in this subpart, includes the terms *prime contractor* and *subcontractor*.

Director, as used in this subpart means the Director, Office of Federal Contract Compliance Programs (OFCCP), United States Department of Labor.

Equal Opportunity clause, as used in this subpart, means the clause at 52.222-26, Equal Opportunity, prescribed in 22.810(e).

EO 11246, as used in this subpart means Parts II and IV of Executive Order 11246, September 24, 1965 (30 FR 12319), and any Executive Order amending or superseding this Order (see 22.802). This term specifically includes the Equal Opportunity clause at 52.222-26, and the rules, regulations, and orders issued pursuant to EO 11246 by the Secretary of Labor or a designee.

Government contract, as used in this subpart, means any agreement or modification thereof between a Government contracting agency and any person for the furnishing of supplies or services, or for the use of real or personal property including lease arrangements. The term does not include (a) agreements in which the parties stand in the relationship of employer and employee and (b) contracts for the sale of real and personal property by the Government.

Prime contractor, as used in this subpart, means any person who holds, or has held, a Government contract subject to EO 11246.

Recruiting and training agency, as used in this subpart, means any person who refers workers to any contractor or subcontractor or provides or supervises apprenticeship or training for employment by any contractor or subcontractor.

Site of construction, as used in this subpart, means the general physical location of any building, highway, or other change or improvement to real property that is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair, and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to a Government contract or subcontract.

Subcontract, as used in this subpart, means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee) (a) for the furnishing of supplies or services or for use of real or personal property, including lease arrangements, that, in whole or in part, is necessary to the performance of any one or more Government contracts or (b) under which any portion of the contractor's obligation under any one or more Government contracts is performed, undertaken, or assumed.

Subcontractor, as used in this subpart, means any person who holds, or has held, a subcontract subject to EO 11246. The term *first-tier subcontractor* means a subcontractor holding a subcontract with a prime contractor.

United States, as used in this subpart, means the States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and the possessions of the United States.

22.802 General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all Government contracting agencies (1) include this clause in all nonexempt Government prime contracts and subcontracts (see 22.807), and (2) act to ensure compliance with the clause and the regulations of the Secretary of Labor to promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, or national origin.

(b) No contract or modification involving new acquisition shall be entered into, and no subcontract shall be approved by a contracting officer, with a person who has been found ineligible by the Director for reasons of noncompliance with the requirements of EO 11246.

(c) No contracting officer or contractor shall contract for supplies or services in a manner so as to avoid applicability of the requirements of EO 11246.

(d) Contractor disputes related to compliance with its obligation shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor (see 41 CFR 60-1.1).

22.803 Responsibilities.

(a) The Secretary of Labor is responsible for the—

(1) Administration and enforcement of prescribed parts of EO 11246; and

(2) Adoption of rules and regulations and the issuance of orders necessary to achieve the purposes of EO 11246.

(b) The Secretary of Labor has delegated authority and assigned responsibility to the Director for carrying out the responsibilities assigned to the Secretary by EO 11246, except for the issuance of rules and regulations of a general nature.

(c) The head of each agency is responsible for ensuring that the requirements of this subpart are carried out within the agency, and for cooperating with and assisting the OFCCP in fulfilling its responsibilities.

(d) In the event the applicability of EO 11246 and implementing regulations is questioned, the contracting officer shall forward the matter through agency channels for resolution.

22.804 Affirmative action programs.

22.804-1 Nonconstruction.

Except as provided in 22.807, each nonconstruction prime contractor and each subcontractor with 50 or more employees and (a) a contract or subcontract of $50,000 or more or (b) Government bills of lading that in any 12-month period, total, or can reasonably be expected to total, $50,000 or more, is required to develop a written affirmative action program for each of its establishments within 120 days from the commencement of its first such Government contract, subcontract, or Government bill of lading.

22.804-2 Construction.

(a) Construction contractors that hold a nonexempt (see 22.807) Government construction contract are required to meet (1) the contract terms and conditions citing affirmative action requirements applicable to covered geographical areas or projects and (2) applicable requirements of 41 CFR 60-1 and 60-4.

(b) Each contracting agency shall maintain a listing of covered geographical areas that are subject to affirmative action requirements that specify goals for minorities and women in covered construction trades. Information concerning, and additions to, this listing will be provided to the principally affected contracting officers in accordance with agency procedures. Any contracting officer contemplating a construction project in excess of $10,000 within a geographic area not known to be covered by specific affirmative action goals shall request instructions on the most current information from the OFCCP regional office, or as otherwise specified in agency regulations, before issuing the solicitation.

(c) Contracting officers shall give written notice to the OFCCP regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. The notification shall include the name, address, and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed. When requested by the OFCCP regional office, the contracting officer shall arrange a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

22.805 Procedures.

(a) *Preaward clearances for contracts and subcontracts of $1 million or more (excluding construction).* (1) Except as provided in 22.805(a)(7) below, if the estimated amount of the contract, subcontract, or basic ordering agreement is expected to aggregate $1 million or more or to increase the aggregate value of an existing contract to $1 million or more, the contracting officer shall request the appropriate OFCCP regional office to determine whether a contractor is awardable before (i) award of any contract, including any indefinite delivery contract or letter contract, (ii) modification of an existing contract for new effort that would constitute a contract award, or the (iii) issuance of any basic ordering agreement.

(2) Preaward clearance for each proposed contract and for each proposed first-tier subcontract of $1 million or more shall be requested by the contracting officer directly from the OFCCP regional office(s). Verbal requests shall be confirmed in writing.

(3) When the contract work is to be performed outside the United States with employees recruited within the United States, the contracting officer shall send the request for a preaward review to the OFCCP regional office serving the area where the proposed contractor's corporate home or branch office is located in the United States, or the corporate location where personnel recruiting is handled, if different from the contractor's corporate home or branch office. If the proposed contractor has no corporate office or location within the United States, the preaward review request action should be based on the location of the recruiting and training agency in the United States.

(4) The contracting officer shall include the following information in the preaward review request:

(i) Name, address, and telephone number of the prospective contractor and of any corporate affiliate at which work is to be performed.

(ii) Name, address, and telephone number of each proposed first-tier subcontractor with a proposed subcontract estimated at $1 million or more.

(iii) Anticipated date of award.

(iv) Information as to whether the contractor and first-tier subcontractors have previously held any Government contracts or subcontracts.

(v) Place or places of contract performance and first-tier subcontracts estimated at $1 million or more, if known.

(vi) The estimated dollar amount of the contract and each first-tier subcontract, if known.

(5) The contracting officer shall allow as much time as feasible before award for the conduct of necessary reviews by OFCCP. As soon as the apparently successful contractor can be determined, the contracting officer shall process a preaward review request in accordance with agency procedures, assuring, if possible, that the preaward review request is submitted

to the OFCCP regional office at least 30 calendar days before the proposed award date.

(6) In the event the Director has not made a final preaward clearance determination within 30 calendar days from submission of the clearance request, the contracting officer shall withhold award of the contract for an additional 15 calendar days, or until clearance is received, whichever occurs first. If the additional 15 calendar days expire, and the Director has not either found the contractor to be in compliance or made a final written determination declaring the contractor ineligible for reasons of noncompliance, the award may be made to the contractor in question. The contracting officer shall notify the OFCCP regional office of the award.

(7) If the procedures specified in (5) and (6) above would delay award of an urgent and critical contract beyond the time necessary to make award or beyond the time specified in the offer or extension thereof, the contracting officer shall immediately inform the OFCCP regional office of the expiration date of the offer or the required date of award and request clearance be provided before that date. If the OFCCP regional office advises that a preaward review cannot be completed by the required date, the contracting officer shall submit written justification for the award to the head of the contracting activity, who, after informing the OFCCP regional office, may then approve the award without the preaward clearance. If an award is made under this authority, the contracting officer shall immediately request a postaward review from the OFCCP regional office.

(8) If, under the provisions of (7) above, a postaward review determines the contractor to be nonawardable, the Director, may authorize the use of the enforcement procedures at 22.809 against the noncomplying contractor.

(b) *Furnishing posters.* The contracting officer shall furnish to the contractor appropriate quantities of the poster entitled *Equal Opportunity Is The Law.* These shall be obtained in accordance with agency procedures.

22.806 Inquiries.

(a) An inquiry from a contractor regarding status of its compliance with EO 11246, or rights of appeal to any of the actions in 22.809 shall be referred to the OFCCP regional office.

(b) Labor union inquiries regarding the revision of a collective bargaining agreement in order to comply with EO 11246, shall be referred to the Director.

22.807 Exemptions.

(a) Under the following exemptions, all or part of the requirements of EO 11246 may be excluded from a contract subject to EO 11246:

(1) *National security.* The agency head may determine that a contract is essential to the national security and that the award of the contract without complying with one or more of the requirements of this subpart is necessary to the national security. Upon making such a determination, the agency shall notify the Director in writing within 30 days.

(2) *Specific contracts.* The Director may exempt a contracting agency from requiring the inclusion of one or more of the requirements of EO 11246 in any contract if the Director deems that special circumstances in the national interest so require. Groups or categories of contracts of the same type may also be exempted if the Director finds it impracticable to act upon each request individually or if group exemptions will contribute to convenience in the administration of EO 11246.

(b) The following exemptions apply even though a contract or subcontract contains the Equal Opportunity clause:

(1) *Transactions of $10,000 or less.* The Equal Opportunity clause is required to be included in prime contracts and subcontracts by 22.802(a). Individual prime contracts or subcontracts of $10,000 or less are exempt from application of the Equal Opportunity clause, unless the aggregate value of all prime contracts or subcontracts awarded to a contractor or subcontractor in any 12-month period exceeds, or can reasonably be expected to exceed, $10,000. (Note: Government

bills of lading, regardless of amount, are not exempt.)

(2) *Work outside the United States.* Contracts are exempt from the requirements of EO 11246 for work performed outside the United States by employees who were not recruited within the United States.

(3) *Contracts with State or local governments.* The requirements of EO 11246 in any contract with a State or local government (or any agency, instrumentality, or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government that does not participate in work on or under the contract.

(4) *Work on or near Indian reservations.* It shall not be a violation of EO 11246 for a contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. This applies to that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such preference shall not excuse a contractor from complying with EO 11246, rules and regulations of the Secretary of Labor, and applicable clauses in the contract.

(5) *Facilities not connected with contracts.* The Director may exempt from the requirements of EO 11246 any of a contractor's facilities that the Director finds to be in all respects separate and distinct from activities of the contractor related to performing the contract; *provided*, that the Director also finds that the exemption will not interfere with, or impede the effectiveness of, EO 11246.

(6) *Indefinite quantity contracts.* With respect to indefinite quantity contracts and subcontracts, the Equal Opportunity clause applies unless the contracting officer has reason to believe that the amount to be ordered in any year under the contract will not exceed $10,000. The applicability of the Equal Opportunity clause shall be determined by the contracting officer at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the Equal Opportunity clause shall be applied to the contract whenever the amount of a single order exceeds $10,000. Once the Equal Opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration regardless of the amounts ordered, or reasonably expected to be ordered, in any year.

(c) To request an exemption under subparagraphs (a)(1), (a)(2), or (b)(5), the contracting officer shall submit, under agency procedure, a detailed justification for omitting all, or part of, the requirements of EO 11246. Requests for exemptions under subparagraphs (a)(2) or (b)(5) above shall be submitted to the Director for approval.

(d) The Director may withdraw the exemption for a specific contract, or group of contracts, if the Director deems that such action is necessary and appropriate to achieve the purposes of EO 11246. Such withdrawal shall not apply—

(1) To contracts awarded before the withdrawal; or

(2) To any sealed bid contract (including restricted sealed bidding), unless the withdrawal is made more than 10 calendar days before the bid opening date.

[48 FR 42258, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987]

22.808 Complaints.

Complaints received by the contracting officer alleging violation of the requirements of EO 11246 shall be referred immediately to the OFCCP regional office. The complainant shall be advised in writing of the referral. The contractor that is the subject of a complaint shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

22.809 Enforcement.

Upon the written direction of the Director, one or more of the following actions, as well as administrative sanctions and penalties, may be exercised against contractors found to be in violation of EO 11246, the regulations of the Secretary of Labor, or the applicable contract clauses:

(a) Publication of the names of the contractor or their unions.

(b) Cancellation, termination, or suspension of the contractor's contracts or portion thereof.

(c) Debarment from future Government contracts, or extensions or modifications of existing contracts, until the contractor has established and carried out personnel and employment policies in compliance with EO 11246 and the regulations of the Secretary of Labor.

(d) Referral by the Director of any matter arising under EO 11246 to the Department of Justice or to the Equal Employment Opportunity Commission (EEOC) for the institution of appropriate civil or criminal proceedings.

22.810 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the following provisions in solicitations when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity:

(1) 52.222-21, Certification of Nonsegregated Facilities, if the amount of the contract is expected to exceed $10,000.

(2) 52.222-22, Previous Contracts and Compliance Reports.

(b) The contracting officer shall insert the provision at 52.222-23, Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity, in solicitations for construction when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be in excess of $10,000.

(c) The contracting officer shall insert the provision at 52.222-24, Preaward On-Site Equal Opportunity Compliance Review, in solicitations, other than those for construction, when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be for $1 million or more.

(d) The contracting officer shall insert the provision at 52.222-25, Affirmative Action Compliance, in solicitations, other than those for construction, when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity.

(e) The contracting officer shall insert the clause at 52.222-26, Equal Opportunity, in solicitations and contracts (see 22.802) unless all the terms of the clause are exempt from the requirements of EO 11246 (see 22.807(a)). If one or more, but not all, of the terms of the clause are exempt from the requirements of EO 11246, the contracting officer shall use the basic clause with its Alternate I.

(f) The contracting officer shall insert the clause at 52.222-27, Affirmative Action Compliance Requirements for Construction, in solicitations and contracts for construction that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be in excess of $10,000.

(g) The contracting officer shall insert the clause at 52.222-28, Equal Opportunity Preaward Clearance of Subcontracts, in solicitations and contracts, except for construction, when the amount of the contract is expected to be for $1 million or more and the contract includes the clause prescribed in paragraph (a), (b), or (c) of 44.204.

(h) The contracting officer shall insert the clause at 52.222-29, Notification of Visa Denial, in contracts that will include the clause at 52.222-26, Equal Opportunity, if the contractor is required to perform in or on behalf of a foreign country.

[48 FR 42258, Sept. 19, 1983, as amended at 50 FR 23606, June 4, 1985; 52 FR 19803, May 27, 1987]

Subpart 22.9—Nondiscrimination Because of Age

22.901 Policy.

Executive Order 11141, February 12, 1964 (29 FR 2477), states that the Government policy is as follows:

(a) Contractors and subcontractors shall not, in connection with employment, advancement, or discharge of employees, or the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement.

(b) Contractors and subcontractors, or persons acting on their behalf, shall not specify in solicitations or advertisements for employees to work on Government contracts, a maximum age limit for employment unless the specified maximum age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement.

(c) Agencies will bring this policy to the attention of contractors. The use of contract clauses is not required.

22.902 Handling complaints.

Agencies shall bring complaints regarding a contractor's compliance with this policy to that contractor's attention (in writing, if appropriate), stating the policy, indicating that the contractor's compliance has been questioned, and requesting that the contractor take any appropriate steps that may be necessary to comply.

Subpart 22.10—Service Contract Act of 1965, as Amended

SOURCE: 54 FR 19816, May 8, 1989, unless otherwise noted.

22.1000 Scope of subpart.

This subpart prescribes policies and procedures implementing the provisions of the Service Contract Act of 1965, as amended (41 U.S.C. 351, *et seq.*), the applicable provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, *et seq.*), and related Secretary of Labor regulations and instructions (29 CFR parts 4, 6, 8, and 1925).

22.1001 Definitions.

Act or *Service Contract Act*, as used in this subpart, means the Service Contract Act of 1965, as amended.

Agency labor advisor means an individual responsible for advising contracting agency officials on Federal contract labor matters.

Contractor, as used in this subpart, includes a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

Multiple year contracts, as used in this subpart, means contracts having a term of more than 1 year regardless of fiscal year funding. The term includes multi-year contracts with a term of more than 1 year (see 17.101).

Notice, as used in this subpart, means Standard Form (SF) 98, *Notice of Intention to Make a Service Contract and Response to Notice*, and SF 98a *Attachment A*. The term *Notice* is always capitalized in this subpart when it means Standard Forms 98 and 98a.

Service contract, as used in this subpart, means any Government contract, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted under section 7 of the Act (41 U.S.C. 356; see 22.1003-3 and 22.1003-4), or any subcontract at any tier thereunder. See 22.1003-5 and 29 CFR 4.130 for a partial list of services covered by the Act.

Service employee means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations. The term *service employee* includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

United States, as used in this subpart, includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331, *et seq.*), American Samoa, Guam, Northern Mariana Islands, Wake Island, and Johnston Island but does not include any other territory under U.S. jurisdiction or any U.S. base or possession within a foreign country.

Wage and Hour Division means the unit in the Employment Standards Administration of the Department of Labor to which is assigned functions of the Secretary of Labor under the Act.

Wage determination means a determination of minimum wages or fringe benefits made under sections 2(a) or 4(c) of the Act (41 U.S.C. 351(a) or 353(c)) applicable to the employment in a given locality of one or more classes of service employees.

22.1002 Statutory requirements.

22.1002-1 General.

Service contracts over $2,500 shall contain mandatory provisions regarding minimum wages and fringe benefits, safe and sanitary working conditions, notification to employees of the minimum allowable compensation, and equivalent Federal employee classifications and wage rates. Under 41 U.S.C. 353(d), service contracts may not exceed 5 years.

22.1002-2 Wage determinations based on prevailing rates.

Contractors performing on service contracts in excess of $2,500 to which no predecessor contractor's collective bargaining agreement applies shall pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act.

22.1002-3 Wage determinations based on collective bargaining agreements.

(a) Successor contractors performing on contracts in excess of $2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract. This requirement will not apply if the Secretary of Labor determines as a result of a hearing that the wages and fringe benefits are substantially at variance with those which prevail for services of a similar character in the locality or that they have not been reached as a result of arm's length negotiations.

(b) Paragraphs in this subpart 22.10 which deal with this statutory requirement and the Department of Labor's implementing regulations are 22.1008-3, concerning applicability of this requirement and the forwarding of a collective bargaining agreement with a Notice (SF 98, 98a); 22.1010, concerning notification to contractors and bargaining representatives of procurement dates; 22.1012-3, explaining when a collective bargaining agreement will not apply due to late receipt by the contracting officer; and 22.1013 and 22.1021, explaining when the application of a collective bargaining agreement can be challenged due to a variance with prevailing rates or lack of arm's length bargaining.

22.1002-4 Application of the Fair Labor Standards Act minimum wage.

No contractor or subcontractor holding a service contract for any dollar amount shall pay any of its employees working on the contract less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206).

22.1003 Applicability.

22.1003-1 General.

This subpart 22.10 applies to all Government contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted in 22.1003-3 and 22.1003-4 of this section, or any subcontract at any tier thereunder. This subpart does not apply to individual contract requirements for services in contracts not having as their principal purpose the furnishing of services. The nomenclature, type, or particular form of contract used by contracting agencies is not determinative of coverage.

22.1003-2 Geographical coverage of the Act.

The Act applies to service contracts performed in the United States (see 22.1001). The Act does not apply to contracts performed outside the United States.

22.1003-3 Statutory exemptions.

The Act does not apply to—

(a) Any contract for construction, alteration, or repair of public buildings or public works, including painting and decorating;

(b) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (41 U.S.C. 35-45);

(c) Any contract for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect;

(d) Any contract for furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934;

(e) Any contract for public utility services;

(f) Any employment contract providing for direct services to a Federal agency by an individual or individuals; or

(g) Any contract for operating postal contract stations for the U.S. Postal Service.

22.1003-4 Administrative limitations, variations, tolerances, and exemptions.

(a) The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of the Act other than section 10 (41 U.S.C. 358). These will be made only in special circumstances where it has been determined that the limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purpose of the Act to protect prevailing labor standards (41 U.S.C. 353(b)). See 29 CFR 4.123 for a listing of administrative exemptions, tolerances, and variations. Requests for limitations, variances, tolerances, and exemptions from the Act shall be submitted in writing through contracting channels and the agency labor advisor to the Wage and Hour Administrator.

(b) In addition to the statutory exemptions cited in 22.1003-3 of this subsection, the Secretary of Labor has exempted the following types of contracts from all provisions of the Act:

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom.

(2) Any contract entered into by the U.S. Postal Service with an individual owner-operator for mail service if it is not contemplated at the time the contract is made that the owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness, or accident.

(3) Contracts for the carriage of freight or personnel if such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act.

(4) Contracts as follows:

(i) Contracts principally for the maintenance, calibration, or repair of the following types of equipment are exempt, subject to the restrictions in subdivisions (b)(4)(ii), (b)(4)(iii), and (b)(4)(iv) of this subsection.

(A) Automated data processing equipment and office information/word processing systems.

(B) Scientific equipment and medical apparatus or equipment if the application of micro-electronic circuitry or other technology of at least similar sophistication is an essential element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, *Medical Diagnostic Equipment;* Class 6525, *X-Ray Equipment;* FSC Group 66, Class 6630, *Chemical Analysis Instruments;* and Class 6665, *Geographical and Astronomical Instruments,* are largely composed of the types of equipment exempted hereunder).

(C) Office/business machines not otherwise exempt pursuant to subdivision (b)(4)(i)(A) of this subsection, if such services are performed by the manufacturer or supplier of the equipment.

(ii) The exemption set forth in this subparagraph (b)(4) of this subsection shall apply only under the following circumstances:

(A) The items of equipment are commercial items which are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

(B) The contract services are furnished at prices which are, or are based on, established catalog or market prices (see 29 CFR 4.123(e)(1)(ii)(B)) for the maintenance, calibration, or repair of such commercial items.

(C) The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for equivalent employees servicing the same equipment of commercial customers.

(D) The contractor certifies in the contract to the provisions in subdivision (b)(4)(ii) of this subsection. (See 22.1006(e).)

(iii)(A) Determinations of the applicability of this exemption shall be made in the first instance by the contracting officer before contract award. In determining that the exemption applies, the contracting officer shall consider all factors and make an affirmative determination that all of the above conditions have been met.

(B) If any potential offerors would not qualify for the exemption, the contracting officer shall incorporate in the solicitation the Service Contract Act clause (see 22.1005 and 22.1006(a)) and, if the contract will exceed $2,500, the appropriate Department of Labor wage determination (see 22.1007).

(iv) If the Department of Labor determines after contract award that any of the requirements for exemption in subparagraph (b)(4) of this subsection have not been met, the exemption will be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Department of Labor determination.

22.1003-5 Some examples of contracts covered.

The following examples, while not definitive or exclusive, illustrate some of the types of services that have been found to be covered by the Act (see 29 CFR 4.130 for additional examples):

(a) Motor pool operation, parking, taxicab, and ambulance services.

(b) Packing, crating, and storage.

(c) Custodial, janitorial, housekeeping, and guard services.

(d) Food service and lodging.

(e) Laundry, dry-cleaning, linen-supply, and clothing alteration and repair services.

(f) Snow, trash, and garbage removal.

(g) Aerial spraying and aerial reconnaissance for fire detection.

(h) Some support services at installations, including grounds maintenance and landscaping.

(i) Certain specialized services requiring specific skills, such as drafting, illustrating, graphic arts, stenographic reporting, or mortuary services.

(j) Electronic equipment maintenance and operation and engineering support services.

(k) Maintenance and repair of all types of equipment, for example, aircraft, engines, electrical motors, vehicles, and electronic, telecommunication, office and related business and construction equipment. (But see 22.1003-4(b)(4).)

(l) Operation, maintenance, or logistics support of a Federal facility.

(m) Data collection, processing and analysis services.

22.1003-6 Repair distinguished from remanufacturing of equipment.

(a) Contracts principally for remanufacturing of equipment which is so extensive as to be equivalent to manufacturing are subject to the Walsh-Healey Public Contracts Act, rather than to the Service Contract Act. Remanufacturing shall be deemed to be manufacturing when the criteria in either subparagraphs (a)(1) or (a)(2) of this subsection are met.

(1) Major overhaul of an item, piece of equipment, or materiel which is degraded or inoperable, and under which all of the following conditions exist:

(i) The item or equipment is required to be completely or substantially torn down into individual component parts.

(ii) Substantially all of the parts are reworked, rehabilitated, altered and/or replaced.

(iii) The parts are reassembled so as to furnish a totally rebuilt item or piece of equipment.

(iv) Manufacturing processes similar to those which were used in the manufacturing of the item or piece of equipment are utilized.

(v) The disassembled components, if usable (except for situations where the number of items or pieces of equipment involved are too few to make it practicable) are commingled with existing inventory and, as such, lose their identification with respect to a particular piece of equipment.

(vi) The items or equipment overhauled are restored to original life expectancy, or nearly so.

(vii) Such work is performed in a facility owned or operated by the contractor.

(2) Major modification of an item, piece of equipment, or material which is wholly or partially obsolete, and under which all of the following conditions exist:

(i) The item or equipment is required to be completely or substantially torn down.

(ii) Outmoded parts are replaced.

(iii) The item or equipment is rebuilt or reassembled.

(iv) The contract work results in the furnishing of a substantially modified item in a usable and serviceable condition.

(v) The work is performed in a facility owned or operated by the contractor.

(b) Remanufacturing does not include the repair of damaged or broken equipment which does not require a complete teardown, overhaul, and rebuild as described in subparagraphs (a)(1) and (a)(2) of this subsection, or the periodic and routine maintenance, preservation, care, adjustment, upkeep, or servicing of equipment to keep it in usable, serviceable, working order. Such contracts typically are billed on an hourly rate (labor plus materials and parts) basis. Any contract principally for this type of work is subject to the Service Contract Act. Examples of such work include the following:

(1) Repair of an automobile, truck, or other vehicle, construction equipment, tractor, crane, aerospace, air conditioning and refrigeration equipment, electric motors, and ground powered industrial or vehicular equipment.

(2) Repair of typewriters and other office equipment (but see 22.1003-4(b)(4)).

(3) Repair of appliances, radios, television sets, calculators, and other electronic equipment.

(4) Inspecting, testing, calibration, painting, packaging, lubrication, tune-up, or replacement of internal parts of equipment listed in subparagraphs (b)(1), (b)(2), and (b)(3) of this subsection.

(5) Reupholstering, reconditioning, repair, and refinishing of furniture.

22.1003-7 Questions concerning applicability of the Act.

If the contracting officer questions the applicability of the Act to an acquisition, the contracting officer shall request the advice of the agency labor advisor. Unresolved questions shall be submitted in a timely manner to the Administrator, Wage and Hour Division, for determination.

22.1004 Department of Labor responsibilities and regulations.

Under the Act, the Secretary of Labor is authorized and directed to enforce the provisions of the Act, make rules and regulations, issue orders, hold hearings, make decisions, and take other appropriate action. The Department of Labor has issued implementing regulations on such matters as—

(a) Service contract labor standards provisions and procedures (29 CFR part 4, subpart A);

(b) Wage determination procedures (29 CFR part 4, subpart B);

(c) Application of the Act (rulings and interpretations) (29 CFR part 4, subpart C);

(d) Compensation standards (29 CFR part 4, subpart D);

(e) Enforcement (29 CFR part 4, subpart E);

(f) Safe and sanitary working conditions (29 CFR part 1925);

(g) Rules of practice for administrative proceedings enforcing service contract labor standards (29 CFR part 6); and

(h) Practice before the Board of Service Contract Appeals (29 CFR part 8).

22.1005 Clause for contracts of $2,500 or less.

The contracting officer shall insert the clause at 52.222-40, Service Contract Act of 1965, as amended—Contracts of $2,500 or Less, in solicitations and contracts if the contract is subject to the Act and is (a) for $2,500 or less or (b) for an indefinite dollar amount and the contracting officer knows in advance that the contract amount will not exceed $2,500.

22.1006 Clauses for contracts over $2,500.

(a) The contracting officer shall insert the clause at 52.222-41, Service Contract Act of 1965, as amended, in solicitations and contracts if the contract is subject to the Act and is (1) for over $2,500 or (2) for an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be $2,500 or less.

(b) The contracting officer shall insert the clause at 52.222-42, Statement of Equivalent Rates for Federal Hires, in solicitations and contracts if the contract amount is expected to be over $2,500 and the Act is applicable. (See 22.1016.)

(c)(1) The contracting officer shall insert the clause at 52.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts), or another clause which accomplishes the same purpose, in solicitations and contracts if the contract is expected to be a fixed-price service contract containing the clause at 52.222-41, Service Contract Act of 1965, as amended, and is a multiple year contract or is a contract with options to renew which exceeds the small purchase limitation. The clause may be used in contracts that do not exceed the small purchase limitation. The clause at 52.222-43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts), applies to both contracts subject to area prevailing wage determinations and contracts subject to the incumbent contractor's collective bargaining agreement in effect during this contract's preceding contract period (see 22.1002-2 and 22.1002-3). Contracting officers shall ensure that contract prices or contract unit price labor rates are adjusted only to the extent that a contractor's increases or decreases in applicable wages and fringe benefits are made to comply with the requirements set forth in the clauses at 52.222-43 (subparagraphs (c) (1), (2) and (3)), or 52.222-44 (subparagraphs (b) (1) and (2)). (For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The contractor actually paid $4.10. The new wage determination increases the minimum rate to $4.50. The contractor increases the rate actually paid to $4.75 per hour. The allowable price adjustment is $.40 per hour.)

(2) The contracting officer shall insert the clause at 52.222-44, Fair Labor Standards Act and Service Contract Act—Price Adjustment, in solicitations and contracts if the contract is expected to be a fixed-price service contract containing the clause at 52.222-41, Service Contract Act of 1965, as amended, exceeds the small purchase limitation, and is not a multiple year contract or is not a contract with options to renew. The clause may be used in contracts that do not exceed the small purchase limitation. The clause at 52.222-44, Fair Labor Standards Act and Service Contract Act—Price Adjustment, applies to both contracts subject to area prevailing wage determinations and contracts subject to contractor collective bargaining agreements (see 22.1002-2 and 22.1002-3).

(3) The clauses prescribed in paragraph 22.1006(c)(1) cover situations in which revised minimum wage rates are applied to contracts by operation of law, or by revision of a wage determination in connection with (i) exercise of a contract option or (ii) extension of a multiple year contract into a new program year. If a clause prescribed in 16.203-4(d) is used, it must not conflict with, or duplicate payment under, the clauses prescribed in this paragraph 22.1006(c).

(d) The contracting officer shall insert the clause at 52.222-47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits, if—

(1) The clause at 52.222-41 applies;

(2) The contract resulting from the solicitation succeeds a contract for substantially the same services to be performed in the same locality;

(3) The incumbent contractor has negotiated or is negotiating a collective bargaining agreement with some or all of its service employees; and

(4) All applicable Department of Labor wage determinations have been requested but not received.

(e)(1) The contracting officer shall insert the clause at 52.222-48, Exemption from Application of Service Contract Act Provisions, in any solicitation and resulting contract calling for the maintenance, calibration, and/or repair of ADP, scientific and medical, and office and business equipment if the contracting officer determines that the resultant contract may be exempt from Service Contract Act coverage as described at 22.1003-4(b)(4).

(2) If the successful offeror does not certify that the exemption applies, the contracting officer shall not insert the clause at 52.222-48 and instead shall insert in the contract (i) the applicable Service Contract Act clause(s) and (ii) the appropriate Department of Labor wage determination if the contract exceeds $2,500.

(f) The contracting officer shall insert the clause at 52.222-49, Service Contract Act—Place of Performance Unknown, if using the procedures prescribed in 22.1009-4.

22.1007 Requirement to submit Notice (SF 98/98a).

The contracting officer shall submit Standard Forms 98 and 98a (see 53.301-98 and 53.301-98a), "Notice of Intention to Make a Service Contract and Response to Notice" and "Attachment A" (both forms hereinafter referred to as "Notice"), together with any required supplemental information to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210, for the following service contracts:

(a) Each new solicitation and contract in excess of $2,500.

(b) Each contract modification which brings the contract above $2,500 and—

(1) Extends the existing contract pursuant to an option clause or otherwise; or

(2) Changes the scope of the contract whereby labor requirements are affected significantly.

(c) Each multiple year contract in excess of $2,500 upon—

(1) Annual anniversary date if the contract is subject to annual appropriations; or

(2) Biennial anniversary date if the contract is not subject to annual appropriations and its proposed term exceeds 2 years—unless otherwise advised by the Wage and Hour Division (see 22.1008-5).

22.1008 Procedures for preparing and submitting Notice (SF 98/98a).

22.1008-1 Preparation of Notice (SF 98/98a).

The contracting officer shall complete and submit the Notice in accordance with the instructions on the SF 98 and shall supplement it with information required under this section. Care should be taken to ensure that all required information is provided to avert return without action by the Department of Labor. The contracting officer shall retain a copy of the completed Notice and any required supplementary information until the signed and dated response to the Notice is received from the Department of Labor and placed in the contract file.

22.1008-2 Preparation of SF 98a.

(a) The SF 98a shall contain the following information concerning the service employees expected to be employed by the contractor and any known subcontractors in performing the contract:

(1) All classes of service employees to be utilized.

(i) If a wage determination is to be based on a collective bargaining agreement (CBA) (see 22.1002-3 and 22.1008-3), use the exact title shown in the CBA.

(ii) For other than subdivision (a)(1)(i) of this subsection—

(A) Use the exact title shown in the Wage and Hour Division's *Service Contract Act Directory of Occupations* (see paragraph (b) of this subsection).

(B) Provide an appropriate job title and job description if the Directory cannot be used.

(2) The estimated number of service employees in each class; and

(3) The wage rate that would be paid each class if employed by the agency and subject to the wage provisions of 5 U.S.C. 5341 or 5332 (see 22.1016).

(b)(1) The Wage and Hour Division's *Service Contract Act Directory of Occupations* (Directory) contains standard job titles and definitions (descriptions) for many commonly utilized service employee occupations. Contracting officers shall use this Directory to the maximum extent possible in listing service employee classes on the SF 98a. This usage will enhance the timely issuance of comprehensive wage determinations.

(2) If the job title contained in the Directory differs from that contained in the statement of work but the job definition (description) in the Directory and the statement of work match sufficiently, the contracting officer shall use the Directory job title.

(3) The latest edition of the Directory is available for sale by the Superintendent of Documents and may be ordered by calling (202) 783-3238 or writing to Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. Contracting agencies, in accordance with agency procedures, are responsible for notifying their own personnel of a new edition of the Directory.

22.1008-3 Section 4(c) successorship with incumbent contractor collective bargaining agreement.

(a) Early in the acquisition cycle, the contracting officer shall determine whether section 4(c) of the Act affects the new acquisition. The contracting officer shall determine whether there is a predecessor contract and, if so, whether the incumbent prime contractor or its subcontractors and any of their employees have a collective bargaining agreement.

(b) Section 4(c) of the Act provides that a successor contractor must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) to service employees at least equal to those agreed upon by a predecessor contractor under the following conditions:

(1) The services to be furnished under the proposed contract will be substantially the same as services being furnished by an incumbent contractor whose contract the proposed contract will succeed.

(2) The services will be performed in the same locality.

(3) The incumbent prime contractor or subcontractor is furnishing such services through the use of service employees whose wages and fringe benefits are the subject of one or more collective bargaining agreements.

(c) The application of section 4(c) of the Act is subject to the following limitations:

(1) Section 4(c) of the Act will not apply if the incumbent contractor enters into a collective bargaining agreement for the first time and the agreement does not become effective until after the expiration of the incumbent's contract.

(2) If the incumbent contractor enters into a new or revised collective bargaining agreement during the period of the incumbent's performance on the current contract, the terms of the new or revised agreement shall not be effective for the purposes of section 4(c) of the Act under the following conditions:

(i)(A) In sealed bidding, the contracting agency receives notice of the terms of the collective bargaining agreement less than 10 days before bid opening and finds that there is not reasonable time still available to notify bidders (see 22.1012-3(a)); or

(B) For contractual actions other than sealed bidding, the contracting agency receives notice of the terms of the collective bargaining agreement after award, provided that the start of performance is within 30 days of award (see 22.1012-3(b)); and

(ii) The contracting officer has given both the incumbent contractor and its employees' collective bargaining agent timely written notification of the applicable acquisition dates (see 22.1010).

(d) If section 4(c) of the Act applies, the contracting officer shall obtain a copy of any collective bargaining agreement between an incumbent contractor or subcontractor and its employees. Obtaining a copy of an incumbent contractor's collective bargaining agreement may involve coordination with the administrative contracting officer responsible for administering the predecessor contract. (Paragraph (m) of the clause at 52.222-41, Service Contract Act of 1965, as amended, requires the incumbent prime contractor to furnish the contracting officer a copy of each collective bargaining agreement.) The contracting officer shall submit a copy of each collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under each agreement with the Notice.

(e) Section 4(c) of the Act will not apply if the Secretary of Labor determines after a hearing that the wages and fringe benefits in the predecessor contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a similar character in the locality or are not the result of arm's length bargaining (see 22.1013 and 22.1021).

(f) If the services are being furnished at more than one location and the collectively bargained wage rates and fringe benefits are different at different locations or do not apply to one or more locations, the contracting officer shall identify the locations to which the agreements apply.

(g) If the collective bargaining agreement does not apply to all service employees under the contract, the contracting officer shall separately list on the SF 98a the service employee classifications (1) subject to the collective bargaining agreement and (2) not subject to any collective bargaining agreement.

22.1008-4 Procedures when place of performance is unknown.

See 22.1009.

22.1008-5 Multiple-year contracts.

If the proposed contract is multiple year and is not subject to annual appropriations, the contracting officer shall furnish with the Notice a statement in writing describing the type of funding and giving the length of the performance period. Unless otherwise advised by the wage and hour division that a Notice must be filed on the annual anniversary date, the contracting officer shall submit a new Notice on each biannual anniversary date of the multiple year contract if its term is for a period in excess of 2 years.

22.1008-6 Contract modifications (options, extensions, changes in scope) and anniversary dates.

If the purpose of the Notice is to obtain a wage determination for an exercise of an option, an extension to the contract term, a change in scope (see 22.1007(b)(2)), or the anniversary date of a multiple year contract, the contracting officer shall fill in Box 2 of the SF 98 as follows:

(a) In the *Estimated solicitation date* subbox, indicate, as appropriate, *Mod-Exercise of Option*; *Mod-Extension*; *Mod-Change in Scope*; *Annual Anniversary*; or *Biennial Anniversary*; and

(b) In the *month/day/year* subbox, indicate the date the wage determination is required.

22.1008-7 Required time of submission of Notice.

(a) If the contract action is for a recurring or known requirement, the contracting officer shall submit the Notice not less than 60 days (nor more than 120 days, except with the approval of the Wage and Hour Division) before the earlier of (1) issuance of any invitation for bids, (2) issuance of any request for proposals, (3) commencement of negotiations, (4) issuance of modification for exercise of option, contract extension, or change in scope, (5) annual anniversary date of a contract for more than 1 year subject to annual appropriations, or (6) each biennial anniversary date of a contract for more than 2 years not subject to annual appropriations unless otherwise advised by the Wage and Hour Division (see 22.1008-5).

(b) If the contract action is for a nonrecurring or unknown requirement for which the advance planning described in paragraph (a) of this subsection is not feasible, the contracting officer shall submit the Notice as soon as possible, but not later than 30 days before the contracting actions in paragraph (a) of this subsection. The contracting officer should indicate on the Notice that the requirement is nonrecurring or unknown and advance planning was not feasible.

(c) If exceptional circumstances prevent timely submission, as required by paragraphs (a) and (b) of this subsection, the contracting officer shall submit the Notice and the required supplemental information with a written statement of the reason for delay as soon as practicable.

(d) In an emergency situation requiring an immediate wage determination response, the contracting officer shall, in accordance with contracting agency procedures, contact the Wage and Hour Division by telephone for guidance before submitting the Notice.

22.1009 Place of performance unknown.

22.1009-1 General.

If the place of performance is unknown, the contracting officer may use the procedures in this section. The contracting officer should first attempt to identify the specific places or geographical areas where the services might be performed (see 22.1009-2) and then may follow the procedures either in 22.1009-3 or in 22.1009-4.

22.1009-2 Attempt to identify possible places of performance.

The contracting officer should attempt to identify the specific places or geographical areas where the services might be performed. The following may indicate possible places of performance:

(a) Locations of previous contractors and their competitors.

(b) The solicitation mailing list.

(c) Responses to a presolicitation notice (see 5.204).

22.1009-3 All possible places of performance identified.

(a) If the contracting officer can identify all the possible places or areas of performance (even though the actual place of performance will not be known until the successful offeror is chosen), the contracting officer, as required in 22.1008, shall submit the Notice to the Wage and Hour Division. If the number of places of performance exceeds the space available on the Notice, the contracting officer shall provide a listing by state-county-city/town in an attachment to the Notice.

(b) The Wage and Hour Division may issue a wage determination for each different geographical area of performance identified by the contracting officer, or in unusual situations it may issue a wage determination for one or more composite areas of performance. If there is a substantial number of places or areas of performance indicating the need for a wage determination for one or more composite areas of performance, the contracting officer should, before submitting the Notice, contact the Wage and Hour Division concerning the issuance of such a wage determination.

(c) If the contracting officer subsequently learns of any potential offerors in previously unidentified places before the closing date for submission of offers, the contracting officer shall follow one of the following procedures:

(1) Continue to follow the procedures in this subsection and:

(i) Submit Notices for the additional places of performance to the Wage and Hour Division, and

(ii) Amend the solicitation to include all wage determinations and, if necessary, extend the time for submission of final offers.

(2) Follow the procedures in 22.1009-4.

22.1009-4 All possible places of performance not identified.

If the contracting officer believes that there may be offerors interested in performing in unidentified places or areas, the contracting officer may use the following procedures:

(a) If the contracting officer has identified possible places or areas where services might be performed, the contracting officer shall submit the Notice to the Wage and Hour Division (see 22.1009-3 (a) and (b)).

(b) Include the following information in the Commerce Business Daily Notice (see 5.207(f)(4)):

(1) That the place of performance is unknown.

(2) The possible places or areas of performance for which the contracting officer has requested wage determinations.

(3) That the contracting officer will request wage determinations for additional possible places of performance if asked to do so in writing.

(4) The time and date by which requests for wage determinations for additional places must be received by the contracting officer.

(c) Insert the clause at 52.222-49, Service Contract Act—Place of Performance Unknown, in solicitations and contracts. Include the information required in the clause by subparagraphs (b)(2) and (b)(4) of this subsection. The closing date for receipt of offerors' requests for wage determinations for additional possible places of performance should allow reasonable time for potential offerors to review the solicitation and determine their interest in competing. Generally, 10 to 15 days from the date of issuance of the solicitation may be considered a reasonable period of time.

(d) The procedures in 14.304-1 shall apply to late receipt of offerors' requests for wage determinations for additional places of performance. However, late receipt of an offeror's request for a wage determination for additional places of performance does not preclude the offeror's competing for the proposed acquisition.

(e) If the contracting officer receives any timely requests for wage determinations for additional places of performance the contracting officer shall—

(1) Submit Notices for the additional places of performance to the Wage and Hour Division; and

(2) Amend the solicitation to include all wage determinations and, if necessary, extend the time for submission of final offers.

(f) If the successful offeror did not make a timely request for a wage determination and will perform in a place of performance for which the contracting officer therefore did not request a wage determination, the contracting officer shall—

(1) Award the contract;

(2) Request a wage determination; and

(3) Incorporate the wage determination in the contract, retroactive to the date of contract award and with no adjustment in contract price, pursuant to the clause at 52.222-49, Service Contract—Place of Performance Unknown.

22.1010 Notification to interested parties under collective bargaining agreements.

(a) The contracting officer should determine whether the incumbent prime contractor's or its subcontractors' service employees performing on the current contract are represented by a collective bargaining agent. If there is a collective bargaining agent, the contracting officer shall give both the incumbent contractor and its employees' collective bargaining agent written notification of—

(1) The forthcoming successor contract and the applicable acquisition dates (issuance of solicitation, opening of bids, commencement of negotiations, award of contract, or start of performance, as the case may be); or

(2) The forthcoming contract modification and applicable acquisition dates (exercise of option, extension of contract, change in scope, or start of performance, as the case may be); or

(3) The forthcoming multiple year contract anniversary date (annual anniversary date or biennial date, as the case may be).

(b) This written notification must be given at least 30 days in advance of the earliest applicable acquisition date or the applicable annual or biennial anniversary date in order for the time-of-receipt limitations in 22.1012-3 (a) and (b) to apply. The contracting officer shall retain a copy of the notification in the contract file.

22.1011 Response to Notice by Department of Labor.

22.1011-1 Department of Labor action.

The Wage and Hour Division will mark, date, and sign the section of the SF 98 titled *Response to Notice* and return the signed original together with appropriate additional material (wage determination, position/classification descriptions, etc.). The Wage and Hour Division will take one of the following four actions:

(a) Issue and attach applicable wage determination(s); or

(b) Indicate that no wage determination is in effect for the locality of contract performance; or

(c) Indicate that the Service Contract Act is not applicable based on information submitted; or

(d) Return the Notice for additional information (see 22.1008-1).

22.1011-2 Requests for status or expediting of response.

Checking the status or the expediting of wage determination responses shall be made in accordance with contracting agency procedures.

22.1012 Late receipt or nonreceipt of wage determination.

22.1012-1 General.

The Wage and Hour Administrator, generally, will issue a wage determination or revision to it in response to a Notice. The contracting officer shall incorporate the determination or revision in the particular solicitation and contract for which the wage determination was sought.

22.1012-2 Response to timely submission of Notice—no collective bargaining agreement.

(a) If the contracting officer has not received a response from the Department of Labor within 60 days (or 30 days if a nonrecurring or unknown requirement), the contracting agency shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected.

(b) In sealed bidding, a revision of a wage determination shall not be effective if a collective bargaining agreement does not exist, the revision is received by the contracting agency less than 10 days before the opening of bids, and the contracting officer finds that there is not reasonable time to incorporate the revision in the solicitation.

(c) For contractual actions other than sealed bidding where a collective bargaining agreement does not exist, a revision of a wage determination received by the contracting agency after award of a new contract or a modification as specified in 22.1007(b) shall not be effective provided that the start of performance is within 30 days of the award or the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award or the specified modification, and if contract performance does not commence within 30 days of the award or the specified modification, the Department of Labor shall be notified and any revision received by the contracting agency not less than 10 days before commencement of the work shall be effective.

(d) The limitations in paragraphs (b) and (c) of this subsection shall apply only if a timely Notice required in 22.1008-7 (a) and (b) has been submitted.

22.1012-3 Response to timely submission of Notice—with collective bargaining agreement.

(a) In sealed bidding, a wage determination or revision based on a new or changed collective bargaining agreement shall not be effective if the contracting agency has received notice of the terms of the new or changed collective bargaining agreement less than 10 days before bid opening and the contracting officer determines that there is not reasonable time to incorporate the new or changed terms of the collective bargaining agreement in the solicitation (see 52.222-47).

(b) For contractual actions other than sealed bidding, a wage determination or revision based on a new or changed collective bargaining agreement shall not be effective if notice of the terms of the new or changed collective bargaining agreement is received by the contracting agency after award of a successor contract or a modification as specified in 22.1007(b), provided that the contract start of performance is within 30 days of the award of the contract or of the specified modification. If the contract does not specify a start of performance date which is within 30 days of the award of the contract or of the specified modification, or if contract performance does not commence within 30 days of the award of the contract or of the specified modification, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the work shall be effective for purposes of the successor contract under section 4(c) of the Act.

(c) The limitations in paragraphs (a) and (b) of this subsection shall apply only if timely Notices and notifications required in 22.1008–7 and 22.1010 have been given.

(d) If the contracting officer has not received a response from the Department of Labor within 60 days (or 30 days if a nonrecurring or unknown requirement), the contracting agency shall contact the Wage and Hour Division to determine when the wage determination or revision can be expected. If the Department of Labor is unable to provide the wage determination or revision by the latest date needed to maintain the acquisition schedule, the solicitation/contract action should proceed according to the following instructions:

(1) If a successorship/same locality/incumbent collective bargaining agreement situation exists, the contracting officer shall incorporate in the solicitation the wage and fringe benefit terms of the collective bargaining agreement, or the collective bargaining agreement itself, and the clause at 52.222–47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits.

(2) The terms of a new or changed collective bargaining agreement, negotiated by the predecessor contractor during the period of performance of the predecessor contract, will not apply to the successor contract under the conditions set forth in paragraphs (a), (b), and (c) of this subsection.

22.1012–4 Response to late submissio
Notice—no collective bargaining a
ment.

If the contracting officer has
filed the Notice within the time li
in 22.1008–7, and thus has not rece
a response from the Department
Labor, and a successorship/same lo
ity/incumbent collective bargai
agreement situation does not exist,
contracting officer shall contact
Wage and Hour Division to determ
when the wage determination or r
sion can be expected. If the Dep
ment of Labor is unable to provide
wage determination or revision by
latest date needed to maintain the
quisition schedule, the contracting
ficer shall use the latest wage deter
nation or revision, if any, incorpora
in the existing contract. If any new
revised wage determination is recei
later in response to the Notice,
contracting officer shall include it
the solicitation or contract within
calendar days of receipt. If the c
tract has been awarded, the contr
ing officer shall equitably adjust
contract price to reflect any chan
cost of performance resulting from
corporating the wage determination
revision. The Administrator, Wage
Hour Division, may require retroact
application of the wage determinat
for a contractual action over $2,
using more than five service empl
ees. These provisions are not inten
to alter the contracting officer's
sponsibility to make timely subm
sions as required in 22.1008–7.

22.1012–5 Response to late submission
Notice—with collective bargai
agreement.

If the contracting officer has
filed the Notice within the time lim
in 22.1008–7, has not received a
sponse from the Department of La
and a successorship/same locality/
cumbent collective bargaining ag
ment situation exists, the contract
officer shall contact the Wage
Hour Division to determine when
wage determination or revision can
expected. If the Department of La
is unable to provide the wage dete
nation or revision by the latest d
needed to maintain the acquisit

schedule, the contracting officer shall incorporate in the solicitation the wage and fringe benefit terms of the collective bargaining agreement, or the collective bargaining agreement itself, and the clause at 52.222-47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits. If the contract has been awarded, an equitable adjustment following receipt of the wage determination or revision will not be required, since the wage determination or revision will be based on the economic terms of the collective bargaining agreement.

22.1013 Review of wage determination.

(a) *Based on incumbent collective bargaining agreement.* (1) If wages, fringe benefits, or periodic increases provided for in a collective bargaining agreement vary substantially from those prevailing for similar services in the locality, the contracting officer shall immediately contact the agency labor advisor to consider instituting the procedures in 22.1021.

(2) If the contracting officer believes that an incumbent or predecessor contractor's agreement was not the result of arm's length negotiations, the contracting officer shall contact the agency labor advisor to determine appropriate action.

(b) *Based on other than incumbent collective bargaining agreement.* Upon receiving a wage determination not predicated upon a collective bargaining agreement, the contracting officer shall ascertain—

(1) If the wage determination does not conform with wages and fringe benefits prevailing for similar services in the locality; or

(2) If the wage determination contains significant errors or omissions. If either subparagraph (b)(1) or (b)(2) of this section is evident, the contracting officer shall contact the agency labor advisor to determine appropriate action.

22.1014 Delay of acquisition dates over 60 days.

If any invitation for bids, request for proposals, bid opening, or commencement of negotiation for a proposed contract for which a wage determination was provided in response to a Notice has been delayed, for whatever reason, more than 60 days from such date as indicated on the submitted Notice, the contracting officer shall, in accordance with agency procedures, contact the Wage and Hour Division for the purpose of determining whether the wage determination issued under the initial submission is still current. Any revision of a wage determination received by the contracting agency as a result of that communication, or upon discovery by the Department of Labor of a delay, shall supersede the earlier response as the wage determination applicable to the particular acquisition subject to the time frames in 22.1012-2(a) and (b).

22.1015 Discovery of errors by the Department of Labor.

If the Department of Labor discovers and determines, whether before or after a contract award, that a contracting officer made an erroneous determination that the Service Contract Act did not apply to a particular acquisition or failed to include an appropriate wage determination in a covered contract, the contracting officer, within 30 days of notification by the Department of Labor, shall include in the contract the clause at 52.222-41 and any applicable wage determination issued by the Administrator. If the contract is subject to section 10 of the Act (41 U.S.C. 358), the Administrator may require retroactive application of that wage determination. The contracting officer shall equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating a wage determination or revision.

22.1016 Statement of equivalent rates for Federal hires.

(a) The statement required under the clause at 52.222-42, Statement of Equivalent Rates for Federal Hires, (see 22.1006(b)) shall set forth those wage rates and fringe benefits that would be paid by the contracting activity to the various classes of service employees expected to be utilized under the contract if 5 U.S.C. 5332 (General Schedule—white collar) and/or 5

U.S.C. 5341 (Wage Board—blue collar) were applicable.

(b) Procedures for computation of these rates are as follows:

(1) Wages paid blue collar employees shall be the basic hourly rate for each class. The rate shall be Wage Board pay schedule step two for nonsupervisory service employees and step three for supervisory service employees.

(2) Wages paid white collar employees shall be an hourly rate for each class. The rate shall be obtained by dividing the general pay schedule step one biweekly rate by 80.

(3) Local civilian personnel offices can assist in determining and providing grade and salary data.

22.1017 Notice of award.

Whenever an agency awards a service contract subject to the Act which may be in excess of $25,000 and that agency does not report the award to the Federal Procurement Data System, it shall furnish an original and one copy of Standard Form 99, Notice of Award of Contract (see 53.301-99) to the Wage and Hour Division, Employment Standards Administration, Department of Labor, unless it makes other arrangements with the Wage and Hour Division for notifying it of contract awards.

22.1018 Notification to contractors and employees.

The contracting officer shall take the following steps to ensure that service employees are notified of minimum wages and fringe benefits.

(a) As soon as possible after contract award, inform the contractor of the labor standards requirements of the contract relating to the Act and of the contractor's responsibilities under these requirements, unless it is clear that the contractor is fully informed.

(b) At the time of award, furnish the contractor Department of Labor Publication WH-1313, Notice to Employees Working on Government Contracts, for posting at a prominent and accessible place at the worksite before contract performance begins. The publication advises employees of the compensation (wages and fringe benefits) required to be paid or furnished under the Act and satisfies the notice requirements in paragraph (g) of the clause at 52.222-41, Service Contract Act of 1965, as amended.

(c) Attach any applicable wage determination to Publication WH-1313.

22.1019 Additional classes of service employees.

(a) If the contracting officer is aware that contract performance involves classes of service employees not included in the wage determination, the contracting officer shall require the contractor to classify the unlisted classes so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between the unlisted classifications and the classifications listed in the determination (see paragraph (c) of the clause at 52.222-41, Service Contract Act of 1965, as amended). The contractor shall initiate the conforming procedure before unlisted classes of employees perform contract work. The contractor shall submit Standard Form (SF) 1444, Request For Authorization of Additional Classification and Rate. The contracting officer shall review the proposed classification and rate and promptly submit the completed SF 1444 (which must include information regarding the agreement or disagreement of the employees' representative or the employees themselves together with the agency recommendation) and all other pertinent information to the Wage and Hour Division. Within 30 days of receipt of the request, the Wage and Hour Division will (1) approve, modify, or disapprove the request when the parties are in agreement or (2) render a final determination in the event of disagreement among the parties. If the Wage and Hour Division will require more than 30 days to take action, it will notify the contracting officer within 30 days of receipt of the request that additional time is necessary.

(b) Some wage determinations will list a series of classes within a job classification family, for example, Computer Operators, level I, II, and III, or Electronic Technicians, level I, II, and III, or Clerk Typist, level I and II. Generally, level I is the lowest level. It is the entry level, and establishment of a lower level through conformance is not permissible. Further, trainee classifications may not be conformed. Helpers in skilled maintenance trades (for example, electricians, machinists, and automobile mechanics) whose duties constitute, in fact, separate and distinct jobs may also be used if listed on the wage determination, but may not be conformed. Conformance may not be used to artificially split or subdivide classifications listed in the wage determination. However, conforming procedures may be used if the work which an employee performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title. (See 29 CFR 4.152.)

(c) Subminimum rates for apprentices, student learners, and handicapped workers are permissible in accordance with paragraph (q) of the clause at 52.222-41, Service Contract Act of 1965, as amended.

22.1020 Seniority lists.

If a contract is performed at a Federal facility where employees may be hired/retained by a succeeding contractor, the incumbent prime contractor is required to furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract, together with anniversary dates of employment, to the contracting officer no later than 10 days before contract completion. (See paragraph (n) of the clause at 52.222-41, Service Contract Act of 1965, as amended.) At the commencement of the succeeding contract, the contracting officer shall provide a copy of the list to the successor contractor for determining employee eligibility for vacation or other fringe benefits which are based upon length of service, including service with predecessor contractors if such benefit is required by an applicable wage determination.

22.1021 Substantial variance hearings.

(a) A contracting agency or other interested party may request a hearing on an issue presented in 22.1013(a). To obtain a hearing for the contracting agency, the contracting officer shall submit a request through appropriate channels (ordinarily the agency labor advisor) to Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington DC 20210, with sufficient data to support a prima facie showing that the rates at issue vary substantially from those prevailing for similar services in the locality. The request shall also include (1) the number of the wage determinations at issue, (2) name of contracting agency, (3) status of the acquisition and any estimated acquisition dates (e.g., bid opening, award, and commencement of performance), and (4) names and addresses, if known, of interested parties.

(b) Unless the Administrator determines that extraordinary circumstances exist, the Administrator will not consider requests for a hearing unless received as specified in subparagraphs (b)(1) and (b)(2) of this section—

(1) For sealed bid contracts, more than 10 days before the award of the contract;

(2) For negotiated contracts and for contracts with provisions extending the initial term by option, before the commencement date of the contract or the follow-up option period, as the case may be.

22.1022 Withholding of contract payments.

Any violations of the clause at 52.222-40, Service Contract Act of 1965, as amended—Contracts of $2,500 or Less, or the clause at 52.222-41, Service Contract Act of 1965, as amended, renders the responsible contractor liable for the amount of any deductions, rebates, refunds, or underpayments (which includes nonpayment) of compensation due employees performing the contract. The contracting officer may withhold—or, upon written request of the Department of Labor from a level no lower than that of Assistant Regional Administrator, Wage and Hour Division, Employment Standards Administration, Department of Labor, shall withhold—the amount needed to pay such underpaid employees from accrued payments due the contractor on the contract, or on any other prime contract (whether subject to the Service Contract Act or not) with the contractor. The agency shall place the amount withheld in a deposit fund. Such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary (or authorized representatives), an Administrative Law Judge, or the Board of Service Contract Appeals. In addition, the Department of Labor has given blanket approval to forward withheld funds pending completion of an investigation or other administrative proceeding when disposition of withheld funds remains the final action necessary to close out a contract.

22.1023 Termination for default.

As provided by the Act, any contractor failure to comply with the requirements of the contract clauses related to the Act may be grounds for termination for default (see paragraph (k) of the clause at 52.222-41, Service Contract Act of 1965, as amended).

22.1024 Cooperation with the Department of Labor.

The contracting officer shall cooperate with Department of Labor representatives in the examination of records, interviews with service employees, and all other aspects of investigations undertaken by the Department. When asked, agencies shall furnish the Wage and Hour Administrator or a designee, any available information on contractors, subcontractors, their contracts, and the nature of the contract services. The contracting officer shall promptly refer, in writing to the appropriate regional office of the Department, apparent violations and complaints received. Employee complaints shall not be disclosed to the employer.

22.1025 Ineligibility of violators.

A list of persons or firms found to be in violation of the Act is contained in the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs (see 9.404). No Government contract may be awarded to any violator so listed because of a violation of the Act, or to any firm, corporation, partnership, or association in which the violator has a substantial interest without the approval of the Secretary of Labor. This prohibition against award to an ineligible contractor applies to both prime and subcontracts.

22.1026 Disputes concerning labor standards.

Disputes concerning labor standards requirements of the contract are handled under paragraph (t) of the contract clause at 52.222-41, Service Contract Act of 1965, as amended, and not under the clause at 52.233-1, Disputes.

Subpart 22.11—Professional Employee Compensation

22.1101 Applicability.

The Service Contract Act of 1965 was enacted to ensure that Government contractors compensate their blue-collar service workers and some white-collar service workers fairly, but it does not cover bona fide executive, administrative, or professional employees. The Office of Federal Procurement Policy issued Policy Letter No. 78-2, dated March 29, 1978, Preventing *Wage Busting* for Professionals. This subpart implements that policy letter. Its application is limited to professional employees. This subpart 22.11 provides policies and procedures for use in negotiated service contracts exceeding $250,000 that involve meaningful numbers of professional employees.

[48 FR 42258, Sept. 19, 1983 as amended at 51 FR 2665, Jan. 17, 1986]

22.1102 Definition.

Professional employee means any person meeting the definition of *employee employed in a bona fide … professional capacity* given in 29 CFR part 541. The term embraces members of those professions having a recognized status based upon acquiring professional knowledge through prolonged study. Examples of these professions include accountancy, actuarial computation, architecture, dentistry, engineering, law, medicine, nursing, pharmacy, the sciences (such as biology, chemistry, and physics), and teaching. To be a professional employee, a person must not only be a professional but must be involved essentially in discharging professional duties.

22.1103 Policy, procedures, and solicitation provisions.

All professional employees shall be compensated fairly and properly. Accordingly, the contracting officer shall insert provisions at 52.222-45, Notice of Compensation for Professional Employees, and 52.222-46, Evaluation of Compensation for Professional Employees, in solicitations for negotiated service contracts when the contract amount is expected to exceed $250,000 and the service to be provided will require meaningful numbers of professional employees. These provisions require that offerors submit for evaluation a total compensation plan setting forth proposed salaries and fringe benefits for professional employees working on the contract. Supporting information will include data, such as recognized national and regional compensation surveys and studies of professional, public and private organizations, used in establishing the total compensation structure. Plans indicating unrealistically low professional employees compensation may be assessed adversely as one of the factors considered in making the award.

Subpart 22.12—[Reserved]

Subpart 22.13—Special Disabled and Vietnam Era Veterans

22.1300 Scope of subpart.

This subpart prescribes policies and procedures for implementing the Vietnam Era Veterans Readjustment Assistance Act of 1972, as amended (38 U.S.C. 2012) (the Act); Executive Order 11701, January 24, 1973 (38 FR 2675, January 29, 1973); and the regulations of the Secretary of Labor (41 CFR part 60-250 and part 61-250). In this subpart, the terms *contract* and *contractor* include *subcontract* and *subcontractor*.

[48 FR 42258, Sept. 19, 1983, as amended at 53 FR 661, Jan. 11, 1988]

22.1301 Policy.

Government contractors, when entering into contracts subject to the Act, are required to list all suitable employment openings with the appropriate local employment service office and take affirmative action to employ, and advance in employment, qualified special disabled veterans and veterans of the Vietnam Era without discrimination based on their disability or veterans' status.

22.1302 Applicability.

(a) The Act applies to all contracts for supplies and services (including construction) of $10,000 or more except as waived by the Secretary of Labor.

(b) The requirements of the clause at 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans, in any contract with a State or local government (or any agency, instrumentality, or subdivision) shall not apply to any agency, instrumentality, or subdivision of that government that does not participate in work on or under the contract.

22.1303 Waivers.

(a) The agency head, with the concurrence of the Director, Office of Federal Contract Compliance Programs (OFCCP), Department of Labor (Director), may waive any or all of the terms of the clause at 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans, for—

(1) Any contract if a waiver is deemed to be in the national interest; or

(2) Groups or categories of contracts if a waiver is in the national interest and it is—

(i) Impracticable to act on each request individually; and

(ii) Determined that the waiver will substantially contribute to convenience in administering the Act.

(b)(1) The head of a civilian agency, with the concurrence of the Director of OFCCP, or, (2) the Secretary of Defense may waive any requirement in this subpart when it is determined that the contract is essential to the national security, and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of a civilian agency shall notify the Director in writing within 30 days.

(c) The contracting officer shall submit requests for waivers in accordance with agency procedures.

(d) A waiver granted for a particular class of contracts may be withdrawn for any contract within that class whenever considered necessary by the Director to achieve the purposes of the Act. The withdrawal shall not apply to contracts awarded before the withdrawal. The withdrawal shall not apply to solicitations under any means of sealed bidding unless it is made more than 10 calendar days before the date set for bid opening.

[48 FR 42258, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987]

22.1304 Department of Labor notices and reports.

(a) The contracting officer shall furnish to the contractor appropriate notices for posting when they are prescribed by the Director.

(b) The Act requires contractors to submit a report at least annually to the Secretary of Labor regarding employment of Vietnam era and special disabled veterans unless all of the terms of the clause at 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans, have been waived (see 22.1303). The contractor shall use Standard Form VETS-100, Federal Contractor Veterans' Employment Report, to submit the required reports.

[53 FR 661, Jan. 11, 1988]

22.1305 Collective bargaining agreements.

If performance under the clause at 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans, may necessitate a revision of a collective bargaining agreement, the contracting officer shall advise the affected labor unions that the Department of Labor (DOL) will give them appropriate opportunity to present their views. However, neither the contracting officer nor any representative of the contracting officer shall discuss with the contractor or any labor representative any aspect of the collec bargaining agreement.

22.1306 Complaint procedures.

Following agency procedures, contracting office shall forward complaints received about the adm istration of the Act to the Veter Employment Service of DOL, thro the local Veteran's Employment R resentative or designee, at the lo State employment office. The Direc of the Office of Federal Contr Compliance Programs of the DOL primarily responsible for making vestigations of complaints.

22.1307 Actions because of noncom ance.

The contracting officer shall t necessary action as soon as pos upon notification by the appropri agency official to implement any sa tions imposed on a contractor by Department of Labor for violations the clause at 52.222-35, Affirmat Action for Special Disabled and Vi nam Era Veterans. These sanctio (see 41 CFR 60-250.28) may include—

(a) Withholding from payments o erwise due;

(b) Termination or suspension of t contract; or

(c) Debarment of the contractor.

22.1308 Contract clauses.

(a)(1) The contracting officer sh insert the clause at 52.222-35, Affirm tive Action for Special Disabled a Vietnam Era Veterans, in solicitatio and contracts when the contract is f $10,000 or more or is expected amount to $10,000 or more, exce when—

(i) Work is performed outside t United States by employees recruite outside the United States (for the pu poses of this subpart, *United States* i cludes the States, the District of C lumbia, the Virgin Islands, the Com monwealth of Puerto Rico, Gua American Samoa, and the Trust Terr tory of the Pacific Islands); or

(ii) The agency head has waived accordance with 22.1303(a) 22.1303(b) all of the terms of th clause.

(2) If the agency head waives one or more (but not all) of the terms of the clause in accordance with 22.1303(a) or 22.1303(b), use the basic clause with its Alternate I.

(b) The contracting officer shall insert the clause at 52.222-37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era, in solicitations and contracts containing the clause at 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans.

[48 FR 42258, Sept. 19, 1983, as amended at 53 FR 662, Jan. 11, 1988; 55 FR 38517, Sept. 18, 1990]

Subpart 22.14—Employment of the Handicapped

22.1400 Scope of subpart.

This subpart prescribes policies and procedures for implementing Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793) (the Act); Executive Order 11758, January 15, 1974; and the regulations of the Secretary of Labor (41 CFR part 60-741). In this subpart, the terms *contract* and *contractor* include *subcontract* and *subcontractor.*

22.1401 Policy.

Government contractors, when entering into contracts subject to the Act, are required to take affirmative action to employ, and advance in employment, qualified handicapped individuals without discrimination based on their physical or mental handicap.

22.1402 Applicability.

(a) Section 503 of the Act applies to all Government contracts in excess of $2,500 for supplies and services (including construction) except as waived by the Secretary of Labor. The clause at 52.222-36, Affirmative Action for Handicapped Workers, implements the Act.

(b) The requirements of the clause at 52.222-36, Affirmative Action for Handicapped Workers, in any contract with a State or local government (or any agency, instrumentality, or subdivision) shall not apply to any agency, instrumentality, or subdivision of that government that does not participate in work on or under the contract.

22.1403 Waivers.

(a) The agency head, with the concurrence of the Director, Office of Federal Contract Compliance Programs (OFCCP), (Director), may waive any or all of the terms of the clause at 52.222-36, Affirmative Action for Handicapped Workers, for—

(1) Any contract if a waiver is deemed to be in the national interest; or

(2) Groups or categories of contracts if a waiver is in the national interest and it is—

(i) Impracticable to act on each request individually; and

(ii) Determined that the waiver will substantially contribute to convenience in administering the Act.

(b)(1) The head of a civilian agency, with the concurrence of the Director of OFCCP, or, (2) the Secretary of Defense, may waive any requirement in this subpart when it is determined that the contract is essential to the national security, and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of a civilian agency shall notify the Director in writing within 30 days.

(c) The contracting officer shall submit requests for waivers in accordance with agency procedures.

(d) A waiver granted for a particular class of contracts may be withdrawn for any contract within that class whenever considered necessary by the Director to achieve the purposes of the Act. The withdrawal shall not apply to contracts awarded before the withdrawal. The withdrawal shall not apply to solicitations under any means of formal sealed bidding unless it is made more than 10 calendar days before the date set for bid opening.

[48 FR 42258, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987]

22.1404 Department of Labor notices.

The contracting officer shall furnish to the contractor appropriate notices that state the contractor's obligations and the handicapped individual's

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rights under the Employment of the Handicapped program. The contracting officer may obtain these notices from the Department of Labor Regional Office, Office of Federal Contract Compliance Programs.

22.1405 Collective bargaining agreements.

If performance under the clause at 52.222-36, Affirmative Action for Handicapped Workers, may necessitate a revision of a collective bargaining agreement, the contracting officer shall advise the affected labor unions that the Department of Labor will give them appropriate opportunity to present their views. However, neither the contracting officer nor any representative of the contracting officer shall discuss with the contractor or any labor representative any aspect of the collective bargaining agreement.

22.1406 Complaint procedures.

Following agency procedures, the contracting office shall forward any complaints received about the administration of the Act to the OFCCP, 200 Constitution Avenue, NW., Washington, DC 20210, or to any OFCCP regional or area office. The OFCCP shall institute investigation of each complaint and shall be responsible for developing a complete case record.

22.1407 Actions because of noncompliance.

The contracting officer shall take necessary action as soon as possible upon notification by the appropriate agency official to implement any sanctions imposed on a contractor by the Department of Labor for violations of the clause at 52.222-36, Affirmative Action for Handicapped Workers. These sanctions (see 41 CFR 60-741.28) may include—

(a) Withholding from payments otherwise due;

(b) Termination or suspension of the contract; or

(c) Debarment of the contractor.

22.1408 Contract clause.

(a) The contracting officer shall insert the clause at 52.222-36, Affirmative Action for Handicapped Workers, in solicitations and contracts that exceed $2,500 or are expected to exceed $2,500, except when—

(1) Work is performed outside the United States by employees recruited outside the United States (for the purpose of this subpart, *United States*, includes the States, the District of Columbia, the Virgin Islands, Puerto Rico, Guam, American Samoa, and the Trust Territory of the Pacific Islands); or

(2) The agency head has waived, in accordance with 22.1403(a) or 22.1403(b) all the terms of the clause.

(b) If the agency head waives one or more (but not all) of the terms of the clause in accordance with 22.1403(a) or 22.1403(b), use the basic clause with its Alternate I.

PART 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42275, Sept. 19, 1983, unless otherwise noted.

23.000 Scope of part.

This part prescribes acquisition policies and procedures supporting the Government's program for ensuring a drug-free workplace and for protecting and improving the quality of the environment through pollution control, energy conservation, identification of hazardous material, and use of recovered materials.

[54 FR 4968, Jan. 31, 1989 and 55 FR 21707, May 25, 1990]

Subpart 23.1—Pollution Control and Clean Air and Water

23.101 Applicability.

This subpart does not apply to small purchases or to the use of facilities outside the United States. (*United States*, as used in this subpart, includes the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.)

23.102 Authorities.

(a) Clean Air Act (42 U.S.C. 7401 *et seq.*).

(b) Clean Water Act (33 U.S.C. 1251 *et seq.*).

(c) Executive Order 11738, September 10, 1973 (38 FR 25161, September 12, 1973).

(d) Environmental Protection Agency (EPA) regulations (40 CFR part 15).

23.103 Policy.

(a) It is the Government's policy to improve environmental quality. Accordingly, executive agencies shall conduct their acquisition activities in a manner that will result in effective enforcement of the Clean Air Act (the *Air Act*) and the Clean Water Act (the *Water Act*).

(b) Except as provided in 23.104, executive agencies shall not enter into, renew, or extend contracts with firms proposing to use facilities listed by EPA (40 CFR part 15) as violating facilities under the Air Act or the Water Act.

23.104 Exemptions.

(a) Except as provided in paragraphs (b) and (c) of this section, contracts and subcontracts are not subject to the restriction in 23.103(b) if they are (1) $100,000 or under; or (2) for indefinite quantities and the contracting officer believes that the amount ordered in any year under the contract will not exceed $100,000.

(b) If the facility to be used is on the EPA List of Violating Facilities for a *conviction* under the Air Act or the Water Act, the exemption in paragraph (a) above does *not* apply.

(c) The agency head may exempt any contract, subcontract, or class of contracts or subcontracts from the requirement in 23.103(b) for 1 year when it is in the paramount interest of the United States to do so.

(1) Before granting a class exemption, the agency head shall consult with the EPA Administrator or the Administrator's designee.

(2) The agency head shall notify the EPA Administrator, or a designee, as soon as practical after granting an individual exemption. The notification shall describe the purpose of the contract and explain why the paramount interest of the United States required the exemption.

[48 FR 42275, Sept. 19, 1983, as amended at 53 FR 27464, July 20, 1988]

23.105 Solicitation provision and contract clause.

(a) The contracting officer shall insert the solicitation provision at 52.223-1, Clean Air and Water Certification, in solicitations containing the clause at 52.223-2, Clean Air and Water (see paragraph (b) following).

(b) The contracting officer shall insert the clause at 52.223-2, Clean Air and Water, in solicitations and contracts to which this subpart applies (see 23.101), if—

(1) The contract is expected to exceed $100,000;

(2) The contracting officer believes that orders under an indefinite quantity contract in any year will exceed $100,000; or

(3) A facility to be used has been the subject of a conviction under the applicable portion of the Air Act (42 U.S.C. 7413(c)(1)) or Water Act (33 U.S.C. 1319(c)) and is listed by EPA as a violating facility; and

(4) The acquisition is not otherwise exempt under 23.104.

23.106 Delaying award.

(a) If an otherwise successful offeror informs the contracting officer that EPA is considering listing a facility proposed for contract performance (see the provision at 52.223-1, Clean Air and Water Certification), the contracting officer shall promptly notify the EPA Administrator or a designee, in writing, that the offeror is being considered for award.

(b) After consulting with the agency involved, the EPA Administrator or a designee may request the contracting officer to delay award for up to 15 working days, beginning on the date the EPA Administrator or a designee is notified that the award is under consideration.

(c) The contracting officer then shall delay award, only for the period of time requested by the EPA (up to 15 working days), except when the delay is likely to prejudice the agency's programs or seriously disadvantage the Government. The contracting officer shall promptly notify the EPA Administrator or a designee only if a decision is made to award before the period requested expires.

23.107 Compliance responsibilities.

Primary responsibility for ensuring compliance with Federal, State, or local pollution control laws and related requirements rests with EPA and other agencies designated under the laws. If a contracting officer becomes aware of noncompliance with clean air or water standards in facilities used in performing nonexempt contracts, that contracting officer shall notify the agency head, or a designee, who shall promptly notify the EPA Administrator or a designee in writing.

Subpart 23.2—Energy Conservation

23.201 Authorities.

(a) Energy Policy and Conservation Act (42 U.S.C. 6361(a)(1)).

(b) Executive Order 11912, April 13, 1976 (41 FR 15825-7, April 15, 1976), as amended by Executive Order 12038, February 3, 1978 (43 FR 4957, February 7, 1978), and Executive Order 12148, July 20, 1979 (44 FR 43239, July 24, 1979).

23.202 Definitions.

Consumer product means any article (other than an automobile, as defined in section 501(1) of the Motor Vehicle Information and Cost Savings Act) that—

(a) Consumes energy; and

(b) Is distributed in commerce for personal use or consumption by individuals.

Covered product means a consumer product of one of the following types:

(a) Central air conditioners.

(b) Clothes dryers.

(c) Clothes washers.

(d) Dishwashers.

(e) Freezers.

(f) Furnaces.

(g) Home heating equipment, not including furnaces.

(h) Humidifiers and dehumidifiers.

(i) Kitchen ranges and ovens.

(j) Refrigerators and refrigerator-freezers.

(k) Room air conditioners.

(l) Television sets.

(m) Water heaters.

(n) Any other type of product that the Secretary of Energy classifies as a covered product under 42 U.S.C. 6292(b)

Energy efficiency standard means a performance standard that—

(a) Prescribes a minimum level of energy efficiency for a covered product, determined by test procedures prescribed under 42 U.S.C. 6293; and

(b) Includes any other requirements that the Secretary of Energy may prescribe under 42 U.S.C. 6295(c).

Energy use and efficiency label means a label provided by a manufacturer of a covered product under 42 U.S.C. 6296.

Manufacture means to manufacture, produce, assemble, or import.

Manufacturer, as used in this part, means any business that, or person who, manufactures a consumer product.

23.203 Policy.

(a) Whenever the results would be meaningful, practical, and consistent with agency programs and needs, agencies shall apply energy conservation and efficiency criteria to acquisitions. In preparing solicitations and evaluating and selecting offers for award, agencies shall consider these criteria along with price and other relevant factors.

(b) When acquiring covered products, executive agencies shall consider energy use and efficiency labels and, as they become available, energy efficiency standards.

Subpart 23.3—Hazardous Material Identification and Material Safety Data

23.300 Scope of subpart.

This subpart prescribes policies and procedures for acquiring deliverable items, other than ammunition and explosives, that require the furnishing of data involving hazardous materials. Agencies may prescribe special procedures for ammunition and explosives.

23.301 Definition.

Hazardous material is defined in Federal Standard No. 313A. (Federal Standards are sold to the public and Federal agencies through: General Services Administration (3FRI), Washington Navy Yard, Bldg. 197, Washington, DC 20407.)

23.302 General.

(a) The Occupational Safety and Health Administration (OSHA) is responsible for issuing and administering regulations that require Government activities to apprise their employees of—

(1) All hazards to which they may be exposed;

(2) Relative symptoms and appropriate emergency treatment; and

(3) Proper conditions and precautions for safe use and exposure.

(b) Contractors and their subcontractors of any tier are required to submit hazardous materials data. Federal Standard No. 313A (Material Safety Data Sheet, Preparation and Submission of) includes criteria for identification of hazardous materials. The Standard also prescribes Department of Labor Form OSHA-20 for use with Government contracts.

(c) Contractors shall submit hazardous material identification on the following:

(1) All items in, or ordinarily cataloged under, the Federal Supply Classes listed in Table I of Appendix A of Federal Standard No. 313A.

(2) Items having hazardous characteristics in the Federal Supply Classes listed in Table II of Appendix A of Federal Standard No. 313A.

(3) Any other material designated by a Government technical representative as potentially hazardous and requiring safety controls.

23.303 Contract clause.

The contracting officer shall insert the clause at 52.223-3, Hazardous Material Identification and Material Safety Data, in solicitations and contracts when it is contemplated that the contract will require the delivery of hazardous materials as defined in Appendix A of Federal Standard No. 313A, or on the advice of the Government's technical representative that the contract will involve exposure to hazardous materials in any manner; e.g., performance of work, use, handling, manufacturing, packaging, transportation, storage, inspection, and disposal.

Subpart 23.4—Use of Recovered Materials

23.401 Authority.

(a) The statutory basis for this program is the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901, *et seq.*)

(b) The statute requires agencies responsible for drafting or reviewing specifications to ensure that Government specifications and standards (1) do not exclude the use of recovered materials, (2) do not require the item to be manufactured from virgin materials, and (3) require the use of recovered materials to the maximum extent possible without jeopardizing the intended end use of the item.

(c) The statute also requires the Environmental Protection Agency to prepare guidelines on the availability, sources, and potential uses of recovered materials and associated items, including solid waste management services.

[48 FR 42275, Sept. 19, 1983, as amended at 54 FR 34755, Aug. 21, 1989]

23.402 Definitions.

Recovered materials means materials that have been collected or recovered from solid waste.

Solid waste means (a) any garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility; and (b) other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities. It does not include solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Clean Water Act, (33 U.S.C. 1342 *et seq.*), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*).

23.403 Policy.

The Government's policy is to acquire items composed of the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, without adversely affecting performance requirements or exposing suppliers' employees to undue hazards from the recovered materials.

23.404 Procedures.

(a) These procedures apply to all acquisitions that require minimum percentages of recovered materials, when the price of the item exceeds $10,000 or when the aggregate amount paid for items, or of functionally equivalent items, in the preceding fiscal year was $10,000 or more.

(b) The contracting officer may waive requirements for using recovered materials only after determining that the items containing recovered materials—

(1) Are not available within a reasonable period of time;

(2) Fail to meet performance standards in the specifications; or

(3) Are available only at unreasonable prices.

(c) Any determination made under 23.404(b)(2) shall be made on the basis of Bureau of Standards guidelines in any case in which the material is covered by these guidelines.

23.405 Solicitation provision.

The contracting officer shall insert the provision at 52.223-4, Recovered Material Certification, in solicitations that incorporate specifications requiring the use of recovered materials.

Subpart 23.5—Drug-Free Workplace

SOURCE: 54 FR 4968, Jan. 31, 1989 (interim) and 55 FR 21707, May 25, 1990 (final), unless otherwise noted.

23.500 Scope of subpart.

This subpart implements the Drug-Free Workplace Act of 1988 (Pub. L. 100-690).

23.501 Applicability.

This subpart applies to all contracts, including contracts with 8(a) contractors under FAR subpart 19.8 and modifications which require a justification and approval (see subpart 6.3), except—

(a) Contracts valued below $25,000; however, the requirements of this subpart shall apply to contracts of any value if the contract is awarded to an individual;

(b) Contracts or those parts of contracts that are to be performed outside of the United States, its territories, and its possessions;

(c) Contracts by law enforcement agencies, if the head of the law enforcement agency or designee involved determines that application of this subpart would be inappropriate in connection with the law enforcement agency's undercover operations; or

(d) Where application would be inconsistent with the international obligations of the United States or with the laws and regulations of a foreign country.

[54 FR 4968, Jan. 31, 1989, as amended at 55 FR 21707, May 25, 1990]

23.502 Authority.

Drug-Free Workplace Act of 1988 (Pub. L. 100-690).

23.503 Definitions.

Controlled substance, as used in this subpart, means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), and as further defined in regulation at 21 CFR 1308.11-1308.15.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.

Drug-free workplace means the site(s) for the performance of work done by the contractor in connection with a specific contract at which employees of the contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

Employee means an employee of a contractor directly engaged in the performance of work under a Government contract. *Directly engaged* is defined to include all direct cost employees and any other contract employee who has other than a minimal impact or involvement in contract performance.

Individual means an offeror/contractor that has no more than one employee including the offeror/contractor.

[54 FR 4968, Jan. 31, 1989, as amended at 55 FR 21707, May 25, 1990]

23.504 Policy.

(a) No offeror other than an individual shall be considered a responsible source (see 9.104-1(g)) for a contract that equals or exceeds $25,000, unless it has certified, pursuant to 52.223-5, Certification Regarding A Drug-Free Workplace, that it will provide a drug-free workplace by—

(1) Publishing a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the contractor's workplace, and specifying the actions that will be taken against employees for violations of such prohibition;

(2) Establishing an ongoing drug-free awareness program to inform its employees about—

(i) The dangers of drug abuse in the workplace;

(ii) The contractor's policy of maintaining a drug-free workplace;

(iii) Any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(3) Providing all employees engaged in performance of this contract with a copy of the statement required by subparagraph (a)(1) of this section;

(4) Notifying all employees in writing in the statement required by subparagraph (a)(1) of this section, that as a condition of employment on a covered contract, the employee will—

(i) Abide by the terms of the statement; and

(ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than 5 calendar days after such conviction;

(5) Notifying the contracting officer in writing within 10 calendar days after receiving notice under subdivision (a)(4)(ii) of this section, from an employee or otherwise receiving actual notice of such conviction. The notice shall include the postion title of the employee;

(6) Within 30 calendar days after receiving notice under subparagraph (a)(4) of this section of a conviction, taking one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace:

(i) Taking appropriate personnel action against such employee, up to and including termination; or

(ii) Requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(7) Making a good faith effort to maintain a drug-free workplace through implementation of subparagraphs (a)(1) through (a)(6) of this section.

(b) No individual shall be awarded a contract of any dollar values unless that individual certifies, pursuant to the provision at 52.233-5, Certification Regarding A Drug-Free Workplace, that the individual will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the performance of a covered contract.

(c) Failure of the offeror to provide the certification required by paragraph (a) or (b) of this section renders an offeror unqualified and ineligible for award. (See 9.104-1(g) and 19.602-1(a)(2)(i).)

(d) For a contract of 30 days or more performance duration, the contractor shall comply with the provisions of paragraph (a) of this section within 30 calendar days after contract award, unless the contracting officer agrees in writing that circumstances warrant a longer period of time to comply. Before granting such an extension, the contracting officer shall consider such factors as the number of contractor employees at the worksite, whether the contractor has or must develo a drug-free workplace program, an the number of contractor worksites. For contracts of less than 30 days performance duration, the contractor shall comply with the provisions o paragraph (a) of this section as soon as possible, but in any case, by a date prior to when performance is expected to be completed.

[54 FR 4968, Jan. 31, 1989, as amended FR 21707, May 25, 1990; 55 FR 38517, Sep 18, 1990]

23.505 Solicitation provision and contr clause.

(a) Contracting officers shall insert the provision at 52.223-5, Certification Regarding A Drug-Free Workplace, except as provided in paragraph (c) of this section, in solicitations—

(1) Of any dollar value if the contract is expected to be awarded to an individual; or

(2) Expected to equal or exceed $25,000, if the contract is expected to be awarded to other than an individual.

(b) Contracting officers shall insert the clause at 52.223-6, Drug-Free Workplace, in solicitations and contracts described in paragraph (a) of this section unless the conditions of paragraph (c) of this section apply.

(c) Contracting officers shall not insert the provision at 52.223-5, Certification Regarding A Drug-Free Workplace, or the clause at 52.223-6, Drug-Free Workplace, in solicitations or contracts, if—

(1) The resultant contract is to be performed entirely outside of the United States, its territories, and its possessions;

(2) The resultant contract is for law enforcement agencies, and the head of the law enforcement agency or designee involved determines that application of the requirements of this subpart would be inappropriate in connection with the law enforcement agency's undercover operations; or

(3) Inclusion of these requirements would be inconsistent with the international obligations of the Unit

States or with the laws and regulations of a foreign country.

[55 FR 21707, May 25, 1990]

23.506 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) After determining in writing that adequate evidence to suspect any of the causes at paragraph (d) of this section exists, the contracting officer may suspend contract payments in accordance with the procedures at 32.503-6(a)(1).

(b) After determining in writing that any of the causes at paragraph (d) of this section exists, the contracting officer may terminate the contract for default.

(c) Upon initiating action under paragraph (a) or (b) of this section, the contracting officer shall refer the case to the agency suspension and debarment official, in accordance with agency procedures, pursuant to subpart 9.4.

(d) The specific causes for suspension of contract payments, termination of a contract for default, or suspension and debarment are—

(1) The offeror has submitted a false certification in response to the provision at 52.223-5, Certification Regarding A Drug-Free Workplace;

(2) The contractor has failed to comply with its certification; or

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace.

(e) A determination under this section to suspend contract payments, terminate a contract for default, or debar or suspend a contractor may be waived by the agency head for a particular contract, in accordance with agency procedures, only if such waiver is necessary to prevent a severe disruption of the agency operation to the detriment of the Federal Government or the general public (see subpart 9.4). The waiver authority of the agency head cannot be delegated.

[54 FR 4968, Jan. 31, 1989, as amended at 55 FR 21708, May 25, 1990]

PART 24—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

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Subpart 24.1—Protection of Individual Privacy

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24.102 General.
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Subpart 24.2—Freedom of Information Act

24.201 Authority.
24.202 Policy.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42277, Sept. 19, 1983, unless otherwise noted.

24.000 Scope of part.

This part prescribes policies and procedures that apply requirements of the Privacy Act of 1974 (5 U.S.C. 552a) (the Act) and OMB Circular No. A-130, December 12, 1985, to Government contracts and cites the Freedom of Information Act (5 U.S.C. 552, as amended.)

[48 FR 42277, Sept. 19, 1983, as amended at 55 FR 38517, Sept. 18, 1990]

Subpart 24.1—Protection of Individual Privacy

24.101 Definitions.

Agency, as used in this subpart, means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Individual, as used in this subpart, means a citizen of the United States or an alien lawfully admitted for permanent residence.

Maintain, as used in this subpart, means maintain, collect, use, or disseminate.

Operation of a system of records, as used in this subpart, means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

Record, as used in this subpart, means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history, and that contains the individual's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.

System of records on individuals, as used in this subpart, means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

24.102 General.

(a) The Act requires that when an agency contracts for the design, development, or operation of a system of records on individuals on behalf of the agency to accomplish an agency function the agency must apply the requirements of the Act to the contractor and its employees working on the contract.

(b) An agency officer or employee may be criminally liable for violations of the Act. When the contract provides for operation of a system of records on individuals, contractors and their employees are considered employees of the agency for purposes of the criminal penalties of the Act.

(c) If a contract specifically provides for the design, development, or operation of a system of records on individuals on behalf of an agency to accomplish an agency function, the agency must apply the requirements of the Act to the contractor and its employees working on the contract. The system of records operated under the contract is deemed to be maintained by the agency and is subject to the Act.

(d) Agencies, which within the limits of their authorities, fail to require that systems of records on individuals operated on their behalf under contracts be operated in conformance with the Act may be civilly liable to individuals injured as a consequence of any subsequent failure to maintain records in conformance with the Act.

24.103 Procedures.

(a) The contracting officer shall review requirements to determine whether the contract will involve the design, development, or operation of a system of records on individuals to accomplish an agency function.

(b) If one or more of those tasks will be required, the contracting officer shall—

(1) Ensure that the contract work statement specifically identifies the system of records on individuals and the design, development, or operation work to be performed; and

(2) Make available, in accordance with agency procedures, agency rules and regulation implementing the Act.

24.104 Contract clauses.

When the design, development, or operation of a system of records on individuals is required to accomplish an agency function, the contracting officer shall insert the following clauses in solicitations and contracts:

(a) The clause at 52.224-1, Privacy Act Notification.

(b) The clause at 52.224-2, Privacy Act.

Subpart 24.2—Freedom of Information Act

24.201 Authority.

The Freedom of Information Act (5 U.S.C. 552, as amended) provides that information is to be made available to the public either by (a) publication in the FEDERAL REGISTER; (b) providing an opportunity to read and copy records at convenient locations; or (c) upon request, providing a copy of a reasonably described record.

24.202 Policy.

(a) The Act specifies, among other things, how agencies shall make their records available upon public request, imposes strict time standards for agency responses, and exempts certain records from public disclosure. Each agency's implementation of these requirements is located in its respective title of the Code of Federal Regulations and referenced in subpart 24.2 of its implementing acquisition regulations.

(b) Contracting officers may receive requests for records that may be exempted from mandatory public disclosure. The exemptions most often applicable are those relating to classified information, to trade secrets and confidential commercial or financial information, to interagency or intra-agency memoranda, or to personal and medical information pertaining to an individual. Since these requests often involve complex issues requiring an in-depth knowledge of a large and increasing body of court rulings and policy guidance, contracting officers are cautioned to comply with the implementing regulations of their agency and to obtain necessary guidance from the agency officials having Freedom of Information Act responsibility. If additional assistance is needed, authorized agency officials may contact the Department of Justice, Office of Information and Privacy.

[48 FR 42277, Sept. 19, 1983, as amended at 51 FR 31426, Sept. 3, 1986]

PART 25—FOREIGN ACQUISITION

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42278, Sept. 19, 1983, unless otherwise noted.

25.000 Scope of part.

Except as provided in agency regulations, this part provides policies and procedures to implement the Buy American Act, the Balance of Payments Program, purchases under the Trade Agreements Act of 1979, and other laws and regulations that pertain to acquiring foreign supplies, services, and construction materials. This part also provides policies and procedures for the application to foreign acquisitions of international agreements, customs and duties, the clause at 52.215-1, Examination of Records by Comptroller General, and use of local currency for payment.

Subpart 25.1—Buy American Act—Supplies

25.100 Scope of subpart.

This subpart implements the Buy American Act (41 U.S.C. 10) and Executive Order 10582, December 17, 1954 (as amended). It applies to supply contracts and to contracts for services that involve the furnishing of supplies.

25.101 Definitions.

Civil aircraft and related articles, as used in this subpart, means (a) all aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard; (b) the engines (and parts and components for incorporation into the engines) of these aircraft; (c) any other parts, components, and subassemblies for incorporation into the aircraft; and (d) any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft, and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act of 1979.

Components, as used in this subpart, means those articles, materials, and supplies incorporated directly into the end products.

Domestic end product, as used in this subpart, means (a) an unmanufactured end product mined or produced in the United States, or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with 25.102(a)(3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic. On acquisitions above $25,000 in value, components of Canadian origin are treated as domestic.

Domestic offer, as used in this subpart, means an offered price for a domestic end product, including transportation to destination.

End product, as used in this subpart, means those articles, materials, and supplies to be acquired for public use under the contract.

Foreign end product, as used in this subpart, means an end product other than a domestic end product.

Foreign offer, as used in this subpart, means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

Instrumentality, as used in this subpart, does not include an agency or division of the government of a country, but may be construed to include arrangements such as the European Economic Community.

United States, as used in this subpart, means the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction, but does not include leased bases or trust territories.

[48 FR 42278, Sept. 19, 1983, as amended at 53 FR 53340, Dec. 30, 1988]

25.102 Policy.

(a) The Buy American Act requires that only domestic end products be acquired for public use, except articles, materials, and supplies—

(1) For use outside the United States;

(2) For which the cost would be unreasonable, as determined in accordance with 25.105;

(3) For which the agency head determines that domestic preference would be inconsistent with the public interest;

(4) That are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities, of a satisfactory quality (see 25.108); or

(5) Purchased specifically for commissary resale.

(b) If the contract is estimated to exceed $1 million, the agency head, or a designee at a level no lower than the head of a contracting activity, must approve determinations made under paragraph (a)(4) above. Officials making these determinations shall consider the feasibility of forgoing the acquisition or of acquiring a domestic substitute.

[48 FR 42278, Sept. 19, 1983, as amended at 54 FR 48985, Nov. 28, 1989]

25.103 Agreements with certain foreign governments.

The Department of Defense and the National Aeronautics and Space Administration (NASA) have determined that it is inconsistent with the public interest to apply the restrictions of the Buy American Act to their acquisitions for public use of certain supplies mined, produced, or manufactured in certain foreign countries. Detailed procedures implementing these determinations are in the Department of Defense (DOD) Federal Acquisition Regulation Supplement and the NASA Federal Acquisition Regulation Supplement.

[48 FR 42278, Sept. 19, 1983, as amended at 53 FR 662, Jan. 11, 1988]

25.104 Acquiring civil aircraft and related articles.

(a) The U.S. Trade Representative, on February 19, 1980 (45 FR 12349, February 25, 1980), waived applying the Buy American Act to acquiring civil aircraft and related articles of countries or instrumentalities that are parties to the Agreement on Civil Aircraft. The representative acted under the authority of Section 303 of the Trade Agreements Act of 1979 (19 U.S.C. 2513). Countries and instrumentalities that are parties to the agreement (as of January 1, 1986) are Austria, Canada, the European Economic Community (Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom), Japan, Norway, Romania, Sweden, and Switzerland. The Office of the U.S. Trade Representative, Washington, DC 20506, can provide information on changes to the list of parties to the agreement made since January 1, 1986.

(b) For the purpose of this waiver, an article is a product of a country or instrumentality only if—

(1) It is wholly the growth, product, or manufacture of that country or instrumentality; or

(2) In the case of an article that consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

(c) The waiver is subject to modification or withdrawal by the U.S. Trade Representative.

[48 FR 42278, Sept. 19, 1983, as amended at 53 FR 662, Jan. 11, 1988]

25.105 Evaluating offers.

(a) Unless the agency head determines otherwise, the offered price of a domestic end product is unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer (see 25.101), inclusive of duty, by—

(1) More than 6 percent, if the domestic offer is from a large business that is not a labor surplus area concern; or

(2) More than 12 percent, if the domestic offer is from a small business concern or any labor surplus area concern.

(b) The evaluation in paragraph (a) above shall be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation.

(c) If an award of more than $250,000 would be made to a domestic concern if the 12-percent factor were applied, but not if the 6-percent factor were applied, the agency head shall decide whether award to the domestic concern would involve unreasonable cost.

(d) The evaluation in paragraph (a) of this section shall not be applied to offers of Israeli end products at or above $50,000 (see 25.402(a)(2)).

(e) The evaluation in paragraph (a) of this section shall not be applied to offers of Canadian end products above $25,000 (see 25.402(a)(3)). For the definition of *Canadian end product*, see 25.401.

[48 FR 42278, Sept. 19, 1983, as amended at 53 FR 27464, July 20, 1988; 53 FR 53340, Dec. 30, 1988]

25.106 [Reserved]

25.107 Acquisition from or through other Government agencies.

The General Services Administration is responsible for compliance with the Buy American Act for—

(a) Foreign end products acquired for stock in GSA stores depots;

(b) Direct purchases for other agencies; and

(c) Establishing mandatory Federal Supply Schedules that do not include a domestic end product.

25.108 Excepted articles, materials, and supplies.

(a) One or more agencies have determined that the articles, materials, and supplies listed in paragraph (d) of this section are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The list in paragraph (d) of this section is furnished for information only; an article, material or supply listed therein may be treated as domestic only when the agency concerned has made a determination that it is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality.

(b) Agencies making determinations under 25.102(a)(4) or 25.202(a)(3) for unlisted articles, materials, or supplies shall submit a copy of these determinations to the appropriate FAR Council for possible addition of items to the list.

(c) Agencies shall provide detailed information to the appropriate FAR Council if any item on the list becomes reasonably available in sufficient commercial quantities of a satisfactory quality.

(d)(1) The excepted articles, materials, and supplies are as follows:

Acetylene, black.
Agar, bulk.
Anise.
Antimony, as metal or oxide.
Asbestos, amosite, chrysotile, and crocidolite.
Bananas.
Bauxite.
Beef, corned, canned.
Beef extract.
Bephenium hydroxynapthoate.
Bismuth.
Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.
Brazil nuts, unroasted.
Cadmium, ores and flue dust.
Calcium cyanamide.
Capers.
Cashew nuts.
Castor beans and castor oil.
Chalk, English.
Chestnuts.
Chicle.
Chrome ore or chromite.

Cinchona bark.
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.
Cocoa beans.
Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.
Coffee, raw or green bean.
Colchicine alkaloid, raw.
Copra.
Cork, wood or bark and waste.
Cover glass, microscope slide.
Cryolite, natural.
Dammar gum.
Diamonds, industrial, stones and abrasives.
Emetine, bulk.
Ergot, crude.
Erythrityl tetranitrate.
Fair linen, altar.
Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.
Goat and kidskins.
Graphite, natural, crystalline, crucible grade.
Handsewing needles.
Hemp yarn.
Hog bristles for brushes.
Hyoscine, bulk.
Ipecac, root.
Iodine, crude.
Kaurigum.
Lac.
Leather, sheepskin, hair type.
Lavender oil.
Manganese.
Menthol, natural bulk.
Mica.
Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property).
Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.
Nitroguanidine (also known as picrite).
Nux vomica, crude.
Oiticica oil.
Olive oil.
Olives (green), pitted or unpitted, or stuffed, in bulk.
Opium, crude.
Oranges, mandarin, canned.
Petroleum, crude oil, unfinished oils, and finished products (see definitions of petroleum terms in subparagraph (d)(2) below).
Pine needle oil.
Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
Pyrethrum flowers.
Quartz crystals.
Quebracho.
Quinidine.
Quinine.
Rabbit fur felt.
Radium salts, source and special nuclear materials.
Rosettes.
Rubber, crude and latex.
Rutile.
Santonin, crude.
Secretin.
Shellac.
Silk, raw and unmanufactured.
Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
Spices and herbs, in bulk.
Sugars, raw.
Swords and scabbards.
Talc, block, steatite.
Tantalum.
Tapioca flour and cassava.
Tartar, crude; tartaric acid and cream of tartar in bulk.
Tea in bulk.
Thread, metallic (gold).
Thyme oil.
Tin in bars, blocks, and pigs.
Triprolidine hydrochloride.
Tungsten.
Vanilla beans.
Venom, cobra.
Wax, carnauba.
Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
Yarn, 50 Denier rayon.

(2) As used in subparagraph (d)(1) of this section, petroleum terms are defined as follows:

(i) *Crude oil* means crude petroleum, as it is produced at the wellhead, and liquids (under atmospheric conditions) that have been recovered from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir and that are not natural gas products.

(ii) *Finished products* means any one or more of the following petroleum oils, or a mixture or combination of these oils, to be used without further processing except blending by mechanical means:

(A) *Asphalt*—a solid or semi-solid cementitious material that (*1*) gradually liquefies when heated, (*2*) has bitumens as its predominating constituents, and (*3*) is obtained in refining crude oil.

(B) *Fuel oil*—a liquid or liquefiable petroleum product burned for lighting or for the generation of heat or power and derived directly or indirectly from crude oil, such as kerosene, range oil, distillate fuel oils, gas oil, diesel fuel, topped crude oil, or residues.

(C) *Gasoline*—a refined petroleum distillate that, by its composition, is suitable for use as a carburant in internal combustion engines.

(D) *Jet fuel*—a refined petroleum distillate used to fuel jet propulsion engines.

(E) *Liquefied gases*—hydrocarbon gases recovered from natural gas or produced from petroleum refining and kept under pressure to maintain a liquid state at ambient temperatures.

(F) *Lubricating oil*—a refined petroleum distillate or specially treated petroleum residue used to lessen friction between surfaces.

(G) *Naphtha*—a refined petroleum distillate falling within a distillation range overlapping the higher gasoline and the lower kerosenes.

(H) *Natural gas products*—liquids (under atmospheric conditions), including natural gasoline, that—

(*1*) Are recovered by a process of absorption, adsorption, compression, refrigeration, cycling, or a combination of these processes, from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir, and

(*2*) When recovered and without processing in a refinery, otherwise fall within any of the definitions of products contained in subdivision (B), (C), (D), and (G) above.

(I) *Residual fuel oil*—a topped crude oil or viscous residuum that, as obtained in refining or after blending with other fuel oil, meets or is the equivalent of Military Specification Mil-F-859 for Navy Special Fuel Oil and any more viscous fuel oil, such as No. 5 or Bunker C.

(iii) *Unfinished oils* means one or more of the petroleum oils listed in subdivision (ii) above, or a mixture or combination of these oils, that are to be further processed other than by blending by mechanical means.

[48 FR 42278, Sept. 19, 1983, as amended at 54 FR 48985, Nov. 28, 1989; 55 FR 25530, June 21, 1990; 55 FR 38517, Sept. 18, 1990]

25.109 Solicitation provisions and contract clause.

(a) The contracting officer shall insert the provision at 52.225-1, Buy American Certificate, in solicitations for the acquisition of supplies, or for services involving the furnishing of supplies, for use within the United States, except for acquisitions made under the Trade Agreements Act of 1979, as specified in subpart 25.4.

(b) When quotations are obtained orally (see part 13), vendors shall be informed that only domestic end products, other than end products excepted on a blanket or individual basis (see 25.108 and subpart 25.4), shall be acceptable, unless the price for an offered domestic end product is unreasonable (see 25.105).

(c) The contracting officer shall insert the provision at 52.225-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, in solicitations for the acquisition of civil aircraft and related articles.

(d) The contracting officer shall insert the clause at 52.225-3, Buy American Act—Supplies, in solicitations and contracts for the acquisition of supplies, or for services involving the furnishing of supplies, for use within the United States, except for acquisitions made under the Trade Agreements Act of 1979, as specified in subpart 25.4.

[48 FR 42258, Sept. 19, 1983 as amended at 51 FR 2665, Jan. 17, 1986]

Subpart 25.2—Buy American Act—Construction Materials

25.200 Scope of subpart.

This subpart implements the Buy American Act (41 U.S.C. 10) and Executive Order 10582, December 17, 1954 (as amended). It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

25.201 Definitions.

Components, as used in this subpart, means those articles, materials, and supplies incorporated directly into construction materials.

Construction, as used in this subpart, means construction, alteration, or repair of any public building or public work in the United States.

Construction materials, as used in this subpart, means articles, materials, and supplies brought to the construction site for incorporation into the building or work.

Domestic construction material, as used in this subpart, means (a) an unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether a construction material is domestic, only the construction material and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the construction material and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with 25.202(a)(3) are treated as domestic.

Foreign construction material, as used in this subpart, means a construction material other than a domestic construction material.

United States (see 25.101).

25.202 Policy.

(a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when—

(1) The cost would be unreasonable as determined in accordance with 25.203;

(2) The agency head determines that use of a particular domestic construction material would be impracticable; or

(3) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality (see 25.108).

(b) If the cost of the materials is estimated to exceed $100,000, the agency head, or a designee at a level no lower than the head of the contracting activity, must approve determinations made under subparagraph (a)(3) above. Officials making these determinations shall consider the feasibility of forgoing the acquisition or of acquiring a domestic substitute.

(c) When it is determined for any of the reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the contract. Findings justifying the exception shall be available for public inspection.

[48 FR 42278, Sept. 19, 1983, as amended at 54 FR 48985, Nov. 28, 1989]

25.203 Evaluating offers.

(a) The restrictions of the Buy American Act do not apply when the head of the concerned agency determines that using a particular domestic construction material would unreasonably increase the cost or would be impracticable.

(b) When proposed awards are submitted to the agency head for approval, each submission shall include a description of the materials, including unit and quantity, estimated costs, location of the construction project, name and address of the proposed contractor, and a detailed justification of the impracticability of using domestic materials.

25.204 Violations.

If the agency head finds that in the performance of a construction contract there has been a failure to comply with the clause at 52.225-5, Buy American Act—Construction Materials, those findings (including the name of the contractor obligated under the contract) shall be made public. No other contract for construction shall be awarded to that contractor, its subcontractors, or suppliers with which that contractor is associated or affiliated, within a period of 3 years after the findings are made public. (For debarment procedures, see subpart 9.4.)

25.205 Solicitation provision and contract clause.

The contracting officer shall insert the clause at 52.225-5, Buy American Act—Construction Materials, in solicitations and contracts for construction inside the United States.

Subpart 25.3—Balance of Payments Program

25.300 Scope of subpart.

This subpart provides policies and procedures applicable to contracting for supplies, services, or construction for use outside the United States and provides for the use of excess or near-excess foreign currency. The Balance of Payments Program restrictions have been waived with respect to the acquisition in accordance with subpart 25.4 of certain products under the Trade Agreements Act of 1979.

25.301 Definitions.

Components (see 25.101).

Domestic end product (see 25.101).

Domestic offer (see 25.101).

Domestic services, as used in this subpart, means services performed in the United States. If services provided under a single contract are performed both inside and outside the United States, they shall be considered domestic if 25 percent or less of their total cost is attributable to services (including incidental supplies used in connection with these services) performed outside the United States.

End product (see 25.101).

Foreign end product (see 25.101).

Foreign offer (see 25.101).

Foreign services, as used in this subpart, means services other than domestic services.

United States (see 25.101).

25.302 Policy.

(a) The Balance of Payments Program is an interim measure imposed to alleviate the impact of Government expenditures on the Nation's balance of international payments. The Balance of Payments Program differs from the Buy American Act in that the Buy American Act applies only to acquisitions for use inside the United States, while the Balance of Payments Program applies to acquisitions for use outside the United States.

(b) Foreign end products or services may be acquired for use outside the United States if any of the following conditions are met:

(1) The estimated cost of the product or service does not exceed the appropriate small purchase limitation in part 13.

(2) Perishable subsistence items are required and the agency head, or a designee, determines that delivery from the United States would significantly impair their quality at the point of consumption.

(3) The agency head, or a designee, determines that a requirement can only be filled by a foreign end product or service, and that it is not feasible to forgo filling it or to provide a domestic substitute (see 25.108).

(4) The acquisition is for ice, books, utilities, communications, and other materials or services that, by their nature or as a practical matter, can only be acquired or performed in the country concerned and a U.S. Government capability does not exist.

(5) Subsistence items are required specifically for resale in overseas commissary stores.

(6) The acquisition of foreign end products or services is required by a treaty or executive agreement between governments.

(7) Petroleum supplies and their by-products as listed and defined in 25.108 are required.

(8) The end products or services are paid for with excess or near-excess foreign currencies (see 25.304).

(9) The end products or services are mined, produced, or manufactured in Panama and are required by and for the use of United States Forces in Panama.

(c) Contracts shall require use of domestic construction materials (see 25.201) for construction, repair, or maintenance of real property outside the United States, except when the cost of these materials (including transportation and handling costs) exceeds the cost of foreign construction materials by more than 50 percent. A differential greater than 50 percent may be used when specifically authorized by the agency head or a designee.

25.303 Procedures.

(a) *Solicitation of offers.* The procedures in this section apply to contracts for supplies and services when the exceptions in 25.302(b) do not apply. Solicitations shall state that information regarding articles, materials, supplies, and services excepted from these procedures is available to prospective contractors upon request. When quotations are obtained orally (see part 13), vendors shall be informed that only domestic end products or services will be acceptable, except for those items that have been excepted or when the price for the foreign end products or services meets the evaluation criteria in paragraph (b) below.

(b) *Evaluation.* For purposes of evaluation, each foreign offer shall be adjusted by increasing it by 50 percent. If this procedure results in a tie between a foreign offer as evaluated and a domestic offer, the domestic offer shall be considered the successful offer. When this procedure results in the acquisition of foreign end products or services, the acquisition of domestic end products or services is thereby considered unreasonable in cost or inconsistent with the public interest.

25.304 Excess and near-excess foreign currencies.

(a) The United States holds currencies of certain countries in amounts determined annually by the Secretary of the Treasury to be excess to the normal, or above the immediate (near-excess) requirements of the Government. These countries are identified in Bulletins issued by the Office of Management and Budget which will be distributed through agency procedures on an expedited basis. Additional information may also be obtained from the Department of the Treasury, Office of the Assistant Secretary for International Affairs, Office of Development Policy. Acquisitions of foreign end products, services, or construction paid for in excess of near-excess foreign currencies are an exception to the balance of payments restrictions in this subpart (see 25.302(b)(8)).

(b) Excess and near-excess foreign currencies shall be used whenever feasible in payment of contracts over $1 million performed wholly or partly in any of the listed countries. In some cases, award may be made to an offeror willing to accept payment, in whole or part, in excess or near-excess foreign currency, even though the offer, when compared to offers in United States dollars, is not the lowest received. Price differentials may be funded from excess or near-excess foreign currencies available without charge to agency appropriations, subject to Office of Management and Budget (OMB) Circular No. A-20, May 21, 1966.

(c) Before issuing solicitations for contracts to be performed wholly or partly in the listed countries, the contracting officer shall obtain a determination from the agency head, or a designee no lower than the head of the contracting activity, as to the feasibility of using excess or near-excess foreign currency. Agency officials shall consult with the Budget Review Division, Office of Management and Budget, and verify—

(1) The availability of excess or near-excess foreign currency;

(2) The feasibility of using that currency in payment of the contract;

(3) The price differential, if any, that will be considered acceptable; and

(4) Procedures for obtaining excess or near-excess foreign currency requirements.

(d) When use of excess or near-excess foreign currency is determined feasible, the contracting officer shall, in the solicitation—

(1) Require that offers be stated in U.S. dollars;

(2) Request that offers also be stated, in whole or in part, in excess or near-excess foreign currency; and

(3) Reserve the right to make the award to the responsive offeror (i) that is willing to accept payment, in whole or in part, in excess or near-excess foreign currency, and (ii) whose offer is most advantageous to the Government, even though the total price may be higher than offers in U.S. dollars.

[48 FR 42278, Sept. 19, 1983, as amended at 53 FR 43390, Oct. 26, 1988]

25.305 Solicitation provision and contract clause.

(a) *Solicitation provision.* The contracting officer shall insert the provision at 52.225-6, Balance of Payments Program Certificate, in solicitations for supplies or services for use outside the United States, unless one or more of the exceptions in 25.302(b) applies or the acquisition is made under the Trade Agreements Act of 1979 (see subpart 25.4).

(b) *Oral quotations.* When quotations are obtained orally, vendors shall be informed that only domestic end products or services will be acceptable, except for those items that have been excepted or when the price for the foreign end products or services meets the evaluation criteria in 25.303(b).

(c) *Contract clause.* The contracting officer shall insert the clause at 52.225-7, Balance of Payments Program, in solicitations and contracts for acquiring supplies or services for use outside the United States, unless one or more of the exceptions in 25.302(b) applies or the acquisition is made under the Trade Agreements Act of 1979 (see subpart 25.4).

Subpart 25.4—Purchases Under the Trade Agreements Act of 1979

25.400 Scope of subpart.

This subpart provides additional policies and procedures peculiar to acquisitions subject to the Agreement on Government Procurement and the Trade Agreements Act of 1979 (19 U.S.C. 2501-2582) including (a) acquisitions from countries designated under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*); (b) acquisitions involving offers of Israeli end products under the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note); and

(c) Acquisitions involving offers of Canadian end products under the United States-Canada Free-Trade Agreement, as approved by Congress in the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note).

[51 FR 30619, Aug. 27, 1986; 52 FR 30076, Aug. 12, 1987, as amended at 53 FR 53340, Dec. 30, 1988]

25.401 Definitions.

Canadian end product, as used in this subpart, means (a) an unmanufactured end product mined or produced in the territory of Canada or other territories to which the customs laws of Canada apply; or (b) an end product manufactured in the territory of Canada or other territories to which the customs laws of Canada apply, if the cost of the components mined, produced or manufactured either in the territory of Canada, or other territories to which the customs laws of Canada apply, or in the United States, exceeds 50 percent of the cost of all the components.

Caribbean Basin country, as used in this subpart, means a country designated by the President as a beneficiary under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*) and listed below:

Antigua and Barbuda
Aruba
Bahamas
Barbados
Belize
British Virgin Islands
Costa Rica
Dominica
Dominican Republic
El Salvador
Grenada
Guatemala
Guyana
Honduras
Jamaica
Montserrat
NetherlandsAntilles
St. Christopher-Nevis
St. Lucia
St. Vincent and the Grenadines
Tobago
Trinidad

Caribbean Basin country end product, as used in this subpart, means an article that: (a) Is wholly the growth, product, or manufacture of the Caribbean Basin country, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term *includes* services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such. The term *excludes* products that are excluded from duty free treatment for Caribbean countries under 19 U.S.C. 2703(b), which presently are—

(1) Textiles and apparel articles that are subject to textile agreements;

(2) Footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel not designated as eligible

articles for the purpose of the Generalized System of Preferences under Title V of the Trade Act of 1974;

(3) Tuna, prepared or preserved in any manner in airtight containers;

(4) Petroleum, or any product derived from petroleum; and

(5) Watches and watch parts (including cases, bracelets and straps), of whatever type including, but not limited to, mechanical, quartz digital or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Tariff Schedule of the United States (TSUS) column 2 rates of duty apply.

Designated country, as used in this subpart, means a country or instrumentality designated under the Trade Agreements Act of 1979 and listed below:

Austria
Bangladesh
Belgium
Benin
Bhutan
Botswana
Burundi
Canada
Cape Verde
Central African Republic
Chad
Comoros
Denmark
Federal Republic of Germany
Finland
France
Gambia
Guinea
Haiti
Hong Kong
Ireland
Israel
Italy
Japan
Lesotho
Luxembourg
Malawi
Maldives
Mali
Nepal
Netherlands
Niger
Norway
Rwanda
Singapore
Somalia
Sweden
Switzerland
Western Samoa
Sudan
Tanzania U.R.
Uganda
United Kingdom
Upper Volta
Yemen

Designated country end product, as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of the designated country, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term includes services (except transportation services) incidental to its supply; *Provided,* That the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such.

Eligible product, as used in this subpart, means a designated country end product or a Caribbean Basin country end product.

[48 FR 42278, Sept. 19, 1983, as amended at 49 FR 12974, Mar. 30, 1984; 51 FR 16802, May 6, 1986; 53 FR 53340, Dec. 30, 1988; 54 FR 34755, Aug. 21, 1989]

25.402 Policy.

(a)(1) Executive Order 12260 requires the U.S. Trade Representative to set the dollar threshold for application of the Trade Agreement Act. The threshold will be published in the FEDERAL REGISTER and will be distributed through agency procedures on an expedited basis. When the value of the proposed acquisition of an eligible product is estimated to be at or over the dollar threshold, agencies shall evaluate offers for an eligible product without regard to the restrictions of the Buy American Act (see subpart 25.1) or the Balance of Payments Program (see subpart 25.3). When the value of the proposed acquisition is estimated to be below the Trade Agreements Act threshold, the restrictions of the Buy American Act or the Balance of Payments Program shall be applied to foreign offers, except as noted in subparagraphs (a)(2) and (a)(3) of this section (see 25.105).

(2) As required by Article 15 of the U.S.-Israel Free Trade Area Agreement, agencies other than the Department of Defense shall evaluate offers of Israeli end products at or above $50,000 in amount without regard to the restrictions of the Buy American Act (see subpart 25.1) or the Balance of Payments Program (see subpart 25.3).

(3) As required by Section 306 of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note), agencies shall evaluate offers of Canadian end products above $25,000 without regard to the restrictions of the Buy American Act (see subpart 25.1) or the Balance of Payments Program (see subpart 25.3).

(4) To determine whether the Trade Agreements Act applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), the contracting officer shall calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of this acqusition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(5) If a contemplated acquisition includes an option clause (see subpart 17.2), when calculating the threshold for application of Trade Agreements Act provisions include the value of all options.

(b) The U.S. Trade Representative has determined that in order to promote further the economic recovery of the Caribbean Basin countries (as defined in 25.401), products originating in those countries which are eligible for duty free treatment under the Caribbean Basin Economic Recovery Act shall be treated as eligible products for the purposes of this subpart (see 51 FR 6964-6965, February 27, 1986). This determination is effective until September 30, 1995, unless otherwise extended by the U.S. Trade Representative by means of a notice in the FEDERAL REGISTER.

(c) Except when waived under section 302(b)(2) of the Trade Agreements Act, there shall be no acquisition of foreign end products subject to the Act unless the foreign end products are designated country end products or Caribbean Basin country end products.

(d) No requirement for the acquisition of eligible products shall be divided with the intent of reducing the estimated value of the acquisition below the dollar threshold addressed in paragraph (a) of this section.

(e) Acquisitions of eligible products are subject to the requirements of part 6. The use of the authorities cited in 6.302-3(a)(2)(i) or 6.302-7 requires compliance with 6.303-1(d).

(f) Subject to the provisions of U.S. law and regulation, a supplier established in a designated country shall not be accorded less favorable treatment than is accorded to another supplier established in that country on the basis of—

(1) Foreign ownership or affiliation, or

(2) Where the goods being supplied were produced, provided that the country of production is a designated country.

[52 FR 8567, Mar. 18, 1987; 52 FR 30076, Aug. 12, 1987, as amended at 53 FR 27464, July 20, 1988; 53 FR 53341, Dec. 30, 1988]

25.403 Exceptions.

This subpart does not apply to—

(a) An acquisition of an eligible product where the estimated value of the acquisition falls below the Trade Agreements Act dollar thresholds discussed in 25.402(a);

(b) Products of countries (1) not listed in 25.401, or (2) barred by 25.402(c);

(c) Purchases under small or small disadvantaged business preference programs;

(d)(1) Purchases of arms, ammunition or war materials, or purchases indispensable for national security or for national defense purposes, by the Department of Defense, as provided in departmental regulations;

(2) Purchases indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative.

(e) Construction contracts;

(f) Service contracts (except those services incidental to the purchase of eligible products; *provided*, that the value of the services is not greater than the value of the product);

(g) Research and development contracts;

(h) Purchases by the U.S. Army Corps of Engineers;

(i) Purchases of items for resale;

(j) Purchases under subpart 8.6, Acquisition from Federal Prison Industries, Inc., and subpart 8.7, Acquisition from the Blind and Other Severely Handicapped;

(k) [Reserved]

(l) Purchases for agencies not listed in 25.406.

(m) Purchases of products that are excluded from duty free treatment for Caribbean countries under 19 U.S.C. 2703 (b), which presently are—

(1) Textiles and apparel articles that are subject to textile agreements;

(2) Footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel not designated as eligible articles for the purpose of the Generalized System of Preferences under Title V of the Trade Act of 1974;

(3) Tuna, prepared or preserved in any manner in airtight containers;

(4) Petroleum, or any product derived from petroleum; and

(5) Watches and watch parts (including cases, bracelets and straps), of whatever type including, but not limited to, mechanical, quartz digital or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Tariff Schedule of the United States (TSUS) column 2 rates of duty apply.

[48 FR 42278, Sept. 19, 1983, as amended at 51 FR 16803, May 6, 1986; 52 FR 19803, May 27, 1987; 53 FR 27465, July 20, 1988]

25.404 Labor surplus area set-asides.

(a) Except as provided in paragraph (b) of this section, when responsive offers are received for an eligible product, labor surplus area preference shall be accorded only to small business concerns.

(b) When responsive offers are received for an Israeli end product in an amount of at least $50,000 but less than the dollar threshold described in 25.402(a)(1), preference shall be accorded to all labor surplus area concerns.

[51 FR 30619, Aug. 27, 1986 and 52 FR 30076, Aug. 12, 1987]

25.405 Procedures.

When the Trade Agreements Act applies, the following procedures shall be used:

(a) Consistent with user needs, agencies shall allow a minimum of 30 days from the date of publication of the notice of solicitation in the Commerce Business Daily to receipt of offers.

(b) Agencies shall not impose technical requirements solely to preclude the acquisition of eligible products.

(c) Offers received in response to solicitations anticipating competitive negotiations shall be opened in the presence of an impartial witness, whose name shall be recorded in the contract file.

(d) Solicitations shall specify that offers involving eligible products from designated countries or Caribbean Basin countries shall be submitted in the English language and in U.S. dollars.

(e) Within 7 working days after a contract award for an eligible product, agencies shall give unsuccessful offerors from designated countries written notice in accordance with 14.408-1(a)(2) and 15.1001 (c)(2).

[48 FR 42278, Sept. 19, 1983, as amended at 51 FR 16803, May 6, 1986; 51 FR 20976, June 10, 1986; 51 FR 30619, Aug. 27, 1986; 52 FR 30076, Aug. 12, 1987; 53 FR 27465, July 20, 1988]

25.406 Agencies covered by the Agreement on Government Procurement.

This subpart applies only to acquisitions for agencies listed below:

ACTION

Administrative Conference of the United States

American Battle Monuments Commission

Board for International Broadcasting

Commission on Civil Rights

Commodity Futures Trading Commission

Community Services Administration

Consumer Product Safety Commission

Department of Agriculture (the Agreement on Government Procurement does not apply to acquiring agricultural products in furtherance of agricultural support programs or human feeding programs)

Department of Commerce

Department of Defense (excludes Army Corps of Engineers)

Department of Education

Department of Health and Human Services

Department of Housing and Urban Development

Department of the Interior (excludes the Bureau of Reclamation)

Department of Justice

Department of Labor

Department of State

Department of the Treasury

Department of Veterans Affairs

Environmental Protection Agency

Equal Employment Opportunity Commission

Executive Office of the President

Export-Import Bank of the United States

Farm Credit Administration

Federal Communications Commission

Federal Deposit Insurance Corporation

Federal Home Loan Bank Board

Federal Maritime Commission

Federal Mediation and Conciliation Service

Federal Trade Commission

General Services Administration (excludes purchases by the Tools Commodity Center and the Region 9 Office in San Francisco, California)

Interstate Commerce Commission

Maritime Administration of the Department of Transportation

Merit Systems Protection Board

National Aeronautics and Space Administration

National Credit Union Administration

National Labor Relations Board

National Mediation Board

National Science Foundation

National Transportation Safety Board

Nuclear Regulatory Commission

Office of Personnel Management

Overseas Private Investment Corporation

Panama Canal Commission

Peace Corps

Railroad Retirement Board

Securities and Exchange Commission

Selective Service System

Smithsonian Institution

United States Arms Control and Disarmament Agency

United States Information Agency

United States International Development Cooperation Agency

United States International Trade Commission

[48 FR 42278, Sept. 19, 1983, as amended at 49 FR 12974, Mar. 30, 1984; 51 FR 2665, Jan. 17, 1986; 51 FR 16803, May 6, 1986; 54 FR 29281, July 11, 1989; 55 FR 38517, Sept. 18, 1990]

25.407 Solicitation provision and contract clause.

(a) Except as provided in 25.403, the contracting officer shall insert—

(1) The provision at 52.225-8, Buy American Act—Trade Agreements Act—Balance of Payments Program Certificate, in solicitations for supplies; and

(2) The clause at 52.225-9, Buy American Act—Trade Agreements Act—Balance of Payments Program, in solicitations and contracts for supplies.

(b) The contracting officer shall rely on the offeror's certification as submitted.

Subpart 25.5—Payment in Local Foreign Currency

25.501 Policy.

(a) Contracts entered into and performed outside the United States with local foreign firms will be priced and paid in local currency, unless an international agreement provides for payment in U.S. dollars or the contracting officer determines the use of local currency to be inequitable or inappropriate.

(b) When the local currency increases in value in relation to the dollar, a violation of the Anti-Deficiency Act (31 U.S.C. 1341(a)(1)) could occur. To avoid this possibility, agencies should ensure the availability of adequate dollar appropriations to purchase local currency needed to make payments against the contract.

[48 FR 42258, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

Subpart 25.6—Customs and Duties

25.600 Scope of subpart.

This subpart provides policies and procedures for exempting from import duties certain supplies purchased under Government contracts. Regulations governing importations and duties are contained in the *Customs Regulations* issued by the U.S. Customs Service, Department of the Treasury (Chapter 1, Title 19 of the Code of Federal Regulations).

25.601 Definition.

Customs territory of the United States, as used in this subpart, means the States, the District of Columbia, and Puerto Rico.

25.602 Policy.

United States laws impose duties on foreign supplies imported into the customs territory of the United States. Certain exemptions from these duties are available to Government agencies. Agencies shall use these exemptions whenever the anticipated savings to appropriated funds will outweigh the administrative costs associated with processing required documentation.

25.603 Procedures.

(a) *General.* Except as provided elsewhere in the Customs Regulations (see 19 CFR 10.100), all shipments of imported supplies purchased under Government contracts are subject to the usual Customs entry and examination requirements. Unless the agency obtains an exemption (see 25.604), those shipments are also subject to duty.

(b) *Formal entry and release.* (1) Upon receipt of a notice from a Government contractor or customs office of the arrival, or pending arrival, of a shipment of supplies entitled to duty-free entry, the contracting officer normally shall execute—

(i) Customs Form 7501, Consumption Entry, which shall serve as both the entry and the entry summary (see 19 CFR parts 141-142) (two copies to be forwarded to the District Director of Customs at port of entry);

(ii) Customs Form 7501-A, Consumption Entry Permit (one copy to be forwarded to the District Director of Customs at port of entry); and

(iii) Either a duty-free entry certificate when required in accordance with 25.604 (two copies to be forwarded to the District Director of Customs at port of entry) or Customs Form 7506, Warehouse Withdrawal Conditionally Free of Duty, and Permit (two copies to be forwarded to the District Director of Customs at warehouse location).

(2) Customs forms are available from any District Director of Customs Office or United States Customs port. Data for completing customs forms shall be obtained from the contractor.

(c) *Immediate entry and release.* Imported supplies purchased under Government contracts are regarded as shipments, the immediate delivery of which is necessary under the provisions of 19 U.S.C. 1448(b). Request for their release from Customs custody before formal entry and release shall normally be made by the contracting officer by filing Customs Form 3461, Immediate Delivery Application, with the District Director of Customs at port of entry. Forms for formal entry and release must be filed within a reasonable time thereafter. Applications for immediate delivery may be limited to particular shipments or may cover all shipments under a Government contract. They may be approved for specific or indefinite periods of time (see 19 CFR 10.101 and 19 CFR part 142, subpart A, for requirements).

25.604 Exempted supplies.

(a) Schedule 8 of the Tariff Schedules of the United States (19 U.S.C. 1202) lists supplies for which exemptions from duty may be obtained when imported into the customs territory of the United States under a Government contract. For certain of these supplies, the contracting agency must certify to the Commissioner of Customs that they are for the purpose stated in the Tariff Schedule (see 19 CFR 10.102-104, 10.110, 10.114-119, 10.121, and 15 CFR 301 for requirements and formats).

(b) Supplies (as opposed to equipment) for Government-operated vessels or aircraft may be withdrawn from any customs-bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone free of duty and internal revenue tax as provided in 19 U.S.C. 1309(a). The contracting activity shall cite this authority on the appropriate customs form when making such purchases (see 19 CFR 10.59(a)).

25.605 Contract clause.

(a) The contracting officer shall insert the clause at 52.225-10, Duty-Free Entry, in solicitations and contracts over $100,000 that provide for, or anticipate furnishing to the Government, supplies to be imported into the customs territory of the United States.

(b) The clause may be used in solicitations and contracts of $100,000 or less, if such action is consistent with the policy in 25.602.

(c) If the contracting officer knows before award that the contract includes specific supplies that will be accorded duty-free entry, a list of these supplies shall be inserted in the contract Schedule. The list shall include item numbers from Schedule 8, Tariff Schedules of the United States, and a description of the supplies.

Subpart 25.7—Restrictions on Certain Foreign Purchases

25.701 Policy.

(a) The Government does not acquire for use outside the United States, its possessions, or Puerto Rico supplies or services from foreign countries or areas when these supplies or services could not be lawfully imported into the United States.

(b) When acceptance of supplies or services (including construction) is to take place in the United States, its possessions, or Puerto Rico, the contracting officer shall assume that all supplies not produced in the United States, its possessions, or Puerto Rico, have been lawfully imported.

25.702 Restrictions.

Except as provided in 25.703, agencies and their contractors and subcontractors shall not acquire for use outside the United States, its possessions, or Puerto Rico—

(a) Any supplies or services originating from sources within the Communist areas of North Korea, Vietnam, Cambodia, or Cuba; or

(b) Any supplies that are or were located in or transported from or through North Korea, Vietnam, Cambodia, or Cuba.

25.703 Exceptions.

(a) Supplies and services from sources restricted by 25.702 acquired for use outside the United States, its possessions, or Puerto Rico may be purchased or used only in unusual situations; for example, in an emergency or when the items (or services) are not available from another source and a substitute is not acceptable.

(b) Unless otherwise provided by agency procedures, the contracting officer may approve exceptions for small purchases. For other contracts, the agency head shall approve any exceptions. A copy of the written approval shall be furnished to the contractor.

25.704 Contract clause.

The contracting officer shall insert the clause at 52.225-11, Certain Communist Areas, in solicitations and contracts for supplies, services, or construction if acceptance is to take place outside the United States, its possessions, or Puerto Rico.

Subpart 25.8—International Agreements and Coordination

25.801 International agreements.

Treaties and agreements between the United States and foreign governments may affect contracting within foreign countries. Contracting officers should give particular attention to the provisions in those agreements that pertain to purchase procedures, contract forms and clauses, taxes, patents, technical information, facilities, and other matters related to contracting.

25.802 Procedures.

(a) When placing contracts with contractors outside the United States, for performance outside the United States, contracting officers shall—

(1) Determine the existence and applicability of any international agreements to contracts being planned or

processed, and ensure compliance with these agreements; and

(2) Conduct the necessary advance acquisition planning and coordination between the appropriate United States executive agencies and foreign interests as required by these agreements.

(b) Many international agreements are compiled in the *United States Treaties and Other International Agreements* series published by the Department of State. Copies of this publication are normally available in overseas legal offices and United States diplomatic missions.

Subpart 25.9—Additional Foreign Acquisition Clauses

SOURCE: 54 FR 29281, July 11, 1989, unless otherwise noted.

25.901 Omission of examination of records clause.

(a) *Definition. Foreign contractor,* as used in this subpart, means a contractor or subcontractor organized or existing under the laws of a country other than the United States, its territories, or possessions.

(b) *Policy.* As required by 10 U.S.C. 2313, 41 U.S.C. 254, and 15.106-1(b)(3), the contracting officer shall consider for use in negotiated contracts with foreign contractors, whenever possible, the clause at 52.215-1, Examination of Records by Comptroller General. Omission of the clause should be approved only after the contracting agency, having considered such factors as alternate sources of supply, additional cost, and time of delivery, has made all reasonable efforts to include the clause.

(c) *Conditions for omission.* (1)(i) The contracting officer may omit the clause at 52.215-1, Examination of Records by Comptroller General, from contracts with foreign contractors—

(A) If the agency head determines, with the concurrence of the Comptroller General or a designee, the omission of the clause will serve the public interest; or

(B) If the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination, and the agency head determines, after taking into account the price and availability of the property or services from domestic sources, that omission of the clause best serves the public interest.

(ii) When a determination under subdivision (c)(1)(i)(B) of this section is the basis for omission of the clause at 52.215-1, Examination of Records by Comptroller General, the agency head shall forward a written report to the Congress explaining the reasons for the determination.

(d) *Determination and findings.* The determination and findings shall—

(1) Identify the contract and its purpose, and whether it is a contract with a foreign contractor or with a foreign government or agency thereof;

(2) Describe the efforts to include the clause;

(3) State the reasons for the contractor's refusal to include the clause;

(4) Describe the price and availability of the property or services from the United States and other sources; and

(5) Determine that it will serve the interest of the United States to omit the clause.

25.902 Inconsistency between English version and translation of contract.

The contracting officer shall insert the clause at 52.225-14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts whenever translation into another language is anticipated.

Subpart 25.10—Sanctions for Violations of Export Controls

SOURCE: 54 FR 19826, May 8, 1989, unless otherwise noted.

25.1000 Scope of subpart.

Section 2443 of the Multilateral Export Control Enhancement Amendments Act (Pub. L. 100-418), August 23, 1988, referred to herein as *the Act,* directs the President to impose (a) procurement sanctions on Toshiba Corporation and its subsidiary Toshiba Machine Company, and on Kongsberg Vaapenfabrikk and its subsidiary Kongsberg Trading Company, and (b) import sanctions on all products produced by Toshiba Machine Company and Kongsberg Trading Company. Executive Order 12661, dated December 27, 1988, imposed these sanctions. This subpart implements the procurement sanctions. Import sanctions are implemented through Department of Treasury regulations (but see 25.1004(c)).

25.1001 Definitions.

As used in this subpart—

Component part, means any article which is not usable for its intended functions without being imbedded or integrated into any other product and which, if used in production of a finished product, would be substantially transformed in that process.

Essential to United States products or production, means, with respect to component parts, those component parts which are produced by a sanctioned person, that are necessary for manufacture or processing of United States products, and for which there is no suitable alternative.

Finished product, means any article which is usable for its intended function without being imbedded in or integrated into any other product. It does not include an article produced by a person, other than a sanctioned person, that contains parts or components of the sanctioned person if the parts or components have been substantially transformed during production of the finished product.

Information and technology, includes instructions, drawings, blueprints, technical data, plans, software, computer programs, and other forms of intellectual property in any form or medium. Technology also includes component parts, finished products, or other articles if purchased solely to demonstrate such technology, where the only way to gain access to required technology is to purchase a product or article produced by a sanctioned person.

Routine servicing and maintenance, means customary servicing and maintenance, including repairs or installation of spare parts or component parts. The term also includes the temporary importation of tools and equipment necessary to perform such servicing or maintenance, as well as reimportation of products exported for routine servicing and maintenance.

Sanctioned person, means a company or other foreign person upon whom prohibitions have been imposed.

Spare part, means any individual piece, part, or subassembly which is intended for the logistic support or repair of a finished product and not as a finished product itself.

Substantially transformed, when referring to a component part or finished product, means that the part or product has been subjected to a substantial manufacturing or processing operation by which the part or product is converted or combined into a new and different article of commerce having a new name, character, *and* use.

Suitable alternative, means an article (a) that can be substituted for an article produced by a sanctioned person, (b) that will perform the same functions or is capable of the same use, and (c) is available at a competitive price.

25.1002 Policy.

(a) During the period beginning December 28, 1988, and ending December 28, 1991, all executive agencies, departments, and instrumentalities of the United States Government are prohibited from contracting with, or procuring (including rental and lease/purchase) directly or indirectly the products or services of, (1) Toshiba Corporation, (2) Kongsberg Vaapenfabrikk, (3) Toshiba Machine Company, or (4) Kongsberg Trading Company.

(b) The prohibition also applies to subsidiaries, successor entities, or joint ventures of Toshiba Machine Company or Kongsberg Trading Company. The prohibition generally does not apply to subsidiaries, successor entities, or joint ventures of Toshiba Corporation or of Kongsberg Vaapenfabrikk, except when the head of the agency or designee determines that such entities have been formed for the specific purpose of circumventing the prohibition.

(c) Contracts awarded to, or contracts involving the provision of products or services of, any sanctioned person, which were awarded on or after June 30, 1987, should be cancelled or terminated (in whole or in part) as soon as practicable, unless one of the exceptions in 25.1003 applies. For such contracts awarded prior to June 30, 1987, which contain options to increase quantities or period of performance, the options should not be exercised unless one of the exceptions in 25.1003 applies.

25.1003 Exceptions.

The prohibition in 25.1002 shall not apply when—

(a) The Secretary of Defense or designee determines that, in the case of procurement of defense articles or defense services—

(1) The exercise of options (under contracts or subcontracts, entered into prior to December 28, 1988) are for production quantities necessary to satisfy U.S. operational military requirements;

(2) The sanctioned person is a sole source supplier of essential defense articles or services and no alternative supplier can be identified; or

(3) Such articles or services are essential to the national security under defense coproduction agreements.

(b) The head of the agency or designee determines that the procurement is for—

(1) Products or services provided under contracts entered into before June 30, 1987 (but see 25.1002(c) regarding the exercise of options);

(2) Spare parts;

(3) Component parts, but not finished products, essential to U.S. products or production;

(4) Routine servicing and maintenance of products; or

(5) Information and technology.

(c) The products or services of a sanctioned person are acquired from a nonsanctioned person and the contractor agrees that—

(1) The products provided are designed to the specifications of a nonsanctioned person and marketed under the trademark, brand or name of that person;

(2) The business relationship between the nonsanctioned person and the sanctioned person clearly existed prior to June 30, 1987; and

(3) The nonsanctioned person is not directly or indirectly owned by a sanctioned person.

(d) Components of a sanctioned person have been substantially transformed during manufacture of a finished product of a nonsanctioned person.

25.1004 Procedures.

(a) Determinations required by 25.1003 (a) or (b) shall be in a format established by agency regulations. The determination shall include a description of the article or service, the quantities of articles, and the scope and period of performance of such services.

(b) The contract file shall include the determination and supporting rationale to permit an award based on the exceptions in 25.1003.

(c) The clause prescribed in 25.1005 reminds the contractor of its responsibility for complying with applicable import regulations. To facilitate this compliance, the contracting officer shall provide the contractor a copy of any determination made under 25.1003(a) so that the contractor may provide this determination to the U.S. Customs Service pursuant to Department of Treasury Regulation 12.143. However, a separate determination by the Secretary of the Treasury or designee is required for an exception to the import sanctions imposed upon the products listed in 25.1003(b), and the contractor is responsible for obtaining this determination.

25.1005 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.225-12, Notice of Restrictions on Contracting with Sanctioned Persons, in all solicitations.

(b) The contracting officer shall insert the clause at 52.225-13, Restrictions on Contracting with Sanctioned Persons, in all solicitations and contracts.

PART 26—OTHER SOCIOECONOMIC PROGRAMS

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

NOTE: This part contains no text at the FAR level. It has been created to facilitate promulgation of additional agency-level socioeconomic coverage which properly falls under FAR Subchapter D—Socioeconomic Programs, but neither implements or supplements existing FAR parts 19, 20, nor 22 through 25.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

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27.601 General.

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

Source: 49 FR 12974, Mar. 30, 1984, unless otherwise noted.

27.000 Scope of part.

This part prescribes policies, procedures, and contract clauses pertaining to patents and directs agencies to develop coverage for Rights in Data and Copyrights.

Subpart 27.1—General

27.101 Applicability.

The policies, procedures, and clauses prescribed by this part 27 are applicable to all agencies. Agencies are authorized to adopt alternate policies, procedures, and clauses, but only to the extent determined necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements. Any agency action adopting such alternate policies, procedures, and clauses shall be covered in published agency regulations.

27.102 [Reserved]

27.103 Policy.

The policies pertaining to patents, data, and copyrights are set forth in this part 27 and the related clauses in part 52.

27.104 General guidance.

(a) The Government encourages the maximum practical commercial use of inventions made while performing Government contracts.

(b) Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent.

(c) Generally, the Government encourages the use of inventions in performing contracts and, by appropriate contract clauses, authorizes and consents to such use, even though the inventions may be covered by U.S. patents and indemnification against infringement may be appropriate.

(d) Generally, the Government should be indemnified against infringement of U.S. patents resulting from performing contracts when the supplies or services acquired under the contracts normally are or have been sold or offered for sale by any supplier to the public in the commercial open market or are the same as such supplies or services with relatively minor modifications.

(e) The Government acquires supplies or services on a competitive basis in accordance with part 6, but it is important that the efforts directed toward full and open competition not improperly demand or use data relating to private developments.

(f) The Government honors the rights in data resulting from private developments and limits its demands for such rights to those essential for Government purposes.

(g) The Government honors rights in patents, data, and copyrights, and complies with the stipulations of law in using or acquiring such rights.

(h) Generally, the Government requires that contractors obtain permission from copyright owners before including privately-owned copyrighted works in data required to be delivered under Government contracts.

[49 FR 12974, Mar. 30, 1984, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

Subpart 27.2—Patents

27.200 Scope of subpart.

This subpart prescribes policy with respect to—

(a) Patent infringement liability resulting from work performed by or for the Government;

(b) Royalties payable in connection with performing Government contracts; and

(c) Security requirements covering patent applications containing classified subject matter filed by contractors.

27.201 Authorization and consent.

27.201-1 General.

(a) In those cases where the Government has authorized or consented to the manufacture or use of an invention described in and covered by a patent of the United States, any suit for infringement of the patent based on the manufacture or use of the invention by or for the United States by a contractor (including a subcontractor at any tier) can be maintained only against the Government in the U.S. Claims Court and not against the contractor or subcontractor (28 U.S.C. 1498). To ensure that work by a contractor or subcontractor under a Government contract may not be enjoined by reason of patent infringement, the Government shall give authorization and consent in accordance with this regulation. The liability of the Government for damages in any such suit against it may, however, ultimately be borne by the contractor or subcontractor in accordance with the terms of any patent indemnity clause also included in the contract, and an authorization and consent clause does not de-tract from any patent indemnification commitment by the contractor or subcontractor. Therefore, both a patent indemnity clause and an authorization and consent clause may be included in the same contract.

(b) The contracting officer shall not include in any solicitation or contract—

(1) Any clause whereby the Government expressly agrees to indemnify the contractor against liability for patent infringement; or

(2) Any authorization and consent clause when both complete performance and delivery are outside the United States, its possessions, and Puerto Rico.

27.201-2 Clauses on authorization and consent.

(a) The contracting officer shall insert the clause at 52.227-1, Authorization and Consent, in solicitations and contracts (including those for construction; architect-engineer services; dismantling, demolition, or removal of improvements; and noncommon carrier communication services), except when small purchase procedures apply or both complete performance and delivery are outside the United States, its possessions, and Puerto Rico. Although the clause is not required when small purchase procedures apply, it may be used with them.

(b) The contracting officer shall insert the clause with its Alternate I in all R&D solicitations and contracts (including those for construction and architect-engineer services calling exclusively for R&D work or exclusively for experimental work), unless both complete performance and delivery are outside the United States, its possessions, and Puerto Rico. When a proposed contract involves both R&D work and supplies or services, and the R&D work is the primary purpose of the contract, the contracting officer shall use this alternate. In all other proposed contracts involving both R&D work and supplies or services, the contracting officer shall use the basic clause. Also, when a proposed contract involves either R&D or supplies and materials, in addition to construction or architect-engineer work, the contracting officer shall use the basic clause.

(c) If the solicitation or contract is for communication services with a common carrier and the services are unregulated and not priced by a tariff schedule set by a regulatory body, the contracting officer shall use the clause with its Alternate II.

27.202 Notice and assistance.

27.202-1 General.

The contractor is required to notify the contracting officer of all claims of infringement that come to the contractor's attention in connection with performing a Government contract. The contractor is also required, when requested, to assist the Government with any evidence and information in its possession in connection with any suit against the Government, or any claims against the Government made before suit has been instituted, on account of any alleged patent or copyright infringement arising out of or resulting from the contract performance.

27.202-2 Clause on notice and assistance.

The contracting officer shall insert the clause at 52.227-2, Notice and Assistance Regarding Patent and Copyright Infringement, in supply, service, or research and development solicitations and contracts (including construction and architect-engineer contracts) which anticipate a contract value above the dollar limit set forth at 13.000, except when small purchase procedures apply or both complete performance and delivery are outside the United States, its possessions, and Puerto Rico, unless the contracts indicate that the supplies or other deliverables are ultimately to be shipped into one of those areas.

27.203 Patent indemnification of Government by contractor.

27.203-1 General.

(a) To the extent set forth in this section, the Government requires reimbursement for liability for patent infringement arising out of or resulting from performing construction contracts or contracts for supplies or services that normally are or have been sold or offered for sale by any supplier to the public in the commercial open market or that are the same as such supplies or services with relatively minor modifications. Appropriate clauses for indemnification of the Government are prescribed in the following subsections.

(b) A patent indemnity clause shall not be used in the following situations:

(1) When the clause at 52.227-1, Authorization and Consent, with its Alternate I, is included in the contract, except that in contracts calling also for supplies of the kind described in paragraph (a) above, a patent indemnity clause may be used solely with respect to such supplies.

(2) When the contract is for supplies or services (or such items with relatively minor modifications) that clearly are not or have not been sold or offered for sale by any supplier to the public in the commercial open market. However, a patent indemnity clause may be included in (i) sealed bid contracts to obtain an indemnity regarding specific components, spare parts, or services so sold or offered for sale (see 27.203-2(b) below), and (ii) contracts to be awarded (either by sealed bid or negotiation) if a patent owner contends that the acquisition would result in patent infringement and the prospective contractor, after responding to a solicitation that did not contain an indemnity clause, is willing to indemnify the Government against such infringement either (A) without increase in price on the basis that the patent is invalid or not infringed, or (B) for other good reasons.

(3) When both performance and delivery are to be outside the United States, its possessions, and Puerto Rico, unless the contract indicates that the supplies or other deliverables are ultimately to be shipped into one of those areas.

(4) When the contract is awarded by small purchase procedures.

(5) When the contract is solely for architect-engineer work (see part 36).

[49 FR 12974, Mar. 30, 1984, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

27.203-2 Clauses for sealed bid contracts (excluding construction).

(a) Except when prohibited by 27.203-1(b) above, the contracting officer shall insert the clause at 52.227-3, Patent Indemnity, in sealed bid contracts for supplies or services (excluding construction and dismantling, demolition, and removal of improvements), if the contracting officer determines that the supplies or services (or such items with relatively minor modifications) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market. Also the clause may be included as authorized in 27.203-1(b)(2)(i).

(b) In solicitations and contracts (excluding those for construction) that call in part for specific components, spare parts, or services (or such items with relatively minor modifications) that normally are or have been sold or offered for sale by any supplier to the public in the commercial open market, the contracting officer may use the clause with its Alternate I or II, as appropriate. The choice between Alternate I (identification of excluded items) and Alternate II (identification of included items) should be based upon simplicity, Government administrative convenience and ease of identification of the items.

(c) In solicitations and contracts for communication services and facilities where performance is by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body, use the basic clause with its Alternate III.

[49 FR 12974, Mar. 30, 1984, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

27.203-3 Negotiated contracts (excluding construction).

A patent indemnity clause is not required in negotiated contracts, (except construction contracts covered at 27.203-5), but may be used as discussed in 27.203-4 below. A decision to omit a patent indemnity clause in a negotiated fixed-price contract described in this subsection should be based on a price consideration to the Government for forgoing the indemnification rights normally received by commercial purchasers of the same supplies or services.

[49 FR 12974, Mar. 30, 1984, as amended at 51 FR 2665, Jan. 17, 1986]

27.203-4 Clauses for negotiated contracts (excluding construction).

(a) The contracting officer may insert the clause at 52.227-3, Patent Indemnity—

(1) As authorized in 27.203-1(b)(2)(ii); and

(2) Except as prohibited by 27.203-1(b), in solicitations anticipating negotiated contracts (and such contracts) for supplies or services (excluding construction and dismantling, demolition, and removal of improvements), if the contracting officer determines that the supplies or services (or such items with relatively minor modifications) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market. Ordinarily, the contracting officer, in consultation with the prospective contractor, should be able to determine whether the supplies or services being purchased normally are or have been sold or offered for sale by any supplier to the public in the commercial open market. (For negotiated construction contracts, see 27.203-5).

(b) In solicitations and contracts that call in part for specific components, spare parts, or services (or such items with relatively minor modifications) that normally are or have been sold or offered for sale by any supplier to the public in the commercial open market, the contracting officer may use the clause with its Alternate I or II, as appropriate. The choice between Alternate I (identification of excluded items) and Alternate II (identification of included items) should be based upon simplicity, Government administrative convenience, and the ease of identification of the items.

(c) In solicitations and contracts for communication services and facilities where performance is by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body, the clause shall be used with its Alternate III.

27.203-5 Clause for construction contracts and for dismantling, demolition, and removal of improvements contracts.

Except as prohibited by 27.203-1(b), the contracting officer shall insert the clause at 52.227-4, Patent Indemnity—Construction Contracts, in solicitations and contracts for construction or that are fixed-price for dismantling, demolition, or removal of improvements. If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the contracting officer may expressly exclude them from the patent indemnification by using the basic clause with its Alternate I.

27.203-6 Clause for Government waiver of indemnity.

If, in the Government's interest, it is appropriate to exempt one or more specific United States patents from the patent indemnity clause, the contracting officer shall obtain written approval from the agency head or designee and shall insert the clause at 52.227-5, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause. The contracting officer shall document the contract file with a copy of the written approval.

27.204 Reporting of royalties—anticipated or paid.

27.204-1 General.

(a) (1) To determine whether royalties anticipated or actually paid under Government contracts are excessive, improper, or inconsistent with any Government rights in particular inventions, patents, or patent applications, contracting officers shall require prospective contractors to furnish certain royalty information and shall require contractors to furnish certain royalty reports. Contracting officers shall take appropriate action to reduce or eliminate excessive or improper royalties.

(2) Royalty information shall not be required (except for information under 27.204-3) in sealed bid contracts unless the need for such information

is approved at a level above that of the contracting officer as being necessary for proper protection of the Government's interests.

(b) When it is expected that work may be performed in the United States, its possessions, or Puerto Rico, any solicitation that may result in a negotiated contract for which royalty information is desired or for which cost or pricing data is obtained (see 15.804) should contain a provision requesting information relating to any proposed charge for royalties. If the work is to be performed in the United States, its possessions, or Puerto Rico and the response to the solicitation includes a charge for royalties, the contracting officer shall, before award of the contract, forward the information relating to the proposed payments of royalties to the office having cognizance of patent matters for the contracting activity concerned. The cognizant office shall promptly advise the contracting officer of appropriate action. Before award, the contracting officer shall take action to protect the Government's interest with respect to such royalties, giving due regard to all pertinent factors relating to the proposed contract and the advice of the cognizant office.

(c) The contracting officer, when considering the approval of a subcontract for work to be performed in the United States, its possessions, or Puerto Rico, shall require and obtain the same royalty information and take the same action with respect to such subcontracts in relation to royalties as required for prime contracts under paragraph (b) above. However, consent need not be withheld pending receipt of advice in regard to such royalties from the office having cognizance of patent matters.

(d) The contracting officer shall forward the royalty information and/or royalty reports received to the office having cognizance of patent matters for the contracting activity concerned for advice as to appropriate action.

[49 FR 12974, Mar. 30, 1984, as amended at 52 FR 19803, May 27, 1987]

27.204-2 Solicitation provision for royalty information.

If it is expected that work may be performed in the United States, its possessions, or Puerto Rico, the contracting officer shall insert a solicitation provision substantially as shown in 52.227-6, Royalty Information, in any solicitation that may result in a negotiated contract for which royalty information is desired or for which cost or pricing data is obtained under 15.804. If the solicitation is for communication services and facilities by a common carrier, use the provision with its Alternate I.

27.204-3 Patents—notice of Government as a licensee.

(a) When the Government is obligated to pay a royalty on a patent because of a license agreement between the Government and a patent owner and the contracting officer knows (or has reason to believe) that the licensed patent will be applicable to a prospective contract, the Government should furnish information relating to the royalty to prospective offerors since it serves the interest of both the Government and the offerors. In such situations, the contracting officer should include in the solicitation a notice of the license, the number of the patent, and the royalty rate recited in the license.

(b) When the Government is obligated to pay such a royalty, the solicitation should also require offerors to furnish information indicating whether or not each offeror is a licensee under the patent or the patent owner. This information is necessary so that the Government may either (1) evaluate an offeror's price by adding an amount equal to the royalty, or (2) negotiate a price reduction with an offeror-licensee when the offeror is licensed under the same patent at a lower royalty rate.

(c) If the Government is obligated to pay a royalty on a patent involved in the prospective contract, the contracting officer shall insert in the solicitation, substantially as shown, the provision at 52.227-7, Patents—Notice of Government Licensee.

27.204-4 Clause for reporting of royalties (foreign).

In solicitations contemplating negotiated contracts (and such contracts) to be performed outside the United States, its possessions, and Puerto Rico, regardless of the place of delivery, the contracting officer shall insert the clause at 52.227-8, Reporting of Royalties (Foreign).

27.205 Adjustment of royalties.

(a) If at any time the contracting officer has reason to believe that any royalties paid, or to be paid, under an existing or prospective contract or subcontract are inconsistent with Government rights, excessive, or otherwise improper, the facts shall be promptly reported to the office having cognizance of patent matters for the contracting activity concerned. The cognizant office shall review the royalties thus reported and such royalties as are reported under 27.204 and 27.206 and, in accordance with agency procedures, shall either recommend appropriate action to the contracting officer or, if authorized, shall take appropriate action.

(b) In coordination with the cognizant office, the contracting officer shall promptly act to protect the Government against payment of royalties on supplies or services—

(1) With respect to which the Government has a royalty-free license;

(2) At a rate in excess of the rate at which the Government is licensed; or

(3) When the royalties in whole or in part otherwise constitute an improper charge.

(c) In appropriate cases, the contracting officer in coordination with the cognizant office shall obtain a refund pursuant to any refund of royalties clause in the contract (see 27.206) or negotiate for a reduction of royalties.

(d) For guidance in evaluating information furnished pursuant to 27.204 and 27.205(a) above, see 31.205-37 and 31.311-34. See also 31.109 regarding advance understandings on particular cost items, including royalties.

27.206 Refund of royalties.

27.206-1 General.

When a fixed-price contract is negotiated under circumstances that make it questionable whether or not substantial amounts of royalties will have to be paid by the contractor or a subcontractor, such royalties may be included in the target or contract price, provided the contract specifies that the Government will be reimbursed the amount of such royalties if they are not paid. Such circumstances might include, for example, either a pending Government anti-trust action or prospective litigation on the validity of a patent or patents or on the enforceability of an agreement (upon which the contractor or subcontractor bases the asserted obligation) to pay the royalties to be included in the target or contract price.

27.206-2 Clause for refund of royalties.

The contracting officer shall insert the clause at 52.227-9, Refund of Royalties, in negotiated fixed-price contracts and solicitations contemplating such contracts if the contracting officer determines that circumstances make it questionable whether or not substantial amounts of royalties will have to be paid by the contractor or a subcontractor at any tier.

27.207 Classified contracts.

27.207-1 General.

(a) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may be a violation of 18 U.S.C. 792 *et seq.* (Espionage and Censorship), and related statutes, and may be contrary to the interests of national security.

(b) Upon receipt from the contractor of a patent application, not yet filed, that has been submitted by the contractor in compliance with paragraph (a) or (b) of, the clause at 52.227-10, Filing of Patent Applications—Classified Subject Matter, the contracting officer shall ascertain the proper security classification of the patent application. Upon a determination that the application contains classified subject matter, the contracting officer shall inform the contractor of any instructions deemed necessary or advisable relating to transmittal of the application to the United States Patent Office in accordance with procedures in the Department of Defense Industrial Security Manual for Safeguarding Classified Security Information. If the material is classified *Secret* or higher, the contracting officer shall make every effort to notify the contractor of the determination within 30 days, pursuant to paragraph (a) of the clause.

(c) In the case of all applications filed under the provisions of this section 27.207, the contracting officer, upon receiving the application serial number, the filing date, and the information furnished by the contractor under paragraph (d) of the clause at 52.227-10, Filing of Patent Applications—Classified Subject Matter, shall promptly submit that information to personnel having cognizance of patent matters in order that the steps necessary to ensure the security of the application may be taken.

(d) A request for the approval referred to in paragraph (c) of the clause at 52.227-10, Filing of Patent Applications—Classified Subject Matter, must be considered and acted upon promptly by the contracting officer in order to avoid the loss of valuable patent rights of the Government or the contractor.

27.207-2 Clause for classified contracts.

The contracting officer shall insert the clause at 52.227-10, Filing of Patent Applications—Classified Subject Matter, in all classified solicitations and contracts and in all solicitations and contracts where the nature of the work or classified subject matter involved in the work reasonably might be expected to result in a patent application containing classified subject matter.

Subpart 27.3—Patent Rights Under Government Contracts

27.300 Scope of subpart.

This subpart prescribes policies, procedures, and contract clauses with respect to inventions made in the performance of work under a Government contract or subcontract thereunder if a purpose of the contract or subcontract is the conduct of experimental, developmental, or research work, except to the extent statutory requirements necessitate different agency policies, procedures, and clauses as specified in agency supplemental regulations.

27.301 Definitions.

Invention, as used in this subpart, means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Made, as used in this subpart, when used in relation to any invention, means the conception or first actual reduction to practice of such invention.

Nonprofit organization, as used in this subpart, means a domestic university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application, as used in this subpart, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Small business firm, as used in this subpart, means a small business concern as defined at 15 U.S.C. 632 and implementing regulations of the Administrator of the Small Business Administration. (For the purpose of this definition, the size standard contained in 13 CFR 121.3-8 for small business contractors and in 13 CFR 121.3-12 for small business subcontractors will be used. See FAR part 19).

Subject invention, as used in this subpart, means any invention of the contractor conceived or first actually reduced to practice in the performance of work under a Government contract; *provided*, that in the case of a variety of plant, the date of determination defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d), must also occur during the period of contract performance.

[49 FR 12974, Mar. 30, 1984, as amended at 54 FR 25063, June 12, 1989 and 55 FR 25525, June 21, 1990]

27.302 Policy.

(a) *Introduction*. (1) The policy of this section is based on Chapter 18 of title 35, U.S.C. (Pub. L. 95-517, Pub. L. 98-620, 37 CFR part 401), the Presidential Memorandum on Government Patent Policy to the Heads of Executive Departments and Agencies dated February 18, 1983, and Executive Order 12591, which provides that, to the extent permitted by law, the head of each Executive Department and agency shall promote the commercialization, in accord with the Presidential Memorandum, of patentable results of federally funded research by granting to all contractors, regardless of size, the title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the Government. The objectives of this policy are to use the patent system to promote the utilization of inventions arising from federally supported research or development; to encourage maximum participation of industry in federally supported research and development efforts; to ensure that these inventions are used in a manner to promote free competition and enterprise; to promote the commercialization and public availability of the inventions made in the United States by United States industry and labor; to ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and, to minimize the costs of administering policies in this area.

(b) *Contractor right to elect title*. Under the policy set forth in paragraph (a) of this section, each contractor may, after disclosure to the Government as required by the patent rights clause included in the contract, elect to retain title to any invention made in the performance of work under the contract. To the extent an agency's statutory requirements necessitate a different policy, or different procedures and/or contract clauses to effectuate the policy set forth in paragraph (a) of this section, such policy, procedures, and clauses shall be contained in or expressly referred to in that agency's supplement to this subpart. In addition, a contract may provide otherwise (1) when the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign-government (see 27.303(c)), (2) in exceptional circumstances when it is determined by the agency that restriction or elimination of the right to retain title in any subject invention will better promote the policy and objectives of Chapter 18 of title 35, U.S.C. and the Presidential Memorandum, (3) when it is determined by a Government authority which is authorized by statute or Executive order to conduct foreign intelligence or counterintelligence activities that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities, or (4) when the contract includes the operation of a Government-owned, contractor-operated facility of the Department of Energy primarily dedicated to the Department's naval nuclear propulsion or weapons related programs and all funding agreement limitations under 35 U.S.C. 202(a)(iv) for agreements with small business firms and nonprofit organizations are limited to inventions occurring under the above two programs.

In the case of small business firms and nonprofit organizations, when an agency justifies and exercises the exception at subparagraph (b)(2) of this section on the basis of national security, the contract shall provide the contractor with the right to elect ownership to any invention made under such contract as provided by the clause at 52.227-11, Patent Rights—Retention by the Contractor (Short Form), if the invention is not classified by the agency within 6 months of the date it is reported to the agency, or within the same time period the Department of Energy (DOE) does not, as authorized by regulation, law or Executive order or implementing regulations thereto, prohibit unauthorized dissemination of the invention. Contracts in support of DOE's naval nuclear propulsion program are exempted from this paragraph. When a contract involves a series of separate task orders, an agency may apply the exceptions at subparagraph (b) (2) or (3) of this section to individual task orders, and it may structure the contract so that modified patent rights clauses will apply to the task order even though the clause at 52.227-11 is applicable to the remainder of the work. In those instances when the Government has the right to acquire title at the time of contracting, the contractor may, nevertheless, request greater rights to an identified investion (see 27.304-1(a)). The right of the contractor to retain title shall, in any event, be subject to the provisions of paragraphs (c) through (g) of this section.

(c) *Government license.* The Government shall have at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world; and may, if provided in the contract (see Alernative I of the applicable patent rights clause), have additional rights to sublicense any foreign government or international organization pursuant to existing treaties or agreements identified in the contract, or to otherwise effectuate such treaties or agreements. In the case of long term contracts, the contract may also provide (see Alternate II) such rights with respect to treaties or agreements to be entered into by the Government after the award of the contract.

(d) *Government right to receive title.* (1) The Government has the right to receive title to any invention if the contract so provides pursuant to a determination made in accordance with subparagraph (b) (1), (2), (3), or (4) of this section. In addition, to the extent provided in the patent rights clause, the Government has the right to receive title to an invention—

(i) If the contractor has not disclosed the invention within the time specified in the clause;

(ii) In any country where the contractor does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;

(iii) In any country where the contractor has not filed a patent application within the time specified in the clause;

(iv) In any country where the contractor decides not to continue prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; and/or

(v) In any country where the contractor no longer desires to retain title.

(2) For the purposes of this paragraph, election or filing in a European Patent Office Region or under the Patent Cooperation Treaty constitutes election or filing in any country covered therein to meet the times specified in the clause, provided that the Government has the right to receive title in those countries not subsequently designated by the contractor.

(e) *Utilization reports.* The Government shall have the right to require periodic reporting on the utilization or efforts at obtaining utilization that are being made by the contractor or its licensees or assignees. Such reporting by small business firms and nonprofit organizations may be required in accordance with instructions as may be issued by the Department of Commerce. Agencies should protect the confidentiality or utilization reports which are marked with restrictions to the extent permitted by 35 U.S.C. 205 or other applicable laws and 37 CFR part 401. Agencies shall not disclose such utilization reports to persons outside the Government without permission of the contractor. Contractors will continue to provide confidential markings to help prevent inadvertent release outside the agency.

(f) *March-in rights.* (1) With respect to any subject invention in which a contractor has acquired title, contracts provide that the agency shall have the right (unless provided otherwise in accordance with 27.304-1(f)) to require the contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the contractor, assignee, or exclusive licensee refuses such request, to grant such a license itself, if the agency determines that such action is necessary—

(i) Because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(ii) To alleviate health or safety needs which are not reasonably satisfied by the contractor, assignee, or their licensees;

(iii) To meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the contractor, assignee, or licensees; or

(iv) Because the agreement required by paragraph (g) below has neither been obtained nor waived, or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of its agreement obtained pursuant to paragraph (g) below.

(2) This right of the agency shall be exercised only after the contractor has been provided a reasonable time to present facts and show cause why the proposed agency action should not be taken, and afforded an opportunity to take appropriate action if the contractor wishes to dispute or appeal the proposed action, in accordance with 27.304-1(g).

(g) *Preference for United States industry.* Unless provided otherwise in accordance with 27.304-1(f), contracts provide that no contractor which receives title to any subject invention and no assignee of any such contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the agency upon a showing by the contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(h) *Small business preference.* (1) Nonprofit organization contractors are expected to use efforts that are reasonable under the circumstances to attract small business licensees. They are also expected to give small business firms that meet the standard outlined in the clause at 52.227-11, Patent Rights—Retention by the Contractor (Short Form), a preference over other applicants for licenses. What constitutes reasonable efforts to attract small business licensees will vary with the circumstances and the nature, duration, and expense of efforts needed to bring the invention to the market. Subparagraph (k)(4) of the clause is not intended, for example, to prevent nonprofit organizations from providing larger firms with a right of first refusal or other options in inventions that relate to research being supported under long-term or other arrangements with larger companies. Under such circumstances, it would not be reasonable to seek and to give a preference to small business licensees.

(2) Small business firms that believe a nonprofit organzations is not meeting its obligations under the clause may report their concerns to the Secretary of Commerce. To the extent deemed appropriate, the Secretary of Commerce will undertake informal investigation of the concern, and, if appropriate, enter into discussions or negotiations with the nonprofit organization to the end of improving its efforts in meeting its obligations under the clause. However, in no event will the

Secretary of Commerce intervene in ongoing negotiations or contractor decisions concerning the licensing of a specific subject invention. All the above investigations, discussions, and negotiations of the Secretary of Commerce will be in coordinations with other interested agencies, including the Small Business Administration; and in the case of a contract for the operation of a Government-owned, contractor-operated research or production facility, the Secretary of Commerce will coordinate with the agency responsible for the facility prior to any discussions or negotiations with the contractor.

(i) *Minimum rights to contractor.* (1) When the Government acquires title to a subject invention, the contractor is normally granted a revocable, nonexclusive, royalty-free license to that invention throughout the world. The contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and includes the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the contracting officer except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(2) The contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with the applicable provisions in the Federal Property Management Regulations and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that country. See the procedures at 27.304-1(e).

(j) *Confidentiality of inventions.* The publication of information disclosing an invention by any party before the filing of a patent application may create a bar to a valid patent. Accordingly, 35 U.S.C. 205 and 37 CFR part 40 provide that Federal agencies are authorized to withhold from disclosure to the public information disclosing any invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license) for a reasonable time in order for a patent application to be filed. Furthermore, Federal agencies shall not be required to release copies of any document which is part of an application for patent filed with the United States Patent and Trademark Office or with any foreign patent office. The Presidential Memorandum on Government Patent Policy specifies that agencies should protect the confidentiality of invention disclosures and patent applications required in performance or in consequence of awards to the extent permitted by 35 U.S.C. 205 or other applicable laws.

[49 FR 12974, Mar. 30, 1984, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2665, Jan. 17, 1986; 54 FR 25063, June 12, 1989 and 55 FR 25525, June 21, 1990]

27.303 Contract clauses.

In contracts (and solicitations therefor) for experimental, developmental, or research work (but see 27.304-3 regarding contracts for construction work or architect-engineer services), a patent rights clause shall be inserted as follows:

(a) (1) The contracting officer shall insert the clause at 52.227-11, Patent Rights—Retention by the Contractor (Short Form), if all the following conditions apply:

(i) The contractor is a small business concern or nonprofit organization as defined in 27.301 or, except for contracts of the Department of Defense (DOD), the Department of Energy (DOE), or the National Aeronautics and Space Administration (NASA), any other type of contractor.

(ii) No alternative patent rights clause is used in accordance with para-

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graph (c) or (d) of this section or 27.304-2.

(2) To the extent the information is not required elsewhere in the contract, and unless otherwise specified by agency supplemental regulations, the contracting officer may modify 52.227-11(f) to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide, upon request, the filing date, serial number and title, a copy of the patent application, and patent number and issue date for any subject invention in any country in which the contractor has applied for patents.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Federal Government employee is a coinventor.

(3) If the acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement, or if the agency head or a designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement, the contracting officer shall use the clause at 52.227-11, with its Alternate I. If other rights are necessary to effectuate the treaty or agreement, Alternate I may be appropriately modified. In long term contracts, Alternate II shall be added if necessary to effectuate treaties or agreements to be entered into.

(4) If the contracting officer includes the clause at 52.227-11, Patent Rights--Retention by the Contractor (Short Form), in a contract with a nonprofit organization for the operation of a Government-owned facility, the contracting officer will include Alternate III in lieu of subparagraph (k)(3) of the clause.

(5) If the contract is for the operation of a Government-owned facility, the contracting officer may include Alternate IV with the clause at 52.227-11.

(b) (1) The contracting officer shall insert the clause at 52.227-12, Patent Rights—Retention by the Contractor (Long Form), if all the following conditions apply:

(i) The contractor is other than a small business firm or nonprofit organization.

(ii) No alternative clause is used in accordance with paragraph (c) or (d) of this section or 237.304-2.

(iii) The contracting agency is one of those excepted under subdivision (a)(1)(i) of this section.

(2) If the acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement or if the agency head or a designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement, the contracting officer shall use the clause at 52.227-12, with its Alternate I. If other rights are necessary to effectuate the treaty or agreement, Alternate I may be appropriately modified. In long term contracts, Alternate II shall be added if necessary to effectuate treaties or agreements to be entered into.

(c) (1) The contracting officer shall insert the clause at 52.227-13, Patent Rights—Acquisition by the Government, if any of the following conditions apply:

(i) No alternative clause is used in accordance with subparagraphs (c) (2) and (4) or paragraph (d) of this section or 27.304-2.

(ii) The work is to be performed outside the Untied States, its possessions, and Puerto Rico by contractors that are not small business firms, nonprofit organizations as defined in 27.301, or domestic firms. For purposes of this subparagraph, the contracting officer may presume that a contractor is not a domestic firm unless it is known that the firm is not foreign owned, controlled, or influenced. (See 27.304-4(a) regarding subcontracts with U.S. firms.)

(2) Pursuant to their statutory requirements, DOE and NASA may specify in their supplemental regulations use of a modified version of the clause at 52.227-13 in contracts with other than small business concerns or nonprofit organizations.

(3) If the acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement or if the agency head or a designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement, the contracting officer shall use the clause with its Alternate I. If other rights are necessary to effectuate the treaty or agreement, Alternate I may be appropriately modified. In long term contracts, Alternate II shall be added if necessary to effectuate treaties or agreements to be entered into.

(4) Section 401 of title 37 of the Code of Federal Regulations provides that in contracts with small business firms and nonprofit organizations, when an agency exercises the exceptions at 27.302(b) (2) or (3) it shall use the clause at 52.227-11, with such modifications as are necessary to address the exceptional circumstances or concerns which led to the use of the exception. The greater rights determinations provision of 52.227-13(b)(2) shall be included in the modified clause.

(d) (1) If one of the following applies, the contracting officer may insert the clause prescribed in paragraph (a) or (b) of this section as otherwise applicable, agency supplemental regulations may provide another clause and specify its use, or the contracting officer shall insert the clause prescribed in paragraph (c) of this section:

(i) The contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government.

(ii) There are exceptional circumstances and the agency head determines that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of Chapter 18 of title 35 of the United States Code.

(iii) It is determined by a Government authority which is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities that restriction or elimination of the right to retain any subject invention is necessary to protect the security of such activities.

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of the Department of Energy primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) Before using any of the exceptions under subparagraph (d)(1) of this section in a contract with a small business firm or a nonprofit organization and before using the exception of subdivision (d)(1)(ii) of this section for any contractor, the agency shall prepare a written determination, including a statement of facts supporting the determination, that the conditions identified in the exception exist. A separate statement of facts shall be prepared for each exceptional circumstances determination, except that in appropriate cases a single determination may apply to both a contract and any subcontract issued under it, or to any contract to which an exception is applicable. In cases when subdivision (d)(1)(ii) of this section is used, the determination shall also include an analysis justifying the determination. This analysis should address, with specificity, how the alternate provisions will better achieve the objectives set forth in 35 U.S.C. 200. For contracts with small business firms and nonprofit organizations, a copy of each determination, statement of facts, and, if applicable, analysis shall be promptly provided to the contractor or offeror along with a notification of its appeal rights under 35 U.S.C. 202(b)(4) in accordance with 27.304-1(a). In the case of small business and nonprofit contractors, except for determination under subdivision (d)(1)(iii) of this section, the agency shall, within 30 days after award of a contract, also provide copies of each determination, statement of fact, and analysis to the Sec-

retary of Commerce. These shall be sent within 30 days after the award of the contract to which they pertain. In the case of contracts with small business concerns, copies will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

(e) To qualify for the clause at 52.227-11, a prospective contractor may be required by the agencies excepted under subdivision (a)(1)(i) of this section to certify that it is either a small business firm or a nonprofit organization. If one of these agencies has reason to question the status of the prospective contractor, the agency may file a protest in accordance with 13 CFR 121.3-5 if small business firm status is questioned, or require the prospective contractor to furnish evidence of its status as a nonprofit organization.

(f) Alternates I and II to the clauses at 52.227-11, 52.227-12, and 52-227-13, as applicable, may be modified to make clear that the rights granted to the foreign government or international organization may be for additional rights beyond a license or sublicense if so required by the applicable treaty or international agreement. For example, in some cases exclusive licenses or even assignment of title in the foreign country involved might be required. In addition, an Alternate may be modified to provide for direct licensing by the contractor of the foreign government or international organization.

[54 FR 25065, June 12, 1989 and 55 FR 25525, June 21, 1990]

27.304 Procedures.

27.304-1 General.

(a) *Contractor appeals of exceptions.* (1) In accordance with 35 U.S.C. 202(b)(4), a small business firm or nonprofit organization contractor has the right to an administrative review of a determination to use one of the exceptions at 27.303(d)(1)(i)-(iv) if the contractor believes that a determination s either (i) contrary to the policies and objectives of this subsection or (ii) constitutes an abuse of discretion by he agency. Subparagraphs (a) (2) hru (7) of this subsection specify the procedures to be followed by contractors and agencies in such cases. The assertion of such a claim by the contractor shall not be used as a basis for withholding or delaying the award of a contract or for suspending performance under an award. However, pending final resolution of the claim, the contract may be issued with the patent rights provision proposed by the agency; but should the final decision be in favor of the contractor, the contract will be amended accordingly and the amendment made retroactive to the effective date of the contract.

(2) A contractor may appeal a determination by providing written notice to the agency within 30 working days from the time it receives a copy of the agency's determination, or within such longer time as an agency may specify in its regulations. The contractor's notice should specifically identify the basis for the appeal.

(3) The appeal shall be decided by the head of the agency or designee who is at a level above the person who made the determination. If the notice raises a genuine dispute over the material facts, the head of the agency or designee shall undertake or refer the matter for fact-finding.

(4) Fact-finding shall be conducted in accordance with procedures established by the agency. Such procedures shall be as informal as practicable and be consistent with principles of fundamental fairness. The procedures should afford the contractor the opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront such persons as the agency may rely upon. A transcribed record shall be made and shall be available at cost to the contractor upon request. The requirement for a transcribed record may be waived by mutual agreement of the contractor and the agency.

(5) The official conducting the fact-finding shall prepare or adopt written findings of fact and transmit them to the head of the agency or designee promptly after the conclusion of the fact-finding proceeding along with a recommended decision. A copy of the findings of fact and recommended decision shall be sent to the contractor by registered or certified mail.

(6) Fact-finding should be completed within 45 working days from the date the agency receives the contractor's written notice.

(7) When fact-finding has been conducted, the head of the agency or designee shall base his or her decision on the facts found, together with any argument submitted by the contractor, agency officials, or any other information in the administrative record. In cases referred for fact-finding, the agency head or designee may reject only those facts that have been found to be clearly erroneous, but must explicitly state the rejection and indicate the basis for the contrary finding. The agency head or designee may hear oral arguments after fact-finding provided that the contractor or contractor's attorney or representative is present and given an opportunity to make arguments and rebuttal. The decision of the agency head or designee shall be in writing and if it is unfavorable to the contractor, include an explanation of the basis of the decision. The decision of the agency or designee shall be made within 30 working days after fact-finding or, if there was no fact-finding, within 45 working days from the date the agency received the contractor's written notice. In accordance with 35 U.S.C. 203, a small business firm or a nonprofit organization contractor adversely affected by a determination under this section may, at any time within 60 days after the determination is issued, file a petition in the United States Claims Court, which shall have jurisdiction to determine the appeal on the record and to affirm, reverse, remand, or modify, as appropriate, the determination of the Federal agency.

(b) *Greater rights determination.* Whenever the contract contains the clause at 52.227-13, Patent Rights—Acquisition by the Government, the contractor (or an employee-inventor of the contractor after consultation with the contractor) may request greater rights to an identified invention within the period specified in such clause. Requests for greater rights may be granted if the agency head or designee determines that the interests of the United States and the general public will be better served thereby. In making such determinations, the agency head or designee shall consider at least the following objectives:

(1) Promoting the utilization of inventions arising from federally-supported research and development.

(2) Ensuring that inventions are used in a manner to promote full and open competition and free enterprise.

(3) Promoting public availability of inventions made in the United States by United States industry and labor.

(4) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(c) *Retention of rights by inventor.* If the contractor does not elect to retain title to a subject invention, the agency may consider and, after consultation with the contractor, grant requests for retention or rights by the inventor. Retention of rights by the inventor will be subject to the conditions in paragraph (d) (except subparagraphs (d)(1)), (f)(4), and paragraphs (h), (i), and (j) of the applicable Patent Rights—Retention by the Contractor clause.

(d) *Government assignment to contractor of rights in Government employees' inventions.* When a Government employee is a coinventor of an invention made under a contract with a small business firm or nonprofit organization, the agency employing the coinventor may transfer or reassign whatever right it may acquire in the subject invention from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202-204.

(e) *Additional requirements.* (1) If it is desired to have the right to require any of the following, when using the clause at 52.227-11, Patent Rights—Retention by the Contractor (Short Form), the contract shall be modified to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide, upon request, the filing date, serial number, and title; a copy of the patent application; and patent number and issue date for any subject invention in any country in which the contractor has applied for patents.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Federal Government employee is a coinventor.

(2) To the extent provided by such modification (and automatically under the terms of the clauses at 52.227-12, Patent Rights—Retention by the Contractor (Long Form), and 52.227-13, Patent Rights—Acquisition by the Government), the contracting officer may require the contractor to—

(i) Furnish a copy of each subcontract containing a patent rights clause (but if a copy of a subcontract is furnished under another clause, a duplicate shall not be requested under the patent rights clause);

(ii) Submit interim and final invention reports listing subject inventions and notifying the contracting officer of all subcontracts awarded for experimental, developmental, or research work;

(iii) Submit information regarding the filing date, serial number and title, and, upon request, a copy of the patent application, and patent number and issue date for any subject invention in any country for which the contractor has retained title; and

(iv) Submit periodic reports on the utilization of a subject invention or on efforts at obtaining utilization that are being made by the contractor or its licensees or assignees.

(3) The contractor is required to deliver to the contracting officer an instrument confirmatory of all rights to which the Government is entitled and to furnish the Government an irrevocable power to inspect and make copies of the patent application file. Such delivery should normally be made within 6 months after filing each patent application, or within 6 months after submitting the invention disclosure if the application has been previously filed.

(f) *Revocation or modification of contractor's minimum rights.* Before revocation or modification of the contractor's license in accordance with 27.302(i)(2), the contracting officer will furnish the contractor a written notice of intention to revoke or modify the license, and the contractor will be allowed 30 days (or such other time as may be authorized by the contracting officer for good cause shown by the contractor) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(g) *Exercise of march-in rights.* The following procedures shall govern the exercise of the march-in rights set forth in 35 U.S.C. 203, paragraph (j) of the Patent Rights—Retention by the Contractor clauses, and subdivision (c)(1)(ii) of the Patent Rights—Acquisition by the Government clause:

(1) When the agency receives information that it believes might warrant the exercise of march-in rights, before initiating any march-in proceeding in accordance with the procedures of subparagraph (g)(2) of this section, it shall notify the contractor in writing of the information and request informal written or oral comments from the contractor. In the absence of any comments from the contractor within 30 days the agency may, at its discretion, initiate the procedures below. If a comment is received, whether or not within 30 days, then the agency shall, within 60 days after it receives the comment, either initiate the procedures below or notify the contractor, in writing, that it will not pursue march-in rights based on the information about which the contractor was notified.

(2) A march-in proceeding shall be initiated by the issuance of a written notice by the agency head or a designee to the contractor and its assignee or exclusive licensee, as applicable and if known to the agency, stating that the Government has determined to exercise march-in rights. The notice shall state the reasons for the proposed march-in, in terms sufficient to

put the contractor on notice of the facts upon which the action is based, and shall specify the field or fields of use in which the Government is considering requiring licensing. The notice shall advise the contractor, assignee, or exclusive licensee of its rights as set forth in this section and in any supplemental agency regulations or procedures. The determination to exercise march-in rights shall be made by the head of the agency or designee.

(3) Within 30 days after the receipt of the written notice of march-in, the contractor, its assignee or exclusive licensee, may submit in person, in writing, or through a representative information or argument in opposition to the proposed march-in, including any additional specific information which raises a genuine dispute over the material facts upon which the march-in is based. If the information presented raises a genuine dispute over the material facts, the head of the agency or designee shall undertake or refer the matter to another official for fact-finding.

(4) Fact-finding shall be conducted in accordance with the procedures established by the agency. Such procedures shall be as informal as practicable and be consistent with principles of fundamental fairness. The procedures should afford the contractor the opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront such persons as the agency may present. A transcribed record shall be made and shall be available at cost to the contractor upon request. The requirement for a transcribed record may be waived by mutual agreement of the contractor and the agency. Any portion of the march-in proceeding, including a fact-finding hearing that involves testimony or evidence relating to the utilization or efforts at obtaining utilization that are being made by the contractor, its assignee, or licensees shall be closed to the public, including potential licensees. In accordance with 35 U.S.C. 202(c)(5), agencies shall not disclose any such information obtained during a march-in proceeding to persons outside the Government except when such release is authorized by the contractor, its assignee, or licensee.

(5) The official conducting the fact-finding shall prepare or adopt written findings of fact and transmit them to the head of the agency or designee promptly after the conclusion of the factfinding proceeding along with a recommended determination. A copy of the findings of fact shall be sent to the contractor, its assignee, or exclusive licensee by registered or certified mail. The contractor, its assignee or exclusive licensee, and agency representatives will be given 30 days to submit written arguments to the head of the agency or designee; and, upon request by the contractor, oral arguments will be held before the agency head or designee that will make the final determination.

(6) In case in which fact-finding has been conducted, the head of the agency or designee shall base his or her determination on the facts found, together with any other information and written or oral arguments submitted by the contractor, its assignee or exclusive licensee and agency representatives, and any other information in the administrative record. The consistency of the exercise of march-in rights with the policy and objectives of 35 U.S.C. 200 shall also be considered. In cases referred for fact-finding, the head of the agency or designee may reject only those facts that have been found to be clearly erroneous, but must explicitly state the rejection and indicate the basis for the contrary finding. Written notice of the determination whether march-in rights will be exercised shall be made by the head of the agency or designee and sent to the contractor, its assignee, or exclusive licensee, by certified or registered mail within 90 days after the completion of fact-finding or 90 days after oral arguments, whichever is later, or the proceedings will be deemed to have been terminated and thereafter no march-in based on the facts and reasons upon which the proceeding was initiated may be exercised.

(7) An agency may, at any time, terminate a march-in proceeding if it is satisfied that it does not wish to exercise march-in rights.

(8) These procedures shall also apply to the exercise of march-in rights against inventors receiving title to subject inventions under 35 U.S.C. 202(d) and, for that purpose, the term *contractor,* as used herein, shall be deemed to include the inventory and the term *exclusive licensee* shall be deemed to include partially exclusive licensee.

(9) An agency determination unfavorable to the contractor, its assignee, or exclusive licensee shall be held in abeyance pending the exhaustion of appeals or petitions filed under 35 U.S.C. 203(2).

(h) *Licenses and assignments under contracts with nonprofit organizations.* If the contractor is a nonprofit organization, the clause at 52.227-11 provides that certain contractor actions require agency approval, as specified below. Agencies shall provide procedures for obtaining such approval. Rights to a subject invention in the United States may not be assigned without the approval of the contracting agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions (provided that such assignee will be subject to the same provisions as the contractor).

[54 FR 25066, June 12, 1989 and 55 FR 25525, June 21, 1990]

27.304-2 Contracts placed by or for other Government agencies.

The following procedures apply unless agency agreements provide otherwise:

(a) When a Government agency requests another Government agency to award a contract on its behalf, the request should explain any special circumstances surrounding the contract and specify and furnish the patent rights clause to be used. Normally, the clause will be in accordance with the policies and procedures of this subpart. If, however, the request states that a clause of the requesting agency is required (e.g., because of statutory requirements, a deviation, or exceptional circumstances) that clause shall be used rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the agency, then that agency clause and no other patent rights clause shall be included in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable and is only in part for the requesting agency, then the work which is on behalf of the requesting agency shall be identified in the contract, and the agency clause shall be made applicable to that portion. In such situations, the remaining portion of the work (for the agency awarding the contract) shall likewise be identified and the appropriate patent rights clause (if required) shall be made applicable to that remaining portion.

(3) If the request states that an agency clause is not required in any resulting contract, then the appropriate patent rights clause shall be used, if a patent rights clause is required.

(b) Where use of the specified clause, or any modification, waiver, or omission of the Government's rights under any provisions therein, requires a written determination, the reporting of such determination, or a deviation, if any such acts are required in accordance with 27.303(d)(2), it shall be the responsibility of the requesting agency to make such determination, submit the required reports, and obtain such deviations, in consultation with the contracting agency, unless otherwise agreed between the contracting and requesting agencies. However, a deviation to a specified clause of the requesting agency shall not be made without prior approval of that agency.

(c) The requesting agency may require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally the requesting agency shall be responsible for the handling of any disclosed inventions, including the filing of patent applications where the Government receives title, and the custody, control, and licensing thereof, unless provided otherwise in the instructions or other agreements with the contracting agency.

[49 FR 12974, Mar. 30, 1984, as amended at 54 FR 25068, June 12, 1989 and 55 FR 25525, June 21, 1990]

27.304-3 Contracts for construction work or architect-engineer services.

(a) If a solicitation or contract for construction work or architect-engineer services has as a purpose the performance of experimental, developmental, or research work or test and evaluation studies involving such work and calls for, or can be expected to involve, the design of a Government facility or of novel structures, machines, products, materials, processes, or equipment (including construction equipment), it shall include a patent rights clause selected in accordance with the policies and procedures of this subpart 27.3.

(b) A solicitation or contract for construction work or architect-engineer services that calls for or can be expected to involve *only standard types of construction* to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term *standard types of construction* means construction in which the distinctive features, if any, in all likelihood will amount to no more than—

(1) Variations in size, shape, or capacity of otherwise structurally orthodox and conventionally acting structures or structural groupings; or

(2) Purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, which may or may not be sufficiently novel or meritorious to qualify for design protection under the design patent or copyright laws.

27.304-4 Subcontracts.

(a) The policies and procedures covered by this subpart apply to all contracts at any tier. Hence, a contractor awarding a subcontract and a subcontractor awarding a lower-tier subcontract that has as a purpose the conduct of experimental, developmental, or research work is required to determine the appropriate patent rights clause to be included that is consistent with these policies and procedures. Generally, the clause at either 52.227-11, 52.227-12, or 52.227-13 is to be used and will be so specified in the patent rights clause contained in the higher-tier contract, but the contracting officer may direct the use of a particular patent rights clause in any lower-tier contract in accordance with the policies and procedures of this subpart. For instance, when the clause at 52.227-13 is in the prime contract because the work is to be performed overseas, any subcontract with a nonprofit organization would contain the clause at 52.227-11.

(b) Whenever a prime contractor or a subcontractor considers the inclusion of a particular clause in a subcontract to be inappropriate or a subcontractor refuses to accept the proffered clause, the matter shall be resolved by the agency contracting officer in consultation with counsel.

(c) It is Government policy that contractors shall not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

27.304-5 Appeals.

(a) The agency official initially authorized to take any of the following actions shall provide the contractor with a written statement of the basis for the action at the time the action is taken, including any relevant facts that were relied upon in taking the action:

(1) A refusal to grant an extension to the invention disclosure period under subparagraph (c)(4) of the clauses at 52.227-11 and 52.227-12.

(2) A request for a conveyance of title to the Government under 27.302(d)(1)(i) through (v).

(3) A refusal to grant a waiver under 27.302(g), Preference for U.S. Industry.

(4) A refusal to approve an assignment under 27.304-1(h)(1).

(5) A refusal to approve an extension of the exclusive license period under 27.304-1(h)(2).

(b) Each agency shall establish and publish procedures under which any of the agency actions listed in paragraph (a) above may be appealed to the head of the agency or designee. Review at this level shall consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200-206 and this subpart.

(c) Appeals procedures established under paragraph (b) of this subsection shall include administrative due process procedures and standards for fact-finding at least comparable to those set forth in 37 CFR part 401.6(e)-(g) whenever there is a dispute as to the factual basis for an agency request for a conveyance of title under 27.302(d)(1) (i) through (v) including any dispute as to whether or not an invention is a subject invention.

(d) To the extent that any of the actions described in paragraph (a) above are subject to appeal under the Contract Disputes Act, the procedures under that Act will satisfy the requirements of paragraphs (b) and (c) above.

[49 FR 12974, Mar. 30, 1984, as amended at 54 FR 25068, June 12, 1989 and 55 FR 25525, June 21, 1990]

27.305 Administration of patent rights clauses.

27.305-1 Patent rights follow-up.

(a) It is important that the Government and the contractor know and exercise their rights in inventions conceived or first actually reduced to practice in the course of or under Government contracts in order to ensure their expeditious availability to the public and to enable the Government, the contractor, and the public to avoid unnecessary payment of royalties and to defend themselves against claims and suits for patent infringement. To attain these ends, contracts having a patent rights clause should be so administered that—

(1) Inventions are identified, disclosed, and reported as required by the contract, and elections are made;

(2) The rights of the Government in such inventions are established;

(3) Where patent protection is appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and

(5) Expeditious commercial utilization of such inventions is achieved.

(b) If a subject invention is made under funding agreements of more than one agency, at the request of the contractor or on their own initiative, the agencies shall designate one agency as responsible for administration of the rights of the Government in the invention.

27.305-2 Follow-up by contractor.

(a) *Contractor procedures.* If required by the applicable clause, the contractor shall establish and maintain effective procedures to ensure its patent rights obligations are met and that subject inventions are timely identified and disclosed, and when appropriate, patent applications are filed.

(b) *Contractor reports.* Contractors shall submit all reports required by the patent rights clause to the contracting officer or other representative designated for such purpose in the contract. Agencies may, in their implementing instructions, provide specific forms for use on an optional basis for such reporting.

27.305-3 Follow-up by Government.

(a) Agencies shall maintain appropriate follow-up procedures to protect the Government's interest and to check that subject inventions are identified and disclosed, and when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. Follow-up activities for contracts that include a clause referenced in 27.304-2 shall be coordinated with the appropriate agency.

(b) The contracting officer administering the contract (or other representative specifically designated in the contract for such purpose) is responsible for receiving invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information submitted by the contractor pursuant to a patent rights clause. If the contractor fails to furnish documents or information as called for by the clause within the time required, the contracting officer shall promptly request the contractor to supply the required documents or information and, if the failure persists, shall take appropriate action to secure compliance. Invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information relating to patent rights clauses shall be promptly furnished by the contracting officer administering the contract (or other designee) to the procuring agency or contracting activity for which the procurement was made for appropriate action.

(c) Contracting activities shall establish appropriate procedures to detect and correct failures by the contractor to comply with its obligations under the patent rights clauses, such as failures to disclose and report subject inventions, both during and after contract performance. Ordinarily a contractor should have written instructions for its employees covering compliance with these contract obligations. Government effort to review and correct contractor compliance with its patent rights obligations should be directed primarily towards contracts that, because of the nature of the research, development, or experimental work or the large dollar amount spent on such work, are more likely to result in subject inventions significant in number or quality, and towards contracts when there is reason to believe the contractors may not be complying with their contractual obligations. Other contracts may be reviewed using a spot-check method, as feasible. Appropriate follow-up procedures and activities may include the investigation or review of selected contracts or contractors by those qualified in patent and technical matters to detect failures to comply with contract obligations.

(d) Follow-up activities should include, where appropriate, use of Government patent personnel—

(1) To interview agency technical personnel to identify novel developments made in contracts;

(2) To review technical reports submitted by contractors with cognizant agency technical personnel;

(3) To check the Official Gazette of the United States Patent and Trademark Office and other sources for patents issued to the contractor in fields related to its Government contracts; and

(4) If additional information is required, to have cognizant Government personnel interview contractor personnel regarding work under the contract involved, observe the work on site, and inspect laboratory notebooks and other records of the contractor related to work under the contract.

(e) If it is determined that a contractor or subcontractor does not have a clear understanding of the rights and obligations of the parties under a patent rights clause, or that its procedures for complying with the clause are deficient, a post-award orientation conference or letter should ordinarily be used to explain these rights and obligations (see subpart 42.5). When a contractor fails to establish, maintain, or follow effective procedures for identifying, disclosing, and, when appropriate, filing patent applications on inventions (if such procedures are required by the patent rights clause), or after appropriate notice fails to correct any deficiency, the contracting officer may require the contractor to make available for examination books, records, and documents relating to the contractor's inventions in the same field of technology as the contract effort to enable a determination of whether there are such inventions and may invoke the withholding of payments provision (if any) of the clause. The withholding of payments provision (if any) of the patent rights clause or of any other contract clause may also be invoked if the contractor fails to disclose a subject invention. Significant or repeated failures by a contractor to comply with the patent rights obligation in its contracts shall be documented and made a part of the general file (see 4.801(c)(3)).

27.305–4 Conveyance of invention rights acquired by the Government.

(a) Agencies are responsible for those procedures necessary to protect the Government's interest in subject inventions. When the Government ac-

es the entire right, title, and inter-
n an invention by contract, this is
nally accomplished by an assign-
t either from each inventor to the
ractor and from the contractor to
Government, or from the inventor
he Government with the consent
he contractor, so that the chain of
from the inventor to the Govern-
t is clearly established. When the
ernment's rights are limited to a
se, there should be a confirmato-
strument to that effect.

The form of conveyance of title
the inventor to the contractor
t be legally sufficient to convey
rights the contractor is required to
ey to the Government. Agencies
, by supplemental instructions, de-
suitable assignments, licenses,
other papers evidencing any
ts of the Government in patents
atent applications, including such
ruments as may be required to be
rded in the Statutory Register or
mented in the Government Regis-
naintained by the U.S. Patent and
lemark Office pursuant to Execu-
Order 9424, February 18, 1944.

5-5 Publication or release of inven-
ion disclosures.

In accordance with the policy at
2(i), to protect their mutual inter-
contractors and the Government
ld cooperate in deferring the pub-
ion or release of invention disclo-
until the filing of the first
nt application, and use their best
ts to achieve prompt filing when
ication or release may be immi-
. The Government will, on its part
to the extent authorized by 35
C. 205, withhold from disclosure
e public any invention disclosures
rted under the patent rights
es of 52.227-11, 52.227-12, or
7-13 for a reasonable time in
for patent applications to be
. The policy in 27.302(i) regarding
ction of confidentiality shall be
wed.

The Government will also use
nable efforts to withhold from
sure to the public for a reasona-
me other information disclosing a
ted invention included in any
delivered pursuant to contract re-
ments; *provided*, that the contractor notifies the agency as to the identity of the data and the invention to which it relates at the time of delivery of the data. Such notification must be to both the contracting officer and any patent representative to which the invention is reported, if other than the contracting officer.

(c) As an additional protection for small business firms and nonprofit organizations 37 CFR part 401 prescribes that agencies shall not disclose or release, in accordance with 35 U.S.C. 205, for a period of 18 months from the filing date of the application to third parties pursuant to request under the Freedom of Information Act or otherwise copies of any document which the agency obtained under contract which is part of an application for patent with the U.S. Patent and Trademark Office or any foreign patent office filed by the contractor (or its assignees, licensees, or employees) on a subject invention to which the contractor has elected to retain title. This prohibition does not extend to disclosure to other Government agencies or contractors of Government agencies under an obligation to maintain such information in confidence.

[49 FR 12974, Mar. 30, 1984, as amended at 54 FR 25069, June 12, 1989 and 55 FR 25525, June 21, 1990]

27.306 Licensing background patent rights to third parties.

(a) A contract with a small business firm or nonprofit organization will not contain a provision allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless such provision has been approved by the agency head and written justification has been signed by the agency head. Any such provision will clearly state whether the licensing may be required in connection with the practice of a subject invention, a specifically identified work object, or both. The agency head may not delegate the authority to approve such provisions or to sign justifications required for such provisions.

(b) The Government will not require the licensing of third parties under any such provision unless the agency head determines that the use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the contract and that such action is necessary to achieve the practical application of the subject invention or work object. Any such determination will be on the record after an opportunity for a hearing, and the contractor shall be given notification of the determination by certified or registered mail. The notification shall include a statement that any action commenced for judicial review of such determination must be brought by the contractor within 60 days after the notification.

Subpart 27.4—Rights in Data and Copyrights

SOURCE: 52 FR 18140, May 13, 1987, unless otherwise noted.

27.400 Scope of subpart.

(a) The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart sets forth civilian agency and National Aeronautics and Space Administration (NASA) policies, procedures, and instructions with respect to (1) rights in data and copyrights and (2) acquisition of data. However, these policies, procedures, and instructions are not required to be applicable to NASA solicitations until December 31, 1987 (or until such other date as the NASA FAR Supplement is revised to accommodate the policies, procedures, and instructions contained in this subpart). Due to the special mission needs of the Department of Defense (DOD) and as required by 10 U.S.C. 2320, the remainder of the DOD policies, procedures, and instructions with respect to rights in data and copyrights and acquisition of data are contained in the DOD FAR Supplement (DFARS).

(b) Civilian agencies other than NASA shall implement section 203 of Public Law 98-577 pertaining to validation of proprietary data restrictions.

[52 FR 18140, May 13, 1987, as amended at 54 FR 34755, Aug. 21, 1989]

27.401 Definitions.

Computer software, as used in this subpart, means computer programs, computer data bases, and documentation thereof.

Data, as used in this subpart, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

Form, fit, and function data, as used in this subpart, means data relating to items, components, processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

Limited rights, as used in this subpart, means the rights of the Government in limited rights data, as set forth in a Limited Rights Notice if included in a data rights clause of the contract.

Limited rights data, as used in this subpart, means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications thereof. (Agencies may, however, adopt the following alternate definition:

Limited rights data, as used in this subpart, means data developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404(c).)

Restricted computer software, as used in this subpart, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

stricted rights, as used in this sub- , means the rights of the Govern- t in restricted computer software et forth in a Restricted Rights ce, if included in a data rights se of the contract, or as otherwise be included or incorporated in the ract.

chnical data, as used in this sub- , means data other than computer vare, which are of a scientific or nical nature.

limited rights, as used in this sub- , means the rights of the Govern- t to use, disclose, reproduce, pre- derivative works, distribute copies he public, and perform publicly display publicly, in any manner for any purpose, and to have or it others to do so.

2 Policy.

It is necessary for the depart- ts and agencies, in order to carry heir missions and programs, to ac- e or obtain access to many kinds ta produced during or used in the ormance of their contracts. Agen- require such data to: obtain com- ion among suppliers; fulfill cer- responsibilities for disseminating publishing the results of their ac- es; ensure appropriate utilization he results of research, develop- , and demonstration activities in- ng the dissemination of technical mation to foster subsequent tech- gical developments; and meet r programmatic and statutory re- ments. Further, for defense pur- , such data are also required by cies to meet specialized acquisi- needs and ensure logistics sup-

At the same time, the Govern- recognizes that its contractors have a legitimate proprietary in- t (e.g., a property right or other economic interest) in data result- rom private investment. Protec- of such data from unauthorized and disclosure is necessary in to prevent the compromise of property right or economic inter- void jeopardizing the contractor's ercial position, and preclude im- ent of the Government's ability ain access to or use of such data. protection of such data by the Government is also necessary to encourage qualified contractors to participate in Government programs and apply innovative concepts to such programs. In light of the above considerations, in applying these policies, agencies shall strike a balance between the Government's need and the contractor's legitimate proprietary interest.

27.403 Data rights—general.

All contracts that require data to be produced, furnished, acquired or specifically used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, duplication, and disclosure of such data, except certain contracts resulting from sealed bidding or similar situations which require only existing data (other than limited rights data and restricted computer software) to be delivered and reproduction rights are not needed for such data. As a general rule the data rights clause at 52.227-14, Rights in Data—General, including *Alternates I, II, III, IV, and V,* where determined to be appropriate as discussed in 27.404, is to be used for that purpose. However, in certain contracts either the particular subject matter of the contract or the intended use of the data may require the use of other prescribed clauses, or may not require the use of any prescribed clause, as discussed in 27.405 and 27.408. Also, in selecting a data rights clause, it is important to note that any such clause does not specify the data (in terms of type, quantity or quality) that is to be delivered, but only the respective rights of the Government and the contractor to use, disclose, or reproduce such data. Accordingly, the contract should also include appropriate terms to specify the data to be delivered.

27.404 Basic rights in data clause.

(a) *Unlimited rights data.* Under the clause at 52.227-14, Rights in Data—General, the Government acquires unlimited rights in the following data (except as provided in paragraph (f) of this section for copyrighted data): (1)

Data first produced in the performance of a contract (except to the extent such data constitute minor modifications to data that are limited rights data or restricted computer software); (2) form, fit, and function data delivered under contract; (3) data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract; and (4) all other data delivered under the contract other than limited rights data or restricted computer software (see paragraph (b) of this section). If any of the foregoing data are published copyrighted data with the notice of 17 U.S.C. 401 or 402, the Government acquires them under a copyright license, as set forth in paragraph (f) of this section, rather than with unlimited rights.

(b) *Limited rights data and restricted computer software.* The clause at 52.227-14, Rights in Data—General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding such data from delivery to the Government and delivering form, fit, and function data in lieu thereof. However, when an agency has a need to obtain delivery of limited rights data or restricted computer software, the clause may be used with its *Alternates II or III,* as set forth in paragraphs (d) and (e) of this section. These alternatives enable a contracting officer to selectively request the delivery of such data with limited rights or restricted rights, either by specifying such delivery in the contract or by specific request.

(c) *Alternate definition of limited rights data.* In the clause at 52.227-14, Rights in Data—General, in order for data to qualify as limited rights data, in addition to being data that either embody a trade secret or are data that are commercial or financial and confidential or privileged, such data must also pertain to items, components, or processes developed at private expense, including minor modifications thereof. However, for contracts that do not require the development, use or delivery of items, components or processes that are intended to be acquired by or for the Government, an agency may adopt for general use or for use in specific circumstances the alternate definition of limited rights data set forth in *Alternate I.* The alternate definition does not require that such data pertain to items, components, or processes developed at private expense; but rather that such data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(d) *Protection of limited rights data specified for delivery.* (1) Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data—General, by use of *Alternate II,* which *Alternate* adds subparagraph (g)(2) to the clause to enable the Government to require delivery of limited rights data rather than allowing the contractor to withhold such data. To obtain such delivery, the contract may identify and specify data to be delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified as withholdable under subparagraph (g)(1) of the clause at 52.227-14 Rights in Data—General. In addition, if agreed to during negotiations, the contract may specifically identify data that are not to be delivered under *Alternate II* or which, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in subparagraph (g)(2) (*Alternate II*). Such limited rights data will not, without permission of the contractor, be used by the Government for purposes of manufacture, and will not be disclosed outside the Government except for certain specific purposes as may be set forth in the Notice, and then only if the Government makes the disclosure subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes which may be adopted by an agency in its supplement and added to the Limited Rights Notice of subparagraph (g)(2) of the clause (*Alternate II*):

(i) Use (except for manufacture) by
pport service contractors.
(ii) Evaluation by nongovernment
aluators.
(iii) Use (except for manufacture) by
her contractors participating in the
overnment's program of which the
ecific contract is a part, for informa-
on and use in connection with the
ork performed under each contract.
(iv) Emergency repair or overhaul
ork.
(v) Release to a foreign government,
instrumentality thereof, as the in-
rests of the United States Govern-
ent may require, for information or
aluation, or for emergency repair or
erhaul work by such government.
(2) As an aid in determining whether
e clause at 52.227-14 should be used
th its *Alternate II*, the provision at
.227-15, Representation of Limited
ghts Data and Restricted Computer
ftware, may be included in any so-
itation containing the clause at
.227-14, Rights in Data—General.
is representation requests that an
feror state in response to a solicita-
on, to the extent feasible, whether
nited rights data are likely to be
ed in meeting the data delivery re-
irements set forth in the solicita-
on. In addition, the need for *Alter-*
te II should be considered during
gotiations or discussion with an of-
ror, particularly where negotiations
e based on an unsolicited proposal.
wever, use of the clause at 52.227-
, Rights in Data—General, without
ernate II does not preclude this *Al-*
nate from being used subsequently
modification during contract per-
mance, should the need arise for
livery of limited rights data that
ve been withheld or identified as
hholdable.
3) Whenever data that would qual-
as limited rights data, if it were to
delivered in human readable form,
formatted as a computer data base
the purpose of delivery under a
tract containing the clause at
227-14, Rights in Data—General,
h data is to be treated as limited
its data, rather than restricted
nputer software, for the purposes of
agraph (g) of that clause.
) *Protection of restricted computer*
ware specified for delivery. (1)

Contracting officers are authorized to modify the clause at 52.227-14, Rights in Data—General, by use of *Alternate III*, which *Alternate* adds subparagraph (g)(3) to the clause to enable the Government to require delivery of restricted computer software rather than allowing the contractor to withhold such restricted computer software. To obtain such delivery, the contract may identify and specify the computer software to be delivered, or the contracting officer may require by written request during contract performance, the delivery of computer software that has been withheld or identified as withholdable under subparagraph (g)(1) of the clause. In addition, if agreed to during negotiations, the contract may specifically identify computer software that are not to be delivered under *Alternate III* or which, if delivered, will be with restricted rights. In considering whether to use the clause at 52.227-14 with its *Alternate III*, it should be particularly noted that unlike other data, computer software is also an end item in itself, such that if withheld and form, fit, and function data provided in lieu thereof, an operational program will not be acquired. Thus, if delivery of restricted computer software is anticipated to be needed to meet contract performance requirements, the contracting officer should assure that the clause is used with its *Alternate III*. Unless otherwise agreed to (see paragraph (e)(2) of this section) the restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in subparagraph (g)(3) (*Alternate III*). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be—

(i) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(ii) Used or copied for use in or with a backup computer if any computer for which it was acquired becomes inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of any derivative software incorporating restricted computer software are made subject to the same restricted rights;

(v) Disclosed to and reproduced for use by support service contractors, subject to the same restriction under which the Government acquired the software;

(vi) Used or copied for use in or transferred to a replacement computer; and

(vii) Used in accordance with subdivisions (e)(1) (i) through (v) of this section, without disclosure prohibitions, if the computer software is published copyrighted computer software.

(2) The restricted rights set forth in subparagraph (e)(1) of this section are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of subparagraph (g)(3) (*Alternate III*) of the clause. However, either greater or lesser rights, consistent with the purposes and needs for which the software is to be acquired, may be specified by the contracting officer in a particular contract or prescribed in agency regulations. For example, consideration should be given to any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and data bases. Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of subparagraph (g)(3) of the clause are to be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(3) As an aid in determining whether the clause should be used with its *Alternate III*, the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, may be included in any solicitation containing the clause at 52.227-14, Rights in Data—General. This representation requests that an offeror state, in response to a solicitation, to the extent feasible, whether restricted computer software is likely to be used in meeting the data delivery requirements set forth in the solicitation. In addition, the need for *Alternate III* should be considered during negotiations or discussions with an offeror, particularly where negotiations are based on an unsolicited proposal. However, use of the clause at 52.227-14, Rights in Data—General, without *Alternate III* does not preclude this *Alternate* from being used subsequently by modification during contract performance, should the need arise for the delivery of restricted computer software that has been withheld or identified as withholdable.

(f) *Copyrighted data.*—(1) *Data first produced in the performance of a contract.* (i) In order to enhance the transfer or dissemination of information produced at Government expense, contractors are normally authorized, without prior approval of the contracting officer, to establish claim to copyright subsisting in technical or scientific articles based on or containing data first produced in the performance of work under a contract containing the clause at 52.227-14, Rights in Data—General and published in academic, technical or professional journals, symposia proceedings and similar works. Otherwise, the permission of the contracting officer is required in accordance with subdivision (f)(1)(ii) of this section or any applicable agency regulations, to establish claim to copyright subsisting in data first produced in the performance of a contract unless the clause is used with its *Alternate IV* in accordance with subdivision (f)(1)(iii) of this section. Agencies may, however, restrict copyright under certain circumstances in accordance with subparagraph (g)(3) of this section.

(ii) Usually, permission for a contractor to establish claim to copyright subsisting in data first produced under the contract will be granted when copyright protection will enhance the appropriate transfer or dissemination of such data and the commercialization of products or processes to which it pertains. The request for permission must be made in writing, and may be made either prior to contract award or subsequently during contract performance. It should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. The request normally will be granted unless—(A) the data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare; (B) the data are intended primarily for internal use by the Government; (C) the data are of the type that the agency itself distributes to the public under an agency program; (D) the Government determines that limitation on distribution of the data is in the national interest; (E) the Government determines that the data should be disseminated without restriction.

(iii) An *Alternate IV* is provided for use with the clause at 52.227-14, Rights in Data—General, which *Alternate* provides a substitute subparagraph (c)(1) in the clause granting blanket permission for contractors to establish claim to copyright subsisting in all data first produced in the performance of the contract without further request being made by the contractor. *Alternate IV* shall be used in all contracts for basic or applied research (other than those for management or operation of Government facilities and in contracts and subcontracts in support of programs being conducted at such facilities or where international agreements require otherwise) to be performed solely by colleges and universities. *Alternate IV* will not be used in contracts with colleges and universities if a purpose of the contract is for development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government. In addition, *Alternate IV* may be used in other contracts if an agency determines to grant blanket permission for contractors to establish claim to copyright subsisting in all data first produced in the performance of contract without further request being made by the contractor. In any contract where *Alternate IV* is used, the contract may exclude any data, items or categories of data from the blanket permission granted, either by express provisions in the contract or by the addition of a subparagraph (d)(3) to the clause, consistent with subparagraph (g)(3) of this section.

(iv) Whenever a contractor establishes claim to copyright subsisting in data (other than computer software) first produced in the performance of a contract, the Government is granted a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all such data, as set forth in subparagraph (c)(1) of the clause at 52.227-14, Rights in Data—General. For computer software the scope of the Government's license does not include the right to distribute to the public. Agencies may also, either on a case-by-case basis, or on a class basis if provided in implementing regulations, obtain a license of different scope than set forth in subparagraph (c)(1) of the clause if the agency determines that such different license will substantially enhance the transfer or dissemination of any data first produced under the contract, and will not interfere with the Government's use of the data as contemplated by the contract or if required for international agreements. If an agency obtains such a different license, the scope of that license shall be clearly stated in a conspicuous place on the medium on which the data is recorded. That is, if a report, the scope of the different license shall be put on the cover, or first page, of the report. If computer software, the scope of the different license shall be placed on the most conspicuous place available.

(v) Whenever a contractor establishes claim to copyright in data first produced in the performance of a contract, irrespective of which *Alternate* is used with the clause or the scope of the Government's license, the contractor is required to affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgment of Government sponsorship (including the contract number) to the data whenever such data are delivered to the Government, published, or deposited for registration as a published work in the U.S. Copyright Office. Failure to do so could result in such data being treated as unlimited rights data (see paragraph (i) of this section).

(2) *Data not first produced in the performance of a contract.* (i) Contractors are not to incorporate in data delivered under a contract any data that is not first produced under the contract and that is marked with the copyright notice of 17 U.S.C. 401 or 402, without either (A) acquiring for or granting to the Government certain copyright license rights for the data, or (B) obtaining permission from the contracting officer to do otherwise. The copyright license the Government acquires for such data will normally be of the same scope as discussed in subdivision (f)(1)(iv) of this section, and is set forth in subparagraph (c)(2) of the clause at 52.227-14, Rights in Data—General. However, agencies may, on a case-by-case basis, or on a class basis if provided in implementing agency regulations, obtain a license of different scope if the agency determines that such different license will not be inconsistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be so stated in the contract and clearly set forth in a conspicuous place on the data when delivered to the Government. In addition, if computer software not first produced under a contract is delivered with the copyright notice of 17 U.S.C. 401, the Government's license will be as set forth in subparagraph (g)(3) (*Alternate III*) if included in the clause at 52.227-14, Rights in Data—General; or as otherwise may be provided in a collateral agreement incorporated in or made part of the contract.

(ii) Contractors delivering data with both an authorized limited rights or restricted rights notice and the copyright notice of 17 U.S.C. 401 or 402 should modify the copyright notice to include the following (or similar) statement: *Unpublished—all rights reserved under the copyright laws of the United States.* If this statement is omitted, the contractor may be afforded an opportunity to correct it in accordance with paragraph (h) of this section. Otherwise, data delivered with a copyright notice of 17 U.S.C. 401 or 402 may be presumed to be published copyrighted data subject to the applicable license rights set forth in subdivision (f)(2)(i) of this section, without disclosure limitations or restrictions.

(iii) If contractor action causes limited rights or restricted rights data to be published with the copyright notice of 17 U.S.C. 401 or 402 after its delivery to the Government, the Government is relieved of disclosure and use limitations and restrictions regarding such data, and the contractor should advise the Government, request that a copyright notice be placed on the copies of the data delivered to the Government and acknowledge that the applicable copyright license set forth in subdivision (f)(2)(i) of this section applies.

(g) *Release, publication, and use of data.* (1) In paragraph (d) of the clause at 52.227-14, Rights in Data—General, subparagraph (d)(1) recognizes the fact that normally the contractor has the right to use, release to others, reproduce, distribute, or publish data first produced in the performance of a contract, except to the extent such data may be subject to Federal export control or to national security laws or regulations. In addition, to the extent the contractor receives or is given access to data that is necessary for the performance of the contract from or by the Government or others acting on behalf of the Government, and the data contains restrictive markings, subparagraph (d)(2) provides an agreement with the contractor to treat the data in accordance with the markings, unless otherwise specifically authorized by the contracting officer.

(2) In contracts for basic or applied research with universities or colleges, no restrictions may be placed upon the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. Statutes. For the purposes of this subparagraph, agency restrictions on the release or disclosure of computer software that has been, readily can be, or is intended to be, developed to the point of practical application (including for agency distribution under

established programs) are not considered restrictions on the reporting of the results of basic or applied research. Agencies may also restrict claim to copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is produced.

(3) Except for the results of basic or applied research under contracts with universities or colleges, agencies may, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's right to use, release to others, reproduce, distribute, or publish any data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party, either by adding a subparagraph (d)(3) to the Rights in Data—General clause at 52.227-14, or by express limitations or restrictions in the contract. In the latter case, the limitations or restrictions should be referenced in the Rights in Data—General clause. However, such regulatory restrictions or limitations are not to be imposed unless they are determined by the agency to be necessary in the furtherance of agency mission objectives, needed to support specific agency programs, or necessary to meet statutory requirements. Notwithstanding the provisions of this subparagraph, agencies may obtain, if provided in their FAR supplement, for information purposes only, advance copies of articles intended for publication in academic, scientific or technical journals or symposia proceedings or similar works.

(h) *Unauthorized marking of data.* Except for validation of restrictive markings on technical data under contracts for major systems, or for support of major systems, by agencies subject to the provisions of Title III of the Federal Property and Administrative Services Act of 1949, the Government has, in accordance with paragraph (e) of the clause at 52.227-14, Rights in Data—General, the right to either return to the contractor data containing markings not authorized by that clause, or to cancel or ignore such markings. However, markings will not be canceled or ignored without making written inquiry of the contractor and affording the contractor at least 30 days to provide a written justification to substantiate the propriety of the markings. Failure of the contractor to respond, or failure to provide a written justification to substantiate the propriety of the markings within the time afforded, may result in the Government's action to cancel or ignore the markings. If the contractor provides a written justification to substantiate the propriety of the markings, it will be considered by the contracting officer and the contractor notified of any determination based thereon. If the contracting officer determines that the markings are authorized, the contractor will be so notified in writing. Further, if the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the contractor will be furnished a written determination which shall become the final agency decision regarding the appropriateness of the markings and the markings will be cancelled or ignored and the data will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent jurisdiction. In any event, the markings will not be cancelled or ignored unless the contractor fails to respond within the period provided, or, if the contractor does respond, until final resolution of the matter, either by the contracting officer's determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed. The foregoing procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder. In addition, the contractor is not precluded from bringing a claim under the Contract Disputes Act, including pursuant to the Disputes clause of this contract if applicable, that may arise as the result of the Government's action to remove or ignore any markings on data, unless such action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(i) *Omitted or incorrect notices.* (1) Data delivered under a contract containing the clause at 52.227-14, Rights in Data—General, without a limited rights notice or restricted rights notice, and without a copyright notice, will be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may within 6 months (or a longer period approved by the contracting officer for good cause shown) request permission of the contracting officer to have omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the contractor's expense, and the contracting officer may agree to so permit if the contractor (i) identifies the data for which a notice is to be added or corrected, (ii) demonstrates that the omission of the proposed notice was inadvertent, (iii) establishes that use of the proposed notice is authorized, and (iv) acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also (i) permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or (ii) correct any incorrect notices.

(j) *Inspection of data at the contractor's facility.* Contracting officers may obtain the right to inspect data at the contractor's facility by use of *Alternate V*, which adds paragraph (j) to provide that right in the clause at 52.227-14, Rights in Data—General. Agencies may also adopt *Alternate V* for general use. The data subject to inspection may be data withheld or withholdable under subparagraph (g)(1) of the clause. Such inspection may be made by the contracting officer or designee (including nongovernmental personnel under the same conditions as the contracting officer) for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) (*Alternate V*). If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

27.405 Other data rights provisions.

(a) *Production of special works*. (1) The clause at 52.227-17, Rights in Data—Special Works, is to be used in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for—

(i) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translation, adaptation, and the like;

(ii) Histories of the respective agencies, departments, services, or units thereof;

(iii) Surveys of Government establishments;

(iv) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;

(v) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;

(vi) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the individual to whom the information relates;

(vii) Investigatory reports; or

(viii) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities.

(2) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(3) Subdivision (c)(1)(ii) of the clause at 52.227-17, Rights in Data—Special Works, which enables the Government to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the contracting officer determines that such assignment is not needed to further the objectives of the contract.

(4) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved, such liability will not arise.

(5) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production and distribution to the public of such works by other than a Federal agency) agencies are authorized to modify the Rights in Data—Special Works clause for use in such contracts, with rights in data provisions which meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

(b) *Rights relating to existing data other than limited rights data*—(1) *Acquisition of existing audiovisual and similar works.* The clause at 52.227-18, Rights in Data—Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are (i) means of exhibition or transmission, (ii) time, (iii) type of audience, and (iv) geographical location. If the contract requires that works of the type indicated in subparagraph (b)(1) of this section are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form) the clause at 52.227-17, Rights in Data—Special Works, is to be used. (See paragraph (a) of this section.)

(2) *Acquisition of existing computer software.* (i) When contracting other than from GSA's Multiple Award Schedule contracts for the acquisition of existing computer software (i.e., privately developed software normally vended commercially under a license or lease agreement restricting its use, disclosure, or reproduction), no specific contract clause prescribed in this subpart need be used, but the contract (or purchase order) must specifically address the Government's rights to use, disclose and reproduce the software, which rights must be sufficient for the Government to fulfill the need for which the software is being acquired. Such rights may be negotiated and set forth in the contract using the guidance concerning restricted rights as set forth in 27.404(e), or the clause at 52.227-19, Commercial Computer Software—Restricted Rights, may be used. Restricted computer software acquired under GSA Multiple Award Schedule contracts and orders are ex-

cluded from this requirement. The guidance concerning rights set forth in 27.404(e), as well as those in the clause at 52.227-19, are the minimum rights the Government usually should accept. Thus if greater rights than these minimum rights are needed, or lesser rights are to be acquired, they must be negotiated and set forth in the contract (or purchase order). This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at 52.227-19 when used. Examples of greater rights may be those necessary for networking purposes or use of the software from remote terminals communicating with a host computer where the software is located. If the computer software is to be acquired with unlimited rights, the contract must also so state. In addition, the contract must adequately describe the computer programs and/or data bases, the form (tapes, punch cards, disk pack, and the like), and all the necessary documentation pertaining thereto. If the acquisition is by lease or license, the disposition of the computer software (by returning to the vendor or destroying) at the end of the term of the lease or license must be addressed.

(ii) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, such agreement shall be reviewed to assure that it is consistent with subdivision (b)(2)(i) of this section. Caution should be exercised in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at 52.227-19, Commercial Computer Software—Restricted Rights, is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right to use, duplicate or disclose the computer software are reconciled by that clause.

(iii) If a prime contractor under a contract containing the clause at 52.227-14, Rights in Data—General, with subparagraph (g)(3) (*Alternate III*) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of subparagraph (g)(3) in a collateral agreement incorporated in and made part of the contract.

(3) *Other existing data and works.* Except for existing audiovisual and similar works pursuant to subparagraph (b)(1) of this section, and existing computer software pursuant to subparagraph (b)(2) of this section, no clause contained in this subpart is required to be included in (i) contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which such items are to be obtained unless reproduction rights are to be acquired; or (ii) other contracts (e.g., contracts resulting from sealed bidding) that require only existing data (other than limited rights data) to be delivered and such data are available without disclosure prohibitions, unless reproduction rights to the data are to be obtained. If the reproduction rights to the data are to be obtained in any contract of the type described in subdivision (b)(3) (i) or (ii) of this section, such rights must be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line data base services in the same form as they are normally available to the general public.

(c) *Contracts awarded under Small Business Innovative Research (SBIR) Program.* The clause at 52.227-20, Rights in Data—SBIR Program, is for use in all Phase I and Phase II contracts awarded under the Small Business Innovative Research Program (SBIR) established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982). The clause is limited to use solely in contracts awarded under the SBIR Program, and is the only data rights clause to be used in such contracts.

27.406 Acquisition of data.

(a) *General.* (1) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements may be subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(2) To the extent feasible, all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data, shall be specified in the contract. Further, and to the extent feasible, in major system acquisitions, data requirements shall be set out as separate contract line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with subparagraph (a)(1) of this section, develop their own contract schedule provisions in agency procedures (including data requirements lists) for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(3) Data delivery requirements should normally not require that a contractor provide the Government, as a condition of the procurement, unlimited rights in data that qualify as limited rights data or restricted computer software. Rather, form, fit, and function data may be furnished with unlimited rights in lieu of the qualifying data, or the qualifying data may be furnished with limited rights or restricted rights if needed (see 27.404 (d) and (e)). If greater rights are needed such need should be clearly set forth in the solicitation and the contractor fairly compensated for such greater rights.

(b) *Additional data requirements.* (1) Recognizing that in some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at the time of contracting, the clause at 52.227-16, Additional Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of such contracts as the actual requirements become known. The clause shall normally be used in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed $500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(2) Data may be ordered under the clause at 52.227-16, Additional Data Requirements, at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contractor may be relieved of retention requirements for specified data items by the contracting officer at any time during the retention period required by the clause. The contracting officer may permit the contractor to identify and specify in the contract data not to be ordered for delivery under the Additional Data Requirements clause if such data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the Additional Data Requirements clause by deleting the term *or specifically used* in paragraph (a) thereof if delivery of such data is not necessary to meet the Government's requirements for data. Any data ordered under this clause will be subject to the Rights in Data—

General clause (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract, and data authorized to be withheld under such clause will not be required to be delivered under the Additional Data Requirements clause, except as provided in *Alternate II* or *Alternate III*, if included in the clause (see 27.404 (d) and (e)).

(3) Agencies not having an established program for dissemination of computer software shall give consideration to not ordering additional computer software under the clause at 52.227-16, Additional Data Requirements, for the sole purpose of disseminating or marketing of the software to the public especially if this will provide the contractor additional incentive to make improvements to the software at its own expense and disseminate or market it. This should not preclude an agency from including a summary description of computer software available from a contractor in any data dissemination programs which it operates, with a statement as to how the potential user can obtain it through the contractor, licensee, or assignee. In cases where the contracting officer orders software for internal purposes, consideration shall be given, consistent with the Government's needs, to not ordering particular source codes, algorithms, processes, formulae or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

(c) *Acceptance of data.* Acceptability of technical data delivered under a contract shall be in accordance with the appropriate contract clause as required by subpart 46.3, and the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment—Major Systems, when it is included in the contract. (See paragraph (d) of this section.)

(d) *Major system acquisition.* (1) In order to assure that technical data needed to support a major system acquisition are timely delivered and are complete, accurate, and satisfy the requirements of the contract concerning the data, the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment—Major Systems, is to be included in contracts for or in support of a major system (as the term *major system* is defined in section 4 of the Office of Federal Procurement Policy Act, as amended by Pub. L. 98-577), including every detailed design, development, or production contract for a major system acquisition and contracts for any individual part, component, subassembly, assembly, or subsystem integral to the major system, and other property which may be replaced during the service life of the system, and including spare parts and replenishment spare parts.

(2) The clause at 52.227-21, Technical Data, Certification, Revision, and Withholding of Payment—Major Systems, requires the contractor, upon delivery of any technical data made subject to the clause in the contract, to certify that to the best of its knowledge and belief, such data are complete, accurate, and comply with contract requirements. It also provides for corrections of any deficiencies in the data, as well as for the ability of the contracting officer to request revisions of the data to reflect engineering design changes made during performance of the contract and affecting form, fit, and function of the items the data depict. Further included is the authority for the contracting officer to withhold payment under the contract to assure timely delivery of the technical data and/or assure correction if the technical data are not complete, accurate, and in compliance with contract requirements.

(3) When the clause at 52.227-21, Technical Data, Certification, Revision and Withholding of Payment—Major Systems, is used, the section of the contract specifying data delivery requirements (see subparagraph (a)(2) of this section) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of such technical data, the contracting officer or designee shall review the technical data and the contractor's certification relating thereto to assure that the data are complete, accurate, and comply with contract requirements. If not, the contractor is to be requested to correct the deficien-

es, and payment may be withheld
ntil such is done. Final payment
ould not be made under the contract
ntil it has been determined that the
livery requirements of those line
ems of data to which the clause ap-
ies have been satisfactorily met.
(4) In a contract for or in support of
major system awarded by a civilian
ency other than NASA or the U.S.
oast Guard the contracting officer
all include contractual provisions re-
iring, as an element of performance
der the contract, the delivery of any
chnical data, other than computer
ftware, relating to the major system
supplies for the major system pro-
red or to be procured by the Gov-
nment, which are to be developed
clusively with Federal funds in the
rformance of the contract if the de-
ery of such technical data is needed
ensure the competitive acquisition
supplies or services that will be re-
ired in substantial quantities in the
ture. The clause at 52.227-22, Major
stem—Minimum Rights, is to be in-
uded in such contracts in addition to
e clause at 52.227-14, Rights in
ata—General, and other required
auses, to ensure that the Govern-
ent acquires at least those rights re-
ired by Pub. L. 98-577 in technical
ta developed exclusively with Feder-
funds. In any contract to which this
bparagraph (d)(4) applies, technical
ta, other than computer software,
lating to a major system or supplies
r a major system, procured or to be
ocured by the Government and also
lating to the design, development, or
anufacture of products or processes
fered or to be offered for sale to the
blic (except for such data as may be
cessary for the Government to oper-
e or maintain the product, or use the
ocess if obtained by the United
ates as an element of performance
der the contract), shall not be re-
ired to be provided to the Govern-
nt from persons who have devel-
ed such products or processes as a
ndition for the procurement of such
oducts or processes by the Govern-
nt.

27.407 Rights to technical data in successful proposals.

(a) Contracting officers may, in consideration of contract award, desire to acquire unlimited rights in technical data (but not commercial or financial information) contained in a successful proposal upon which a contract award is based. However, before such unlimited rights are acquired, the prospective contractor must be afforded the opportunity either (1) to advise the contracting officer that the technical data, or portions thereof (to be identified by the prospective contractor), are covered by any restrictive notice regarding the disclosure and use of proposal information authorized by subpart 15.4 or 15.5 (or any agency supplement thereto), and request that such protection be maintained by excluding the data from the Government's rights; or (2) to establish to the contracting officer's satisfaction that identified portions of the technical data do not relate directly to or will not be utilized in the work to be performed under the contract, and request that such portions be excluded from the Government's rights.

(b) If unlimited rights to technical data in successful proposals, as set forth in paragraph (a) of this section, are to be acquired, it shall be by use of the clause at 52.227-23, Rights to Proposal Data (Technical). Any excluded technical data will be identified by inserting appropriate proposal page numbers in the clause, which clause enables the identification of data to be excluded from the Government's rights, as discussed in paragraph (a) of this section. Such exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in subpart 15.4 or 15.5 (or agency supplements thereto) relating to proposal information (i.e., will be used for evaluation purposes only). If the clause at 52.227-23, Rights to Proposal Data (Technical), is included in a contract, the prospective contractor must be specifically afforded the opportunity to exclude technical data as set forth in paragraph (a) of this section, and the contract file must reflect that fact. If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to their acquisition as limited rights data, if they so qualify, in accordance with 27.404(d).

27.408 Cosponsored research and development activities.

(a) In contracts involving cosponsored research and development wherein the contractor is required to make substantial contributions of funds or resources (i.e., by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable, the contracting officer may limit the acquisition of or acquire less than unlimited rights to any data developed and delivered under such contract. Agencies may regulate the use of this authority in their supplements. Basically such rights should, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprocurement rights as appropriate), and will address any disclosure limitations or restrictions to be imposed on the data. Also, consideration may be given to directed licensing provisions if needed to carry out the objectives of the contract. Since the purpose of the cosponsored research and development, the legitimate proprietary interests of the contractor, the needs of the Government, and the respective contributions of both parties may vary, no specific clauses are prescribed, but a clause providing less than unlimited rights in the Government for data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, such clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (i.e., Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. Such clause may be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, such clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies which will be available, in any event, to the public for their direct use.

(b) Where the contractor's contributions are readily segregable (by performance requirements and the funding therefor) and so identified in the contract, any data resulting therefrom may be treated under such clause as limited rights data or restricted computer software in accordance with 27.404 (d) or (e), as applicable; or if such treatment is inconsistent with the purpose of the contract, rights to such data may, if so negotiated and stated in the contract, be treated in a manner consistent with paragraph (a) of this section.

27.409 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.227-14, Rights in Data—General, including its use with *Alternate I* through *Alternate V* as may be required or authorized in accordance with paragraphs (b) through (f) of this section, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is—

(i) For the production of special works of the type set forth in 27.405(a), but the clause at 52.227-14, Rights in Data— General, shall be included in the contract and made applicable to data other than special works, as appropriate;

(ii) For the acquisition of existing data works, as described in 27.405(b);

(iii) To be performed outside the United States, its possessions, and

erto Rico, in which case agencies
y prescribe different clauses (see
agraph (n) of this section);
v) For architect-engineer services
construction work, in which case
ncies may utilize the clause at
227-17, Rights in Data—Special
rks, or may prescribe different
uses;
) A Small Business Innovation Re-
rch contract (see paragraph (l) of
section);
i) For the management, operation,
ign, or construction of a Govern-
nt-owned facility to perform re-
rch, development, or production
k, in which case agencies may pre-
be different clauses (see paragraph
of this section); or
ii) A contract involving cospon-
ed research and development in
ch a clause providing for less than
imited right has been authorized.
27.408).
) Subparagraph (e)(3) of the clause
2.227-14, Rights in Data—General,
be deleted or reserved by an
ncy not subject to Title III of the
eral Property and Administrative
vices Act.
) If an agency determines, in ac-
iance with 27.404(c), to adopt the
rnate definition of *Limited Rights*
in paragraph (a) of the clause,
clause shall be used with its *Alter-*
I.
) In accordance with 27.404(d), if a
racting officer determines it is
ssary to obtain the delivery of lim-
rights data, the clause shall be
with its *Alternate II.* The con-
ting officer shall, when *Alternate*
used, assure that the purposes, if
for which limited rights data are
e disclosed outside the Govern-
t are included in the *Limited*
ts *Notice* of subparagraph (g)(2)
e clause.
In accordance with 27.404(e), if a
racting officer determines it is
ssary to obtain the delivery of re-
ted computer software, the clause
be used with its *Alternate III.*
greater or lesser rights regarding
use, duplication, or disclosure of
icted computer software than
set forth in the Restricted
ts Notice of subparagraph (g)(3)
e clause must be specified in the
contract and the notice modified accordingly.

(e) The clause shall be used with its *Alternate IV* in contracts for basic or applied research (other than those for the management or operation of Government facilities or where international agreements require otherwise), to be performed solely by universities and colleges. The clause may be used with its *Alternate IV* in other contracts if in accordance with 27.404(f)(1) an agency determines to grant blanket permission for the contractor to establish claim to copyright subsisting in all data first produced without further request being made by the contractor. When *Alternate IV* is used, the contract may exclude items or categories of data from the blanket permission granted, either by express provisions in the contract or by the addition of a subparagraph (d)(3) to the clause (see 27.404(g)(2)).

(f) In accordance with 27.404(i), if a contracting officer needs to have the right to inspect certain data at a contractor's facility or if by an agency, generally the clause shall be used with its *Alternate V.*

(g) In accordance with 27.404(d)(2), if the contracting officer desires to have an offeror state in response to a solicitation, to the extent feasible, whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation, the contracting officer shall insert in the solicitation the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software in any solicitation containing the clause at 52.227-14, Rights in Data—General. The contractor's response will provide an aid in determining whether the clause should be used with *Alternate II* and/or *Alternate III.*

(h) The contracting officer shall normally insert the clause at 52.227-16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. (See 27.406(b).) This clause may also be used in other contracts when considered appropriate.

(i) In accordance with 27.405(a), the contracting officer shall insert the clause at 52.227-17, Rights in Data—Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data and/or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 27.405(a). The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released or reproduced by the contractor for other than contract performance. Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(j) The contracting officer shall insert the clause at 52.227-18, Rights in Data—Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 27.405(b)(1). The contract may set forth limitations consistent with the purposes for which the work is being acquired. The clause at 52.227-17, Rights in Data—Special Works, shall be used if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(k) In accordance with 27.405(b)(2), when contracting (other than from GSA's Multiple Award Schedule contracts) for the acquisition of existing computer software, the clause at 52.227-19, Commercial Computer Software-Restricted Rights, may be used in the solicitation and contract. In any event, the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405(b)(2).

(l) If the contract is a Small Business Innovation Research (SBIR) contract, the clause at 52.227-20, Rights in Data—SBIR Program shall be used in all Phase I and Phase II contracts awarded under the Small Business Innovation Research Program established pursuant to Pub. L. 97-219 (The Small Business Innovation Development Act of 1982).

(m) While no specific clause of this subpart is required to be included in contracts solely for the acquisition, without disclosure prohibitions, of books, publications and similar items in the exact form in which such items exist prior to the request for purchase (i.e., the off-the-shelf purchase of such items), or in other contracts (e.g., contracts resulting from sealed bidding) where only existing data available without disclosure prohibitions is to be furnished, if reproduction rights are to be acquired the contract shall include terms addressing such rights. (See 27.405(b)(3).)

(n) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts to be performed outside the United States, its possessions, and Puerto Rico.

(o) Agencies may prescribe in their procedures the clause at 52.227-17, Rights in Data—Special Works, or prescribe, as appropriate, clauses consistent with the policy in 27.402 in contracts for architect-engineer services and construction work.

(p) Agencies may prescribe in their procedures, as appropriate, a clause consistent with the policy of 27.402 in contracts for management, operation, design, or construction of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(q) In accordance with 27.406(d), the contracting officer shall insert the clause at 52.227-21, Technical Data Certification, Revision, and Withholding of Payment—Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. When used, this clause requires that the technical data to which it applies be specified in the contract. (See 27.406(d).)

(r) In the case of civilian agencies except NASA and the U.S. Coast Guard, the contracting officer shall insert the clause at 52.227-22, Major System—Minimum Rights, in contracts for major systems or contracts in support of major systems.

(s) In accordance with 27.407, if a contracting officer desires to acquire unlimited rights in technical data contained in a successful proposal upon which a contract award is based, the contracting officer shall insert the clause at 52.227-23, Rights to Proposed Data (Technical). Rights to technical data in a proposal are not acquired by mere incorporation by reference of the proposal in the contract, and if a proposal is incorporated by reference, 27.404 must be followed to assure that such rights are appropriately addressed.

[52 FR 18140, May 13, 1987, as amended at 55 FR 38517, Sept. 18, 1990]

Subpart 27.5—[Reserved]

Subpart 27.6—Foreign License and Technical Assistance Agreements

27.601 General.

Agencies shall provide all necessary rules and regulations as are required for the proper application of the laws and policies of the U.S. Government regarding—

(a) Elimination in agreements between domestic concerns and foreign governments or foreign concerns of charges for the use of patents in which the U.S. Government has a royalty-free license or of charges in agreements for the use of data that the U.S. Government has a right to use and disclose to others, that is in the public domain, or that was acquired by the U.S. Government with the unrestricted right to use, duplicate, or disclose and to have or permit others to do so;

(b) Foreign license and technical assistance agreements between the U.S. Government and United States domestic concerns;

(c) Guidance on negotiating contract prices and terms concerning patents and data, including royalties, in contracts between the U.S. Government and a foreign government or foreign concern; and

(d) Regulations and guidance on controls on the exportation of data relating to certain designated items, such as arms or munitions of war, and guidance on reviews of agreements involving such data (see 22 CFR part 124).

PART 28—BONDS AND INSURANCE

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42286, Sept. 19, 1983, unless otherwise noted.

28.000 Scope of part.

This part prescribes requirements for obtaining financial protection against damages under sealed bid and negotiated contracts. It covers bid guarantees, bonds, sureties, and insurance. The terms *bid* and *bidders* include *proposal* and *offerors.*

[48 FR 42286, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

28.001 Definitions.

Attorney-in-fact, as used in this part, means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety (see also *power of attorney*).

Bid guarantee means a form of security assuring that the bidder (a) will not withdraw a bid within the period specified for acceptance and (b) will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.

Bond means a written instrument executed by a bidder or contractor (the *principal*), and a second party (the *surety* or *sureties*), to assure fulfillment of the principal's obligations to a third party (the *obligee* or *Government*), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

(a) An advance payment bond secures fulfillment of the contractor's obligations under an advance payment provision.

(b) An annual bid bond is a single bond furnished by a bidder, in lieu of separate bid bonds, which secures all bids (on other than construction contracts) requiring bonds submitted during a specific Government fiscal year.

(c) An annual performance bond is a single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor's obligations under contracts (other than construction contracts) requiring bonds entered into during a specific Government fiscal year.

(d) A patent infringement bond secures fulfillment of the contractor's obligations under a patent provision.

(e) A payment bond assures payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract.

(f) A performance bond secures performance and fulfillment of the contractor's obligations under the contract.

Consent of surety means an acknowledgment by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

Insurance, as used in this part, neans a contract which provides that or a stipulated consideration, one arty undertakes to indemnify another against loss, damage, or liability rising from an unknown or contingent event.

Penal sum or *penal amount* means he amount of money specified in a ond (or a percentage of the bid price a bid bond) as the maximum payment for which the surety is obligated.

Power of attorney, as used in this art, means the authority given one erson or corporation to act for and bligate another, as specified in the inrument creating the power; in corpote suretyship, an instrument under al which appoints an attorney-inct to act in behalf of a surety compay in signing bonds (see also *attorney-fact*).

Reinsurance means a transaction hich provides that a surety, for a onsideration, agrees to indemnify another surety against loss which the tter may sustain under a bond which has issued.

Surety means an individual or corpotion legally liable for the debt, deult, or failure of a principal to satis- a contractual obligation. The types sureties referred to are as follows:

(a) An individual surety is one erson, as distinguished from a busiess entity, who is liable for the entire enal amount of the bond.

(b) A corporate surety is licensed nder various insurance laws and, nder its charter, has legal power to t as surety for others.

(c) A cosurety is one of two or more reties that are jointly liable for the enal sum of the bond. A limit of lility for each surety may be stated.

Subpart 28.1—Bonds

.100 Scope of subpart.

This subpart prescribes requireents and procedures for the use of nds and all types of bid guarantees.

101 Bid guarantees.

101-1 Policy on use.

) A contracting officer shall not reire a bid guarantee unless a perrmance bond or a performance and payment bond is also required (see 28.102 and 28.103). Except as provided in paragraph (c) of this subsection, bid guarantees shall be required whenever a performance bond or a performance and payment bond is required.

(b) All types of bid guarantees are acceptable for supply or service contracts (see annual bid bonds and annual performance bonds coverage in 28.001). Only separate bid guarantees are acceptable in connection with construction contracts. Agencies may specify that only separate bid bonds are acceptable in connection with construction contracts.

(c) The chief of the contracting office may waive the requirement to obtain a bid guarantee when a performance bond or a performance and payment bond is required if it is determined that a bid guarantee is not in the best interest of the Government for a specific acquisition (e.g., overseas construction, emergency acquisitions). Class waivers may be authorized by the agency head or designee.

[48 FR 42286, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 52 FR 19803, May 27, 1987; 52 FR 30076, Aug. 12, 1987; 54 FR 34755, Aug. 21, 1989]

28.101-2 Amount required.

The contracting officer shall determine a bid guarantee amount that is adequate to protect the Government from loss should the successful bidder fail to execute further contractual documents and bonds as required. The bid guarantee amount shall be at least 20 percent of the bid price but shall not exceed $3 million. When the penal sum is expressed as a percentage, a maximum dollar limitation may be stated.

28.101-3 Contract clause.

(a) When a bid guarantee is required, the solicitation shall contain a statement to that effect, and provide sufficient details for bidders to determine the amount of the bid guarantee.

(b) The contracting officer shall insert the clause at 52.228-1, Bid Guarantee, in solicitations and contracts that contain a requirement for a bid guarantee. A clause substantially the same as this may be used for negotiated contracts. This clause may be appropriately modified for use in connection with construction solicitations and contracts when the agency has specified that only separate bid bonds are acceptable in accordance with 28.101-1(b).

[48 FR 42286, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987]

28.101-4 Noncompliance with bid guarantee requirements.

(a) In sealed bidding, noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except in the situations described in paragraph (c) of this subsection when the noncompliance shall be waived.

(b) In negotiation, noncompliance with a solicitation requirement for a bid guarantee requires rejection of an initial proposal as unacceptable, if a determination is made to award the contract based on initial proposals without discussion, except in the situations described in paragraph (c) of this subsection when noncompliance shall be waived. (See 15.610(a) for conditions regarding making awards based on initial proposals.) If the conditions for awarding based on initial proposals are not met, deficiencies in bid guarantees submitted by offerors determined to be in the competitive range shall be addressed during discussions and the offeror shall be given an opportunity to correct the deficiency.

(c) Noncompliance with a solicitation requirement for a bid guarantee shall be waived in the following circumstances unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the Government's interest when—

(1) Only one offer is received. In this case, the contracting officer may require the furnishing of the bid guarantee before award;

(2) The amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer;

(3) The amount of the bid guarantee submitted, although less than that required by the solicitation for the maximum quantity offered, is sufficient for a quantity for which the offeror is otherwise eligible for award. Any award to the offeror shall not exceed the quantity covered by the bid guarantee;

(4) The bid guarantee is received late, and late receipt is waived under 14.304;

(5) A bid guarantee becomes inadequate as a result of the correction of a mistake under 14.406 (but only if the bidder will increase the bid guarantee to the level required for the corrected bid);

(6) A telegraphic offer modification is received without corresponding modification of the bid guarantee, if the modification expressly refers to the previous offer and the offeror corrects any deficiency in bid guarantee;

(7) An otherwise acceptable bid bond was submitted with a signed offer, but the bid bond was not signed by the offeror;

(8) An otherwise acceptable bid bond is erroneously dated or bears no date at all; or

(9) A bid bond does not list the United States as obligee, but correctly identifies the offeror, the solicitation number, and the name and location of the project involved, so long as it is acceptable in all other respects.

[54 FR 48985, Nov. 28, 1989]

28.102 Performance and payment bonds for construction contracts.

28.102-1 General.

(a) The Miller Act (40 U.S.C. 270a-270f) requires performance and payment bonds for any construction contract exceeding $25,000, except that this requirement may be waived (1) by the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bond, or (2) as otherwise authorized by the Miller Act or other law.

(b) The contractor shall furnish all bonds, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.

28.102-2 Amount required.

(a) *Performance bonds.* (1) The penal amount of performance bonds shall be 100 percent of the original contract price, unless the contracting officer determines that a lesser amount would be adequate for the protection of the Government.

(2) The Government may require additional performance bond protection when a contract price is increased. The increase in protection shall generally equal 100 percent of the increase n contract price. The Government may secure additional protection by directing the contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(b) *Payment bonds.* (1) The penal amount of payment bonds shall equal—

(i) Fifty percent of the contract price if the contract price is not more than $1 million;

(ii) Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or

(iii) Two and one half million if the contract price is more than $5 million.

(2) If the original contract price is $5 million or less, the Government may require additional protection if the contract price is increased. The penal amount of the total protection as revised shall meet the requirement of subparagraph (1) immediately above.

(3) The Government shall secure additional protection by directing the contractor to increase the penal sum of the existing bond or to obtain an additional bond.

(c) *Requirements and indefinite-quantity contracts.* (1) When determining the penal sum of bonds for requirements contracts, the contracting officer shall consider the contract price to be the price payable for the estimated quantity.

(2) When determining the penal sum of bonds for indefinite-quantity contracts, the contracting officer shall consider the contract price to be the price payable for the specified minimum quantity. When the minimum quantity is exceeded, subparagraphs)(2) and (b)(2) above apply.

28.102-3 Solicitation requirements.

When performance or payment bonds are required, the solicitation shall specify—

(a) The requirement for the bond(s);

(b) The penal sum of each bond (expressed either as a fixed sum or percentage of the contract price) or penal coverage required in case of annual bonds; and

(c) The deadline for submitting acceptable bonds.

28.103 Performance and payment bonds for other than construction contracts.

28.103-1 General.

(a) Generally, agencies shall not require performance and payment bonds for other than construction contracts. However, performance and payment bonds may be used as permitted in 28.103-2 and 28.103-3.

(b) The contractor shall furnish all bonds before receiving a notice to proceed with the work.

(c) No bond shall be required after the contract has been awarded if it was not specifically required in the contract, except as may be determined necessary for a contract modification.

28.103-2 Performance bonds.

(a) Performance bonds may be required when necessary to protect the Government's interest. The following situations may warrant a performance bond:

(1) Government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

(2) A contractor sells assets to or merges with another concern, and the Government, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

(3) Substantial progress payments are made before delivery of end items starts.

(4) Contracts are for dismantling, demolition, or removal of improvements.

(b) When a performance bond is required, the solicitation shall contain the information in 28.102-3.

(c) The Government may require additional performance bond protection when a contract price is increased.

(d) The contracting officer must determine the contractor's responsibility (see subpart 9.1) even though a bond has been or can be obtained.

28.103-3 Payment bonds.

(a) A payment bond is required only when a performance bond is required, and if the use of payment bond is in the Government's interest.

(b) The contracting officer shall determine the penal amount of a payment bond.

(c) When a payment bond is required, the solicitation shall contain the information in 28.102-3.

(d) When a contract price is increased, the Government may require additional bond protection in an amount adequate to protect suppliers of labor and material.

28.104 Annual performance bonds.

(a) Annual performance bonds only apply to non-construction contracts. They shall provide a gross penal sum applicable to the total amount of all covered contracts.

(b) When the penal sums obligated by contracts are approximately equal to or exceed the penal sum of the annual performance bond, an additional bond will be required to cover additional contracts.

28.105 Other types of bonds.

The head of the contracting activity may approve using other types of bonds in connection with acquiring particular supplies or services. These types include advance payment bonds and patent infringement bonds.

28.105-1 Advance payment bonds.

Advance payment bonds may be required only when the contract contains an advance payment provision and a performance bond is not furnished. The contracting officer shall determine the amount of the advance payment bond necessary to protect the Government.

28.105-2 Patent infringement bonds.

(a) Contracts providing for patent indemnity may require these bonds only if—

(1) A performance bond is not furnished; and

(2) The financial responsibility of the contractor is unknown or doubtful.

(b) The contracting officer shall determine the penal sum.

28.106 Administration.

28.106-1 Bonds and bond related forms.

The following Standard Forms (SF's) and Optional Forms (OF's) shown in 53.301 and 53.302 shall be used, except in foreign countries, when a bid bond, performance or payment bond, or an individual surety is required. The bond forms shall be used as indicated in the instruction portion of each form.

(a) SF 24, Bid Bond (see 28.101).

(b) SF 25, Performance Bond (see 28.102-1 and 28.106-3(b)).

(c) SF 25-A, Payment Bond (see 28.103-3 and 28.106-3(b)).

(d) SF 25-B, Continuation Sheet (for SF's 24, 25, and 25-A).

(e) SF 28, Affidavit of Individual Surety (see 28.203).

(f) SF 34, Annual Bid Bond (see 28.001).

(g) SF 35, Annual Performance Bond (see 28.104).

(h) SF 273, Reinsurance Agreement for a Miller Act Performance Bond (see 28.202(a)(4)).

(i) SF 274, Reinsurance Agreement for a Miller Act Payment Bond (see 28.202(a)(4)).

(j) SF 275, Reinsurance Agreement in Favor of the United States (see 28.202(a)(4)).

(k) SF 1414, Consent of Surety (see 28.106-5).

(l) SF 1415, Consent of Surety and Increase of Penalty (see 28.106-3).

(m) SF 1416, Payment Bond for Other Than Construction Contracts (see 28.103-3).

(n) OF 90, Release of Lien on Real Property (see 28.203-5).

(o) OF 91, Release of Personal Property from Escrow (see 28.203-5).

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 48986, Nov. 28, 1989]

28.106-2 Substitution of surety bonds.

(a) A new surety bond covering all or part of the obligations on a bond previously approved may be substituted for the original bond if approved by the head of the contracting activity.

(b) When a new surety bond is approved, the contracting officer shall notify the principal and surety of the original bond of the effective date of the new bond.

28.106-3 Additional bond.

(a) When additional bond coverage is required and is furnished in whole or in part by the original surety or sureties, agencies shall use Standard Form 1415, Consent of Surety and Increase of Penalty. Standard Form 1415 is authorized for local reproduction, and a copy of the form is furnished for this purpose in part 53 of the looseleaf edition of the FAR.

(b) When additional coverage is furnished in whole or in part by a new surety, agencies shall use Standard Form 25, Performance Bond or Standard Form 25-A, Payment Bond.

[48 FR 42286, Sept. 19, 1983, as amended at 53 FR 43391, Oct. 26, 1988]

28.106-4 Contract clause.

The contracting officer shall insert the clause at 52.228-2, Additional Bond Security, in solicitations and contracts when bonds are required.

28.106-5 Consent of surety.

(a) When any contract is modified, the contracting officer shall obtain the consent of surety if—

(1) An additional bond is obtained from other than the original surety;

(2) No additional bond is required and—

(i) The modification is for new work beyond the scope of the original contract; or

(ii) The modification does not change the contract scope but changes the contract price (upward or downward) by more than 25 percent or $50,000; or

(3) Consent of surety is required for a novation agreement (See subpart 42.12).

(b) Agencies shall use Standard Form 1414, Consent of Surety, for all types of contracts.

28.106-6 Furnishing information.

(a) The surety on the bond, upon its written request, may be furnished information on the progress of the work, payments, and the estimated percentage of completion, concerning the contract for which the bond was furnished.

(b) When a payment bond has been provided, the contracting officer shall, upon request, furnish the name and address of the surety or sureties to any subcontractor or supplier who has furnished or been requested to furnish labor or material for the contract. In addition, general information concerning the work progress, payments, and the estimated percentage of completion may be furnished to persons who have provided labor or materials and have not been paid.

(c) When a payment bond has been provided for a contract, the head of the agency or designee shall furnish a certified copy of the bond and the contract for which it was given to any person who makes a request therefor and who furnishes an affidavit that the requestor has supplied labor or materials for such work and payment therefor has not been made or that the requestor is being sued on such bond. The person who makes the request shall be required to pay such costs of preparation as determined by the head of the agency or designee to be reasonable and appropriate (see 40 U.S.C. 270(c)).

[48 FR 42286, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

28.106-7 Withholding contract payments.

(a) During contract performance, agencies shall not withhold payments due contractors or assignees because subcontractors or suppliers have not been paid.

(b) If, after completion of the contract work, the Government receives written notice from the surety regarding the contractor's failure to meet its obligation to its subcontractors or suppliers, the contracting officer shall withhold final payment. However, the surety must agree to hold the Government harmless from any liability resulting from withholding the final payment. The contracting officer will authorize final payment upon agreement between the contractor and surety or upon a judicial determination of the rights of the parties.

(c) For any withholding incident to the labor standards provisions of the contract, see part 22.

Subpart 28.2—Sureties

28.200 Scope of subpart.

This subpart prescribes procedures for the use of sureties to protect the Government from financial losses.

28.201 Requirements for sureties.

(a) Agencies shall obtain adequate security for bonds (including coinsurance and reinsurance agreements) required or used with a contract for supplies or services (including construction). Acceptable forms of security include (1) corporate or individual sureties or (2) any of the types of security authorized in lieu of sureties by 28.204.

(b) Solicitations shall not preclude offerors from using the types of surety or security permitted by this subpart, unless prohibited by law or regulation.

[48 FR 42286, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

28.202 Acceptability of corporate sureties.

(a)(1) Corporate sureties offered for bonds furnished with contracts performed in the United States, its possessions, or Puerto Rico must appear on the list contained in the Department of the Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies."

(2) The penal amount of the bond should not exceed the surety's underwriting limit stated in the Department of the Treasury circular. If the penal amount exceeds the underwriting limit, the bond will be acceptable only if (i) the amount which exceeds the specified limit is coinsured or reinsured and (ii) the amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.

(3) Coinsurance or reinsurance agreements shall conform to the Department of the Treasury regulations in 31 CFR 223.10 and 223.11. When reinsurance is contemplated, the contracting office generally shall require reinsurance agreements to be executed and submitted with the bonds before making a final determination on the bonds.

(4) When specified in the solicitation, the contracting officer may accept a bond from the direct writing company in satisfaction of the total bond requirement of the contract. This is permissible until necessary reinsurance agreements are executed, even though the total bond requirement may exceed the insurer's underwriting limitation. The contractor shall execute and submit necessary reinsurance agreements to the contracting officer within the time specified on the bid form, which may not exceed 45 calendar days after the execution of the bond. The contractor shall use Standard Form 273, Reinsurance Agreement for a Miller Act Performance Bond, and Standard Form 274, Reinsurance Agreement for a Miller Act Payment Bond, when reinsurance is furnished with Miller Act bonds. Standard Form 275, Reinsurance Agreement in Favor of the United States, is used when reinsurance is furnished with bonds for other purposes.

(b) For contracts performed in a foreign country, sureties not appearing on Treasury Department Circular 570 are acceptable if the contracting officer determines that it is impracticable for the contractor to use Treasury listed sureties.

(c) The Department of the Treasury issues supplements to Circular 570, notifying all Federal agencies of (1) new approved corporate surety companies and (2) the termination of the authority of any specific corporate surety to qualify as a surety on Federal bonds. Upon receipt of notification of termination of a company's authority to qualify as a surety on Federal bonds, the contracting officer shall review the outstanding contracts and take action necessary to protect the Government, including, where appropriate, securing new bonds with acceptable sureties in lieu of outstanding bonds with the named company.

(d) The Department of the Treasury Circular 570 may be obtained from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, 401 14th St., SW., 2nd Floor—West Wing, Washington, DC 20227.

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 48986, Nov. 28, 1989]

28.203 Acceptability of individual sureties.

(a) An individual surety is acceptable for all types of bonds except position schedule bonds. The contracting officer shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation. (See 28.203-7 for information on excluded individual sureties.)

(b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28 and provide a security interest in accordance with 28.203-1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceed the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety must accept both joint and several liability to the extent of the penal amount of the bond.

(c) If the contracting officer determines that no individual surety in support of a bid guarantee is acceptable, the offeror utilizing the individual surety shall be rejected as nonresponsible, except as provided in 28.101-4. A finding of nonresponsibility based on unacceptability of an individual surety, need not be referred to the Small Business Administration for a competency review. (See 19.602-1(a)(2)(i) and 61 Comp. Gen. 456 (1982).)

(d) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the contracting officer, to substitute an acceptable surety for a surety previously determined to be unacceptable.

(e) When evaluating individual sureties, contracting officers may obtain assistance from the office identified in 28.202(d).

(f) Contracting officers shall obtain the opinion of legal counsel as to the adequacy of the documents pledging the assets prior to accepting the bid guarantee and payment and performance bonds.

(g) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the appropriate agency official in accordance with agency procedures.

[54 FR 48986, Nov. 28, 1989]

28.203-1 Security interests by an individual surety.

(a) An individual surety may be accepted only if a security interest in assets acceptable under 28.203-2 is provided to the Government by the individual surety. The security interest shall be furnished with the bond.

(b) The value at which the contracting officer accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation and may be provided by one or a combination of the following methods:

(1) An escrow account with a federally insured financial institution in the name of the contracting agency. (See 28.203-2(b)(2) with respect to Government securities in book entry form.) Acceptable securities for deposit in escrow are discussed in 28.203-2. While the offeror is responsible for establishing the escrow account, the terms and conditions must be acceptable to the contracting officer. At a minimum, the escrow account shall provide for the following:

(i) The account must provide the contracting officer the sole and unrestricted right to draw upon all or any part of the funds deposited in the account. A written demand for withdrawal shall be sent to the financial institution by the contracting officer, after obtaining the concurrence of legal counsel, with a copy to the offeror/contractor and to the surety. Within the time period specified in the demand, the financial institution would pay the Government the amount demanded up to the amount on deposit. If any dispute should arise between the Government and the offeror/contractor, the surety, or the subcontractors or suppliers with respect to the offer or contract, the financial institution would be required, unless precluded by order of a court of competent jurisdiction, to disburse monies to the Government as directed by the contracting officer.

(ii) The financial institution would be authorized to release to the individual surety all or part of the balance of the escrow account, including any accrued interest, upon receipt of written authorization from the contracting officer.

(iii) The Government would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.

(iv) The financial institution would not be liable or responsible for the interpretation of any provisions or terms and conditions of the solicitation or contract.

(v) The financial institution would provide periodic account statements to the contracting officer.

(vi) The terms of the escrow account could not be amended without the consent of the contracting officer.

(2) A lien on real property, subject to the restrictions in 28.203-2 and 28.203-3.

[54 FR 48986, Nov. 28, 1989]

28.203-2 Acceptability of assets.

(a) The Government will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured financial institution from individual sureties to satisfy the underlying bond obligations.

(b) Acceptable assets include—

(1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;

(2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has (i) placed a notation against the individual's book entry account indicating that the security has been pledged in favor of the respective agency; (ii) agreed to notify the agency prior to maturity of the security; and (iii) agreed to hold the proceeds of the security subject to the pledge in favor of the agency until a substitution of securities is made or the security interest is formally released by the agency);

(3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. National security exchanges are—(i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange. These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. Stock options and stocks on the over-the-counter (OTC) market or NASDQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the Securities and Exchange Commission, Division of Enforcement, 450 Fifth Street NW., Washington, DC 20549.

(4) Real property owned in fee simple by the surety without any form of concurrent ownership, except as provided in subdivision (c)(3)(iii) of this subsection, and located within the 50 United States, its territories, or possessions. These assets will be accepted at 100 percent of the most current tax assessment value (exclusive of encumbrances) or 75 percent of the properties' unencumbered market value provided a current appraisal is furnished (see 28.203-3).

5) Irrevocable letters of credit (ILC)
ued by a federally insured financial
stitution in the name of the con-
acting agency and which identify the
ency and solicitation or contract
mber for which the ILC is provided.

c) Unacceptable assets include but
e not limited to—

1) Notes or accounts receivable;

2) Foreign securities;

3) Real property as follows:

i) Real property located outside the
ited States, its territories, or posses-
ns.

ii) Real property which is a princi-
l residence of the surety.

iii) Real property owned concur-
tly regardless of the form of co-ten-
cy (including joint tenancy, tenancy
the entirety, and tenancy in
mmon) except where all co-tenants
ree to act jointly.

iv) Life estates, leasehold estates, or
ure interests in real property.

4) Personal property other than
at listed in paragraph (b) of this
bsection (e.g., jewelry, furs, an-
ues);

5) Stocks and bonds of the individ-
surety in a controlled, affiliated, or
sely held concern of the offeror/
tractor;

6) Corporate assets (e.g., plant and
uipment);

7) Speculative assets (e.g., mineral
hts);

8) Letters of credit, except as pro-
ed in 28.203-2(b)(5).

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203-3 Acceptance of real property.

a) Whenever a bond with a security
erest in real property is submitted,
individual surety shall provide—

1) Evidence of title in the form of a
tificate of title prepared by a title
urance company approved by the
ited States Department of Justice.
is list entitled List of Approved At-
neys, Abstracters, and Title Compa-
s is available from the Title Unit,
d Acquisition Section, Land and
ural Resource Division, Depart-
t of Justice, Washington, DC
30. This title evidence must show
simple title vested in the surety
g with any concurrent owners;
ther any real estate taxes are due
payable; and any recorded encum-
brances against the property, including the lien filed in favor of the Government under paragraph (d) of this subsection;

(2) Evidence of the amount due under any encumbrance shown in the evidence of title;

(3) A copy of the current real estate tax assessment of the property or a current appraisal dated no earlier than 6 months prior to the date of the bond, prepared by a professional appraiser who certifies that the appraisal has been conducted in accordance with the generally accepted appraisal standards as reflected in the Uniform Standards of Professional Appraisal Practice as promulgated by the Appraisal Foundation, 1029 Vermont Avenue NW., Washington, DC 20005.

(b) Failure to provide evidence that the lien has been properly recorded will render the offeror nonresponsible.

(c) The individual surety is liable for the payment of all administrative costs of the Government, including legal fees, associated with the liquidation of pledged real estate.

(d) The following format, or any document substantially the same, shall be used by the surety and recorded in the local recorder's office when a surety pledges real estate on Standard Form 28, Affidavit of Individual Surety.

Lien on Real Estate

I/we agree that this instrument constitutes a lien in the amount of $—— on the property described in this lien. The rights of the United States Government shall take precedence over any subsequent lien or encumbrance until the lien is formally released by a duly authorized representative of the United States. I/we hereby grant the United States the power of sale of subject property, including the right to satisfy its reasonable administrative costs, including legal fees associated with any sale of subject property, in the event of contractor default if I/we otherwise fail to satisfy the underlying ( ) bid guarantee, ( ) performance bond, ( ) or payment bond obligations as an individual surety on solicitation/contract number ——. The lien is upon the real estate now owned by me/us described as follows: (legal description, street address and other identifying description)

IN WITNESS HEREOF, I/we have hereunto affixed my/our hand(s) and seal(s) this —— DAY OF —— 19—.

WITNESS:

(SEAL)

I, ——, a Notary Public in and for the (CITY) ——, (STATE) ——, do hereby certify that ——, a party or parties to a certain Agreement bearing the date —— day of —— 19—, and hereunto annexed, personally appeared before me, the said —— being personally well known to me as the person(s) who executed said lien, and acknowledged the same to be his/her/their act and deed. GIVEN under my hand and seal this —— day of —— 19—.

NOTARY PUBLIC, STATE

My Commission expires:

[54 FR 48987, Nov. 28, 1989]

28.203–4 Substitution of assets.

An individual surety may request the Government to accept a substitute asset for that currently pledged by submitting a written request to the responsible contracting officer. The contracting officer may agree to the substitution of assets upon determining, after consultation with legal counsel, that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obligations. If acceptable, the substitute assets shall be pledged as provided for in subpart 28.2.

[54 FR 48988, Nov. 28, 1989]

28.203–5 Release of lien.

(a) After consultation with legal counsel, the contracting officer shall release the security interest on the individual surety's assets using the Optional Form 90, Release of Lien on Real Property, or Optional Form 91, Release of Personal Property from Escrow, or a similar release as soon as possible consistent with the conditions in subparagraphs (a) (1) and (2) of this subsection. A surety's assets pledged in support of a payment bond may be released to a subcontractor or supplier upon Government receipt of a Federal district court judgment, or a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of the release by the surety stating that it approves of such release.

(1) *Contracts subject to the Miller Act.* The security interest shall be maintained for the later of (i) 1 year following final payment, (ii) until completion of any warranty period (applicable only to performance bonds), or (iii) pending resolution of all claims filed against the payment bond during the 1-year period following final payment.

(2) *Contracts not subject to the Miller Act.* The security interest shall be maintained for 90 days following final payment or until completion of any warranty period (applicable only to performance bonds), whichever is later.

(b) Upon written request, the contracting officer may release the security interest on the individual surety's assets in support of a bid guarantee based upon evidence that the offer supported by the individual surety will not result in contract award.

(c) Upon written request by the individual surety, the contracting officer may release a portion of the security interest on the individual surety's assets based upon substantial performance of the contractor's obligations under its performance bond. Release of the security interest in support of a payment bond must comply with the subparagraphs (a) (1) and (2) of this subsection. In making this determination, the contracting officer will give consideration as to whether the unreleased portion of the lien is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

[54 FR 48988, Nov. 28, 1989]

03-6 Contract clause.

nsert the clause at 52.228-11 in so-
tations and contracts which require
submission of bid guarantees, per-
mance, or payment bonds.

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03-7 Exclusion of individual sureties.

) An individual may be excluded
m acting as a surety on bonds sub-
ted by offerors on procurement by
executive branch of the Federal
vernment, by the acquiring agen-
head or designee utilizing the pro-
ures in subpart 9.4. The exclusion
ll be for the purpose of protecting
Government.
) An individual may be excluded
any of the following causes:
) Failure to fulfill the obligations
ler any bond.
) Failure to disclose all bond obli-
ions.
) Misrepresentation of the value of
ilable assets or outstanding liabil-
.
) Any false or misleading state-
nt, signature or representation on a
d or affidavit of individual surety-
.
) Any other cause affecting re-
nsibility as a surety of such serious
compelling nature as may be de-
mined to warrant exclusion.
) An individual surety excluded
suant to this subsection shall be in-
led on the list entitled Parties Ex-
led from Procurement Programs.
e 9.404.)
) Contracting officers shall not
ept the bonds of individual sureties
se names appear on the list enti-
Parties Excluded from Procure-
t Programs (see 9.404) unless the
uiring agency's head or a designee
es in writing the compelling rea-
justifying acceptance.
) An exclusion of an individual
ty under this subsection will also
lude such party from acting as a
ractor in accordance with subpart

R 48988, Nov. 28, 1989]

4 Options in lieu of sureties.

e contractor may deposit any of
types of security listed in this sec-
instead of furnishing corporate or individual sureties on performance and payment bonds. When any of those types of security are deposited, a statement shall be incorporated in the bond form pledging the security. The contractor shall execute the bond forms as the principal. Agencies shall establish safeguards to protect against loss of the security and shall return the security or its equivalent to the contractor when the bond obligation has ceased.

[48 FR 42286, Sept. 19, 1983. Redesignated at 54 FR 48986, Nov. 28, 1989]

28.204-1 United States bonds or notes.

Any person required to furnish a bond to the Government has the option, instead of furnishing a surety or sureties on the bond, of depositing certain United States bonds or notes in an amount equal at their par value to the penal sum of the bond (the Act of February 24, 1919 (31 U.S.C. 9303) and Treasury Department Circular No. 154 dated July 1, 1978 (31 CFR part 225)). In addition, a duly executed power of attorney and agreement authorizing the collection or sale of such United States bonds or notes in the event of default of the principal on the bond shall accompany the deposited bonds or notes. The contracting officer may (a) turn securities over to the finance or other authorized agency official, or (b) deposit them with the Treasurer of the United States, a Federal Reserve Bank (or branch with requisite facilities), or other depository designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the agency concerned and Treasury Department Circular No. 154 (exception: The contracting officer shall deposit all bonds and notes received in the District of Columbia with the Treasurer of the United States).

[48 FR 42286, Sept. 19, 1983. Redesignated and amended at 54 FR 48986, 48989, Nov. 28, 1989]

28.204-2 Certified or cashiers checks, bank drafts, money orders, or currency.

Any person required to furnish a bond has an option to furnish a certified or cashier's check, bank draft, Post Office money order, or currency, in an amount equal to the penal sum of the bond, instead of furnishing surety or sureties on the bonds. Those furnishing checks, drafts, or money orders shall draw them to the order of the appropriate Federal agency.

[48 FR 42286, Sept. 19, 1983. Redesignated at 54 FR 48986, Nov. 28, 1989]

Subpart 28.3—Insurance

28.301 Policy.

Contractors shall be required to carry insurance under the following circumstances:

(a) (1) The Government requires any contractor subject to Cost Accounting Standard (CAS) 416 (4 CFR part 416) to obtain insurance, by purchase or self-coverage, for the perils to which the contractor is exposed, except when (i) the Government, by providing in the contract in accordance with law, agrees to indemnify the contractor under specified circumstances or (ii) the contract specifically relieves the contractor of liability for loss of or damage to Government property.

(2) The Government reserves the right to disapprove the purchase of any insurance coverage not in the Government's interest.

(3) Allowability of the insurance program's cost shall be determined in accordance with the criteria in 31.205-19.

(b) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this regulation to provide insurance for certain types of perils (e.g., workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of the Government. The minimum amounts of insurance required by this regulation (see 28.307-2) may be reduced when a contract is to be performed outside the United states, its possessions, and Puerto Rico. When more than one agency is involved, the agency responsible for review and approval of a contractor's insurance program shall coordinate with other interested agencies before acting on significant insurance matters.

(c) Contractors awarded nonpersonal services contracts for health care services are required to maintain medical liability insurance and indemnify the Government for liability producing acts or omissions by the contractor, its employees and agents (see 37.400).

[48 FR 42286, Sept. 19, 1983, as amended at 54 FR 5056, Jan. 31, 1989]

28.302 Notice of cancellation or change.

When the Government requires the contractor to provide insurance coverage, the policies shall contain an endorsement that any cancellation or material change in the coverage adversely affecting the Government's interest shall not be effective unless the insurer or the contractor gives written notice of cancellation or change as required by the contracting officer. When the coverage is provided by self-insurance, the contractor shall not change or decrease the coverage without the administrative contracting officer's prior approval (see 28.308(c)).

28.303 Insurance against loss of or damage to Government property.

When the Government requires or approves insurance to cover loss of or damage to Government property (see 45.103, Responsibility and liability for Government property), it may be provided by specific insurance policies or by inclusion of the risks in the contractor's existing policies. The policies shall disclose the Government's interest in the property.

28.304 Risk-pooling arrangements.

Agencies may establish risk-pooling arrangements. These arrangements are designed to use the services of the insurance industry for safety engineering and the handling of claims at minimum cost to the Government. The agency responsible shall appoint a single manager or point of contact for each arrangement.

28.305 Overseas workers' compensation and war-hazard insurance.

(a) *Public-work contract*, as used in this subpart, means any contract for a fixed improvement or for any other project, fixed or not, for the public use of the United States or its allies, involving construction, alteration, removal, or repair, including projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

(b) The Defense Base Act (42 U.S.C. 1651 *et seq.*) extends the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901) to various classes of employees working outside the United States, including those engaged in performing—

(1) Public-work contracts; or

(2) Contracts approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195) other than (i) contracts approved or financed by the Development Loan Fund (unless the Secretary of Labor, acting upon the recommendation of a department or agency, determines that such contracts should be covered) or (ii) contracts exclusively for materials or supplies.

(c) When the Defense Base Act applies (see 42 U.S.C. 1651 *et seq.*) to these employees, the benefits of the Longshoremen's and Harbor Workers' Compensation Act are extended through operation of the War Hazards Compensation Act (42 U.S.C. 1701 *et seq.*) to protect the employees against the risk of war hazards (injury, death, capture, or detention). When, by means of an insurance policy or a self-insurance program, the contractor provides the workers' compensation coverage required by the Defense Base Act, the contractor's employees automatically receive war-hazard risk protection.

(d) When the agency head recommends a waiver to the Secretary of Labor, the Secretary may waive the applicability of the Defense Base Act to any contract, subcontract, work location, or classification of employees.

(e) If the Defense Base Act is waived for some or all of the contractor's employees, the benefits of the War Hazards Compensation Act are automatically waived with respect to those employees for whom the Defense Base Act is waived. For those employees, the contractor shall provide workers' compensation coverage against the risk of work injury or death and assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention. The contract shall provide either that the costs of this liability or the reasonable costs of insurance against this liability shall be allowed as a cost under the contract.

28.306 Insurance under fixed-price contracts.

(a) *General.* Although the Government is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed-price contract, in special circumstances agencies may specify insurance requirements under fixed-price contracts. Examples of such circumstances include the following:

(1) The contractor is—or has a separate operation—engaged principally in Government work.

(2) Government property is involved.

(3) The work is to be performed on a Government installation.

(4) The Government elects to assume risks for which the contractor ordinarily obtains commercial insurance.

(b) *Work on a Government installation.* (1) When the clause at 52.228-5, Insurance—Work on a Government Installation, is required to be included in a fixed-price contract by 28.310, the coverage specified in 28.307 is the minimum insurance required and shall be included in the contract Schedule or elsewhere in the contract. The contracting officer may require additional coverage and higher limits.

(2) When the clause at 52.228-5, Insurance—Work on a Government Installation, is not required by 28.310 but is included because the contracting officer considers it to be in the Government's interest to do so, any of the types of insurance specified in 28.307 may be omitted or the limits may be lowered, if appropriate.

28.307 Insurance under cost-reimbursement contracts.

Cost-reimbursement contracts (and subcontracts, if the terms of the prime contract are extended to the subcontract) ordinarily require the types of insurance listed in 28.307-2, with the minimum amounts of liability indicated. (See 28.308 for self-insurance.)

28.307-1 Group insurance plans.

(a) *Prior approval requirement.* Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor must submit the plan for approval, in accordance with agency regulations. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to the Government requires similar approval.

(b) *Premium refunds or credits.* The plan shall provide for the Government to share in any premium refunds or credits paid or otherwise allowed to the contractor. In determining the extent of the Government's share in any premium refunds or credits, any special reserves and other refunds to which the contractor may be entitled in the future shall be taken into account.

28.307-2 Liability.

(a) *Workers' compensation and employer's liability.* Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so commingled with a contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least $100,000 shall be required, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers. (See 28.305(c) for treatment of contracts subject to the Defense Base Act.)

(b) *General liability.* (1) The contracting officer shall require bodily injury liability insurance coverage written on the comprehensive form of policy of at least $500,000 per occurrence.

(2) Property damage liability insurance shall be required only in special circumstances as determined by the agency.

(c) *Automobile liability.* The contracting officer shall require automobile liability insurance written on the comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States shall provide coverage of at least $200,000 per person and $500,000 per occurrence for bodily injury and $20,000 per occurrence for property damage. The amount of liability coverage on other policies shall be commensurate with any legal requirements of the locality and sufficient to meet normal and customary claims.

(d) *Aircraft public and passenger liability.* When aircraft are used in connection with performing the contract, the contracting officer shall require aircraft public and passenger liability insurance. Coverage shall be at least $200,000 per person and $500,000 per occurrence for bodily injury, other than passenger liability, and $200,000 per occurrence for property damage. Coverage for passenger liability bodily injury shall be at least $200,000 multiplied by the number of seats or passengers, whichever is greater.

(e) *Vessel liability.* When contract performance involves use of vessels, the contracting officer shall require, as determined by the agency, vessel collision liability and protection and indemnity liability insurance.

28.308 Self-insurance.

(a) When it is anticipated that 50 percent or more of the self-insurance costs to be incurred at a segment (see 31.001) of a contractor's business will be allocable to negotiated Government contracts, and the self-insurance costs at the segment for the contractor's fiscal year are expected to be $200,000 or more, the contractor shall submit, in writing, information on its proposed self-insurance program to the administrative contracting officer and obtain that official's approval of the program. The submission shall be by segment or segments of the contractor's business to which the program applies and shall include—

(1) A complete description of the program, including any resolution of the board of directors authorizing and adopting coverage, including types of risks, limits of coverage, assignments of safety and loss control, and legal service responsibilities;

(2) If available, the corporate insurance manual and organization chart detailing fiscal responsibilities for insurance;

(3) The terms regarding insurance coverage for any Government property;

(4) The contractor's latest financial statements;

(5) Any self-insurance feasibility studies or insurance market surveys reporting comparative alternatives;

(6) Loss history, premiums history, and industry ratios;

(7) A formula for establishing reserves, including percentage variations between losses paid and losses reserved;

(8) Claims administration policy, practices, and procedures;

(9) The method of calculating the projected average loss; and

(10) A disclosure of all captive insurance company and re-insurance agreements, including methods of computing cost.

(b) Programs of self-insurance covering a contractor's insurable risks, including the deductible portion of purchased insurance, may be approved when examination of a program indicates that its application is in the Government's interest. Agencies shall not approve a program of self-insurance for workers' compensation in a jurisdiction where workers' compensation does not completely cover the employer's liability to employees, unless the contractor—

(1) Maintains an approved program of self-insurance for any employer's liability not so covered; or

(2) Shows that the combined cost to the Government of self-insurance for workers' compensation and commercial insurance for employer's liability will not exceed the cost of covering both kinds of risk by commercial insurance.

(c) Once the administrative contracting officer has approved a program, the contractor must submit to that official for approval any major proposed changes to the program. Any program approval may be withdrawn if a contracting officer finds that either (1) any part of a program does not comply with the requirements of this subpart and/or the criteria at 31.205-19 or (2) conditions or situations existing at the time of approval that were a basis for original approval of the program have changed to the extent that a program change is necessary.

(d) To qualify for a self-insurance program, a contractor must demonstrate ability to sustain the potential losses involved. In making the determination, the contracting officer shall consider the following factors:

(1) The soundness of the contractor's financial condition, including available lines of credit.

(2) The geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely.

(3) The history of previous losses, including frequency of occurrence and the financial impact of each loss.

(4) The type and magnitude of risk, such as minor coverage for the deductible portion of purchased insurance or major coverage for hazardous risks.

(5) The contractor's compliance with Federal and State laws and regulations.

(e) Agencies shall not approve a program of self-insurance for catastrophic risks (e.g., see 50.403, Special procedures for unusually hazardous or nuclear risks). Should performance of Government contracts create the risk of catastrophic losses, the Government may, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased insurance, or both.

(f) Self-insurance programs to protect a contractor against the costs of correcting its own defects in materials or workmanship shall not be approved. For these purposes, normal rework estimates and warranty costs will not be considered self-insurance.

[48 FR 42286, Sept. 19, 1983, as amended at 55 FR 3883, Feb. 5, 1990]

28.309 Contract clauses for workers' compensation insurance.

(a) The contracting officer shall insert the clause at 52.228-3, Workers' Compensation Insurance (Defense Base Act), in solicitations and contracts when the Defense Base Act applies (see 28.305) and—

(1) The contract will be a public-work contract performed outside the United States; or

(2) The contract will be approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195) and is not excluded by 28.305(b)(2).

(b) The contracting officer shall insert the clause at 52.228-4, Workers' Compensation and War-Hazard Insurance Overseas, in solicitations and contracts when the contract will be a public-work contract performed outside the United States and the Secretary of Labor waives the applicability of the Defense Base Act (see 28.305(d)).

28.310 Contract clause for work on a Government installation.

(a) The contracting officer shall insert the clause at 52.228-5, Insurance—Work on a Government Installation, in solicitations and contracts when a fixed-price contract is contemplated, the contract amount is expected to be over the appropriate small purchase limitation in part 13, and the contract will require work on a Government installation, unless—

(1) Only a small amount of work is required on the Government installation (e.g., a few brief visits per month); or

(2) All work on the Government installation is to be performed outside the United States, its possessions, and Puerto Rico.

(b) The contracting officer may insert the clause at 52.228-5 in solicitations and contracts described in (a)(1) and (2) above if it is in the Government's interest to do so.

28.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

28.311-1 Solicitation provision.

The contracting officer shall insert the provision at 52.228-6, Insurance—Immunity from Tort Liability, in solicitations for research and development when a cost-reimbursement contract is contemplated, unless the head of the contracting activity waives the requirement for use of the clause at 52.228-7, Insurance—Liability to Third Persons.

28.311-2 Contract clause.

The contracting officer shall insert the clause at 52.228-7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction contracts and those for architect-engineer services, when a cost-reimbursment contract is contemplated, unless the head of the contracting activity waives the requirement for use of the clause. If the solicitation includes the provision at 52.228-6, Insurance—Immunity from Tort Liability, and the successful offeror represents in the offer that the offeror is *partially* immune from tort liability as a State agency or as a charitable institution, the contracting officer shall use the clause with its Alternate I. If the solicitation includes the provision at 52.228-6, Insurance—Immunity from Tort Liability, and the successful offeror represents in the offer that the offeror is *totally* immune from tort liability as a State agency or as a charitable institution, the contracting officer shall use the clause with its Alternate II.

28.312 Contract clause for insurance of leased motor vehicles.

The contracting officer shall insert the clause at 52.228-8, Liability and Insurance—Leased Motor Vehicles, in solicitations and contracts for the leasing of motor vehicles (see subpart 8.11).

28.313 Contract clauses for insurance of transportation or transportation-related services.

(a) The contracting officer shall insert the clause at 52.228-9, Cargo Insurance, in solicitations and contracts for transportation or for transportation-related services, except when freight is shipped under rates subject to released or declared value.

(b) The contracting officer shall insert a clause substantially the same as that at 52.228-10, Vehicular and General Public Liability Insurance, in solicitations and contracts for transportation or for transportation-related services when the contracting officer determines that vehicular liability or general public liability insurance required by law is not sufficient.

PART 29—TAXES

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Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

Source: 48 FR 42293, Sept. 19, 1983, unless otherwise noted.

29.000 Scope of part.

This part prescribes policies and procedures for (a) using tax clauses in contracts (including foreign contracts), (b) asserting immunity or exemption from taxes, and (c) obtaining tax refunds. It explains Federal, State, and local taxes on certain supplies and services acquired by executive agencies and the applicability of such taxes to the Federal Government. It is for the general information of Government personnel and does not present the full scope of the tax laws and regulations.

Subpart 29.1—General

29.101 Resolving tax problems.

(a) Contract tax problems are essentially legal in nature and vary widely. Specific tax questions must be resolved by reference to the applicable contract terms and to the pertinent tax laws and regulations. Therefore, when tax questions arise, contracting officers should request assistance from the agency-designated legal counsel.

(b) To keep treatment within an agency consistent, contracting officers or other authorized personnel shall consult the agency-designated counsel before negotiating with any taxing authority for the purpose of (1) determining whether or not a tax is valid or applicable or (2) obtaining exemption from, or refund of, a tax.

(c) When the constitutional immunity of the Government from State or local taxation may reasonably be at issue, contractors should be discouraged from negotiating independently with taxing authorities if the contract involved is either (1) a cost-reimbursement contract or (2) a fixed-price contract containing a tax escalation clause.

(d) Before purchasing goods or services from a foreign source, the contracting officer should consult the agency-designated counsel (1) for information on foreign tax treaties and agreements in force and on the implementation of any foreign-tax-relief programs and (2) to resolve any other tax questions affecting the prospective contract.

Subpart 29.2—Federal Excise Taxes

29.201 General.

(a) Federal excise taxes are levied on the sale or use of particular supplies or services. Subtitle D of the Internal Revenue Code of 1954, Miscellaneous Excise Taxes, 26 U.S.C. 4041 *et seq.*, and its implementing regulations, 26 CFR parts 40 through 299, cover miscellaneous federal excise tax requirements. Questions arising in this area should be directed to the agency-designated counsel. The most common excise taxes are—

(1) Manufacturers' excise taxes imposed on certain motor-vehicle articles, tires and inner tubes, gasoline, lubricating oils, coal, fishing equipment, firearms, shells, and cartridges sold by manufacturers, producers, or importers; and

(2) Special-fuels excise taxes imposed at the retail level on diesel fuel and special motor fuels.

(b) Sometimes the law exempts the Federal Government from these taxes. Contracting officers should solicit prices on a tax-exclusive basis when it is known that the Government is exempt from these taxes and the exemption is at least $100, and on a tax-inclusive basis when no exemption exists or the exemption is less than $100.

(c) Executive agencies shall take maximum advantage of available Federal excise tax exemptions, especially when the exemption is $100 or more. In addition, refunds amounting to $100 or more shall be claimed.

29.202 General exemptions.

No Federal manufacturers' or special-fuels excise taxes are imposed in many contracting situations as, for example, when the supplies are for any of the following:

(a) The exclusive use of any State or political subdivision, including the District of Columbia (26 U.S.C. 4041 and 4221).

(b) Shipment to a United States possession or Puerto Rico, or for export. Shipment or export must occur within 6 months of the time title passes to the Government. When the exemption is claimed, the words *for export or shipment to a possession* must appear on the contract or purchase document, and the contracting officer must furnish the seller proof of export (see 26 CFR 48.4221-3).

(c) Further manufacture, or resale for further manufacture (this exemption does not include tires and inner tubes) (26 CFR 48.4221-2).

(d) Use as fuel supplies, ships or sea stores, or legitimate equipment on vessels of war, including (1) aircraft owned by the United States and constituting a part of the armed forces and (2) guided missiles and pilotless aircraft owned or chartered by the United States. When this exemption is to be claimed, the purchase should be made on a tax-exclusive basis. The contracting officer shall furnish the seller an exemption certificate for Supplies for Vessels of War (an example is given in 26 CFR 48.4221-4(d)(2); the IRS will accept one certificate covering all orders under a single contract for a specified period of up to 12 calendar quarters) (26 U.S.C. 4041 and 4221).

(e) A nonprofit educational organization (26 U.S.C. 4041 and 4221).

(f) Emergency vehicles (26 U.S.C. 4053 and 4064(b)(1)(c)).

[48 FR 42293, Sept. 19, 1983, as amended at 53 FR 662, Jan. 11, 1988]

29.203 Other Federal tax exemptions.

(a) Pursuant to 26 U.S.C. 4293, the Secretary of the Treasury has exempted the United States from the communications excise tax imposed in 26 U.S.C. 4251, when the supplies and services are for the exclusive use of the United States. (Secretarial Authorization, June 20, 1947, Internal Revenue Cumulative Bulletin, 1947-1, 205.)

(b) Pursuant to 26 U.S.C. 4483(b), the Secretary of the Treasury has exempted the United States from the federal highway vehicle users tax imposed in 26 U.S.C. 4481. The exemption applies whether the vehicle is owned or leased by the United States. (Secretarial Authorization, Internal Revenue Cumulative Bulletin, 1956-2, 1369.)

[53 FR 662, Jan. 11, 1988]

Subpart 29.3—State and Local Taxes

29.300 Scope of subpart.

This subpart prescribes the policies and procedures regarding the exemption or immunity of Federal Government purchases and property from State and local taxation.

29.301 Definition.

State and local taxes means taxes levied by the States, the District of Columbia, Puerto Rico, possessions of the United States, or their political subdivisions.

29.302 Application of State and local taxes to the Government.

(a) Generally, purchases and leases made by the Federal Government are immune from State and local taxation. Whether any specific purchase or lease is immune, however, is a legal question requiring advice and assistance of the agency-designated counsel.

(b) When it is economically feasible to do so, executive agencies shall take maximum advantage of all exemptions from State and local taxation that may be available. If appropriate, the contracting officer shall provide a Standard Form 1094, U.S. Tax Exemption Certificate (see part 53), or other evidence listed in 29.305(a) to establish that the purchase is being made by the Government.

29.303 Application of State and local taxes to Government contractors and subcontractors.

(a) Prime contractors and subcontractors shall not normally be designated as agents of the Government for the purpose of claiming immunity from State or local sales or use taxes. Before any activity contends that a contractor is an agent of the Government, the matter shall be referred to the agency head for review. The referral shall include all pertinent data on which the contention is based, together with a thorough analysis of all relevant legal precedents.

(b) When purchases are not made by the Government itself, but by a prime contractor or by a subcontractor under a prime contract, the right to an exemption of the transaction from a sales or use tax may not rest on the Government's immunity from direct taxation by States and localities. It may rest instead on provisions of the particular State or local law involved, or, in some cases, the transaction may not in fact be expressly exempt from the tax. The Government's interest shall be protected by using the procedures in 29.101.

(c) Frequently, property (including property acquired under the progress payments clause of fixed-price contracts or the Government property clause of cost-reimbursement contracts) owned by the Government is in the possession of a contractor or subcontractor. Situations may arise in which States or localities assert the right to tax Government property directly or to tax the contractor's or subcontractor's possession of, interest in, or use of that property. In such cases, the contracting officer shall seek review and advice from the agency-designated counsel on the appropriate course of action.

29.304 Matters requiring special consideration.

The imposition of State and local taxes may result in special contract considerations including the following:

(a) With coordination of the agency-designated counsel, a contract may (1) state that the contract price includes or excludes a specified tax or (2) require that the contractor take certain actions with regard to payment, nonpayment, refund, protest, or other treatment of a specified tax. Such special treatment may be appropriate when there is doubt as to the applicability or allocability of the tax, or when the applicability of the tax is being litigated.

(b) The applicability of State and local taxes to purchases by the Federal Government may depend on the place and terms of delivery. When the contract price will be substantial, alternative places and terms of delivery should be considered in light of possible tax consequences.

(c) Indefinite-delivery contracts for equipment rental may require the contractor to furnish equipment in any of the States. Since leased equipment remains the contractor's property, States and local governments impose a wide variety of property, use, or other taxes on equipment leased to the Government. The amount of these taxes can vary considerably from jurisdiction to jurisdiction. See 29.401-1 for the prescription of the contract clause to be included in contracts when delivery points are not known at time of contracting.

(d) The North Carolina State and local sales and use tax.

(1) The North Carolina Sales and Use Tax Act authorizes counties and incorporated cities and towns to obtain each year from the Commissioner of Revenue of the State of North Carolina a refund of sales and use taxes indirectly paid on building materials, supplies, fixtures, and equipment that become a part of or are annexed to any building or structure erected, altered, or repaired for such counties and incorporated cities and towns in North Carolina. In United States v. Clayton, 250 F. Supp. 827 (1965), it was held that the United States is entitled to the benefit of the refund, but must follow the refund procedure of the Act and the regulations to recover what it is due.

(2) The Act provides that, to receive the refund, claimants must file, within 6 months after the claimant's fiscal year closes, a written request substantiated by such records, receipts, and information as the Commissioner of Revenue may require. No refund will be made on an application not filed within the time allowed and in such manner as the Commissioner may require. The requirements of the Commissioner are set forth in regulations that provide that, to substantiate a refund claim for sales or use taxes paid on purchases of building materials, supplies, fixtures, or equipment by a contractor, the Government must secure from the contractor certified statements setting forth the cost of the property purchased from each vendor and the amount of sales or use taxes paid. In the event the contractor makes several purchases from the same vendor, the certified statement must indicate the invoice numbers, the inclusive dates of the invoices, the total amount of the invoices, and the sales and use taxes paid. The statement must also include the cost of any tangible personal property withdrawn from the contractor's warehouse stock and the amount of sales or use tax paid by the contractor. Similar certified statements by subcontractors must be obtained by the general contractor and furnished to the claimant. Any local sales or use taxes included in the contractor's statement must be shown separately from the State sales or use taxes.

(3) The clause prescribed at 29.401-2 requires contractors to submit to contracting officers by November 30 of each year a certified statement disclosing North Carolina State and local sales and use taxes paid during the 12-month period that ended the preceding September 30. The contracting officer shall ensure that contractors comply with this requirement and shall obtain the annual refund to which the Government may be entitled. The application for refund must be filed each year before March 31 and in the manner and form required by the Commissioner of Revenue. Copies of the form may be obtained from the State of North Carolina Department of Revenue, Raleigh, NC 27602.

29.305 State and local tax exemptions.

(a) *Evidence of exemption.* Evidence needed to establish exemption from State or local taxes depends on the grounds for the exemption claimed, the parties to the transaction, and the requirements of the taxing jurisdiction. Such evidence may include the following:

(1) A copy of the contract or relevant portion.

(2) Copies of purchase orders, shipping documents, credit-card-imprinted sales slips, paid or acknowledged in-

voices, or similar documents that identify an agency or instrumentality of the United States as the buyer.

(3) A U.S. Tax Exemption Certificate (SF 1094).

(4) A State or local form indicating that the supplies or services are for the exclusive use of the United States.

(5) Any other State or locally required document for establishing general or specific exemption.

(6) Shipping documents indicating that shipments are in interstate or foreign commerce.

(b) *Furnishing proof of exemption.* If a reasonable basis to sustain a claimed exemption exists, the seller will be furnished evidence of exemption, as follows:

(1) Under a contract containing the clause at 52.229-3, Federal, State, and Local Taxes, or at 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract), in accordance with the terms of those clauses.

(2) Under a cost-reimbursement contract, if requested by the contractor and approved by the contracting officer or at the discretion of the contracting officer.

(3) Under a contract or purchase order that contains no tax provision, if (i) requested by the contractor and approved by the contracting officer or at the discretion of the contracting officer, and (ii) the contractor either certifies that the contract price does not include the tax or, if the transaction or property is tax exempt, consents to a reduction in the contract price.

Subpart 29.4—Contract Clauses

29.401 Domestic contracts.

29.401-1 Indefinite-delivery contracts for leased equipment.

The contracting officer shall insert the clause at 52.229-1, State and Local Taxes, in solicitations and contracts for leased equipment when a fixed-price indefinite-delivery contract is contemplated, the contract will be performed wholly or partly within the United States, its possessions, or Puerto Rico, and the place or places of delivery are not known at the time of contracting.

29.401-2 Construction contracts performed in North Carolina.

The contracting officer shall insert the clause at 52.229-2, North Carolina State and Local Sales and Use Tax, in solicitations and contracts for construction to be performed in North Carolina. If the requirement is for vessel repair to be performed in North Carolina, the clause shall be used with its Alternate I.

29.401-3 Sealed bid and certain negotiated contracts.

The contracting officer shall insert the clause at 52.229-3, Federal, State, and Local Taxes, in solicitations and contracts if the contract is to be performed wholly or partly within the United States, its possessions, or Puerto Rico when—

(a) Contracting by sealed bidding, unless the requirement is for construction and the contract amount is expected to be less than the applicable small purchase limitation in part 13; or

(b) Contracting by negotiation, if a fixed-price contract is contemplated and the contract amount is expected to be over the applicable small purchase limitation in part 13, unless the clause at 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract), is included in the contract.

[48 FR 42293, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

29.401-4 Noncompetitive negotiated contracts.

The contracting officer shall insert the clause at 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract), in fixed-price noncompetitive negotiated contracts over the applicable small purchase limitation in part 13 to be performed wholly or partly within the United States, its possessions, or Puerto Rico when satisfied (a) that the contract price does not include contingencies for State and local taxes and (b) that, unless the clause is used, the contract price will include such contingencies. When the clause at 52.229-4 is included in a contract, the contracting officer shall ensure that the contract does *not* include the clause at 52.229-3, Federal, State, and Local Taxes.

29.401-5 Contracts performed in U.S. possessions or Puerto Rico.

The contracting officer shall insert the clause at 52.229-5, Taxes—Contracts Performed in U.S. Possessions or Puerto Rico, in solicitations and contracts that include the clause at 52.229-3, Federal, State, and Local Taxes, or 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract).

29.401-6 New Mexico gross receipts and compensating tax.

(a) *Definition. Services,* as used in this subsection, is as defined in the Gross Receipts and Compensating Tax Act of the State of New Mexico, Sec. 7-9-3(k) NM SA 1978, and means all activities engaged in for other persons for a consideration, which activities involve predominately the performance of a service as distinguished from selling or leasing property. *Services* includes activities performed by a person for its members of shareholders. In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling. *Services* also includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. Such tangible personal property retains its character as tangible personal property until it is installed as an ingredient or component part of a construction project in New Mexico. However, sales of tangible personal property that will become an ingredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property.

(b) *Contract clause.* The contracting officer shall insert the clause at 52.229-10, State of New Mexico Gross Receipts and Compensating Tax, in solicitations and contracts issued by the executive agencies identified in paragraph (c) of this subsection when all three of the following conditions exist:

(1) The contractor will be performing a cost-reimbursement contract.

(2) The contract directs or authorizes the contractor to acquire tangible personal property as a direct cost under a contract and title to such property passes directly to and vests in the United States upon delivery of the property by the vendor.

(3) The contract will be for services to be performed in whole or in part within the State of New Mexico.

(c) *Participating agencies.* (1) The executive agencies listed below have entered into an agreement with the State of New Mexico to eliminate the double taxation of Government cost-reimbursement contracts when contractors and their subcontractors purchase tangible personal property to be used in performing services in whole or in part in the State of New Mexico and for which title to such property will pass to the United States upon delivery of the property to the contractor and its subcontractors by the vendor. Therefore, the clause applies only to solicitations and contracts issued by the—

United States Department of Agriculture;
United States Department of the Air Force;
United States Department of the Army;
United States Department of Energy;
United States Department of Health and Human Services;
United States Department of Interior;
United States Department of Labor;
United States Department of the Navy;
United States Department of Transportation;
United States General Services Administration; and
United States National Aeronautics and Space Administration.

(2) Any other Federal agency which expects to award cost-reimbursement contracts to be performed in New Mexico should contact the New Mexico Taxation and Revenue Department to execute a similar agreement.

[53 FR 34228, Sept. 2, 1988, as amended at 55 FR 3883, Feb. 5, 1990; 55 FR 38517, Sept. 18, 1990]

402 Foreign contracts.

402-1 Foreign fixed-price contracts.

a) The contracting officer shall ert the clause at 52.229-6, Taxes—reign Fixed-Price Contracts, in so-itations and contracts when a fixed-ce contract is contemplated and the ntract is to be performed wholly or rtly in a foreign country, unless it is ntemplated that the contract will be h a foreign government.

b) The contracting officer shall ert the clause at 52.229-7, Taxes—ed-Price Contracts With Foreign vernments, in solicitations and con-cts when a fixed-price contract with oreign government is contemplated.

02-2 Foreign cost-reimbursement con-tracts.

) The contracting officer shall rt the clause at 52.229-8, Taxes—eign Cost-Reimbursement Con-ts, in solicitations and contracts n a cost-reimbursement contract is templated and the contract is to be formed wholly or partly in a for-country, unless it is contemplated the contract will be with a for-government.

) The contracting officer shall rt the clause at 52.229-9, Taxes—-Reimbursement Contracts with eign Governments, in solicitations contracts when a cost-reimburse-t contract with a foreign govern-t is contemplated.

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Subpart 30.6—CAS Administration

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APPENDIX A TO PART 30—Preambles to the Cost Accounting Standards

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 52 FR 35613, Sept. 22, 1987, unless otherwise noted.

30.000 Scope of part.

This part describes policies and procedures for applying the Cost Accounting Standards to negotiated national defense contracts and subcontracts. This part also prescribes policies and procedures for applying those standards to certain nondefense contracts. This part does not apply to sealed bid contracts or to any contract with a small business concern (see 30.201-1(b) for these and other exemptions).

Subpart 30.1—General

30.101 Cost Accounting Standards.

(a) Pub. L. 91-379 (50 U.S.C. App. 2168) requires certain national defense contractors and subcontractors to comply with Cost Accounting Standards (CAS) and to disclose in writing and follow consistently their cost accounting practices.

(b) The obligation to comply with the CAS is extended to certain nondefense contracts as a matter of policy. This decision has resulted in differences in application between national defense and nondefense contracts and these differences are noted in the appropriate sections throughout this part.

Subpart 30.2—CAS Program Requirements

30.201 Contract requirements.

30.201-1 CAS applicability.

(a) This subsection describes the rules for determining whether a proposed contract or subcontract is exempt from CAS. (See subpart 30.4.) Negotiated contracts not exempt in accordance with 30.201-1(b) shall be subject to CAS. A CAS-covered contract may be subject to either full or modified coverage. The rules for determining whether full or modified coverage applies are in 30.201-2.

(b) The following categories of contracts and subcontracts are exempt from all CAS requirements:

(1) Sealed bid contracts.

(2) Negotiated contracts and subcontracts not in excess of $100,000.

(3) Contracts and subcontracts with small businesses.

(4) Contracts and subcontracts with foreign governments or their agents or instrumentalities or, insofar as the requirements of CAS other than 30.401 and 30.402 are concerned, any contract or subcontract awarded to a foreign concern.

(5) Contracts and subcontracts in which the price is set by law or regulation.

(6) Contracts and subcontracts when the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public (see 15.804-3(c)). A prospective contractor requesting exemption from CAS on this basis must provide supporting justification in accordance with 15.804-3(e). When the contracting officer determines that the justification is adequate, this exemption from CAS shall be used even though the award is made on the basis of adequate price competition.

(7) Contracts and subcontracts of $500,000 or less if the business unit is not currently performing any national defense CAS-covered contracts.

(8) Nondefense contracts awarded based on adequate price competition (see 15.804-3(b)).

(9) Nondefense contracts and subcontracts awarded to business units that are not currently performing any CAS-covered national defense contracts.

(10) Contracts and subcontracts with educational institutions other than those to be performed by Federally Funded Research and Development Centers (FFRDC's) operated by such institutions.

(11) Contracts awarded to labor surplus area concerns pursuant to a labor surplus area set-aside (see part 20).

(12) Contracts and subcontracts awarded to a United Kingdom contractor for performance substantially in the United Kingdom, provided that the contractor has filed with the United Kingdom Ministry of Defense, for retention by the Ministry, a completed Disclosure Statement (Form No. CASB-DS-1) which shall adequately describe its cost accounting practices. Whenever that contractor is already required to follow U.K. Government Accounting Conventions, the disclosed practices shall be in accord with the requirements of those conventions. (See 30.201-4(d).

(13) Subcontracts under the NATO PHM Ship program to be performed outside the United States by a foreign concern.

(14) Contracts and subcontracts to be executed and performed entirely outside the United States, its territories, and possessions.

(15) Firm-fixed-price contracts and subcontracts awarded without submission of any cost data; (*provided*, that the failure to submit such data is not attributable to a waiver of the requirement for certified cost or pricing data.

30.201-2 Types of CAS coverage.

(a) *Full coverage.* Full coverage requires that the business unit comply with all of the CAS in effect on the date of the contract award and with any CAS that become applicable because of later award of a national defense CAS-covered contract. However, the award of a new nondefense CAS-covered contract shall not trigger application of new CAS having effective dates later than the award date of the last national defense CAS-covered contract. Full coverage applies to contractor business units that—

(1) Receive a single national defense CAS-covered contract award of $10 million or more;

(2) Received $10 million or more in national defense CAS-covered contract awards during its preceding cost accounting period; or

(3) Received less than $10 million in national defense CAS-covered contract

awards during its preceding cost accounting period but such awards were 10 percent or more of total sales.

(b) *Modified coverage.* (1) Modified CAS coverage requires only that the contractor comply with Standard 401, Consistency in Estimating, Accumulating, and Reporting Costs, and Standard 402, Consistency in Allocating costs Incurred for the Same Purpose. Modified, rather than full, CAS coverage may be applied to a covered contract of less than $10 million awarded to a business unit that received less than $10 million in national defense CAS-covered contracts in the immediately preceding cost accounting period if the sum of such awards was less than 10 percent of the business unit's total sales during that period. For the purpose of determining whether the sum of covered contract awards equals 10 percent of the business unit's total sales, an order received by the one segment from another segment shall be treated in the same way that a subcontract award to the receiving segment would be treated. In measuring sales for a year, a transfer by one segment to another shall be deemed to be a sale by the transferor.

(2) If any one contract is awarded with modified CAS coverage, all CAS-covered contracts awarded to that business unit during that cost accounting period must also have modified coverage with the following exception: if the business unit receives a single national defense contract award of $10 million or more, that contract must be subject to full CAS coverage. Thereafter, any covered contract awarded in the same cost accounting period must also be subject to full CAS coverage.

(3) A contract awarded with modified CAS coverage shall remain subject to such coverage throughout its life regardless of changes in the business unit's CAS status during subsequent cost accounting periods.

(c) *Nondefense contracts.* Nondefense contracts subject to CAS shall have the same type of CAS coverage as the most recently awarded national defense contract currently being performed by the same business unit.

(d) *Subcontracts.* Subcontract awards subject to CAS require the same type of CAS coverage as would prime contracts awarded to the same business unit.

(e) *Foreign concerns.* Contracts with foreign concerns subject to CAS shall only be subject to modified coverage.

30.201-3 Solicitation provisions.

(a) *Cost Accounting Standards Notices and Certification (National Defense).* The contracting officer shall insert the provision at 52.230-1, Cost Accounting Standards Notices and Certification (National Defense), in solicitations for proposed national defense contracts subject to CAS as specified in 30.201. The provision allows offerors to—

(1) Certify their Disclosure Statement status.;

(2) Claim exemption from CAS if they are not currently performing any CAS-covered contracts and the proposal will result in an award of $500,000 or less;

(3) Claim exemption from full CAS coverage and elect modified CAS coverage when appropriate; and

(4) Certify whether award of the contemplated contract would require a change to existing cost accounting practices.

(b) *Cost Accounting Standards Notices and Certification (Nondefense).* The contracting officer shall insert the provision at 52.230-2, Cost Accounting Standards Notices and Certification (Nondefense), in solicitations for proposed nondefense contracts that do not meet the criteria for CAS exemption in 30.201-1. The provision allows offerors to claim exemption from CAS if they are not currently performing any CAS-covered national defense contracts or to certify what type of CAS coverage applies to them.

30.201-4 Contract clauses.

(a) *Cost Accounting Standards.* (1) The contracting officer shall insert the clause at 52.230-3, Cost Accounting Standards, in negotiated contracts, unless the contract is exempted (see 30.201-1) the contract is subject to modified coverage (see 30.201-2), or the clause prescribed in paragraph (d) of this subsection is used.

(2) The clause at 52.230-3 requires the contractor to disclose actual cost

accounting practice (applicable to national defense contracts only) and to follow these practices consistently.

(b) *Administration of Cost Accounting Standards.* (1) The contracting officer shall insert the clause at 52.230-4, Administration of Cost Accounting Standards, in contracts containing either the clause prescribed in paragraph (a) of this subsection, or the clause prescribed in paragraph (c) of this subsection.

(2) The clause at 52.230-4, Administration of Cost Accounting Standards, specifies rules for administering CAS requirements and procedures to be followed in cases of failure to comply.

(c) *Disclosure and Consistency of Cost Accounting Practices.* (1) The contracting officer shall insert the clause 52.230-5, Disclosure and Consistency of Cost Accounting Practices, in negotiated contract when the contract amount is over $100,000, but less that $10 million, and the offeror certifies it is eligible for and elects to use modified CAS coverage (see 30.201-2, unless the clause prescribed in paragraph (d) of this subsection is used).

(2) The clause at 52.230-5 requires the contractor to comply with CAS 401 and 402, to disclose (if it meets certain requirements) actual cost accounting practices, and to follow consistently disclosed and established cost accounting practices.

(d) *Consistency in Cost Accounting Practices.* The contracting officer shall insert the clause 52.230-6, Consistency in Cost Accounting Practices, in negotiated defense contracts that are exempt from CAS requirements solely on the basis of the fact that the contract is to be awarded to a United Kingdom contractor and is to be performed substantially in the United Kingdom (see 30.201-1(b) (12)).

[52 FR 35613, Sept. 22, 1987, as amended at 55 FR 38517, Sept. 18, 1990]

30.201-5 Waiver.

(a) In some instances, contractors or subcontractors may refuse to accept all or part of the requirements of the CAS clauses (52.230-3, Cost Accounting Standards and 52.230-5, Disclosure and Consistency of Cost Accounting Practices). If the contracting officer determine that it is impractical to obtain the materials supplies, or services from any other source, the contracting officer shall prepare a request for waiver describing the proposed contract or subcontract and containing—

(1) An unequivocal statement that the proposed contractor or subcontractor refuses to accept a contract containing all or a specified part of a CAS clause and the specific reason for that refusal;

(2) A statement as to whether the proposed contractor or subcontractor has accepted any prime contract or subcontract containing a CAS clause;

(3) The amount of the proposed award and the sum of all awards by the agency requesting the waiver to the proposed contractor or subcontractor in each of the preceding 3 years;

(4) A statement that no other source is available to satisfy the agency's needs on a timely basis;

(5) A statement of alternative methods considered for fulfilling the need and the agency's reasons for rejecting them;

(6) A statement of steps being taken by the agency to establish other sources of supply for future contracts for the products or services for which a waiver is being requested; and

(7) Any other information that may be useful in evaluating the requests.

(b) (1) For national defense contracts of the DOD, waivers shall be controlled and approved by the Deputy Assistant Secretary of Defense (Procurement) and shall be processed for review by the Defense Acquisition Regulatory (DAR) Council in accordance with agency procedures.

(2) For national defense contracts of National Aeronautics and Space Administration (NASA), waivers shall be controlled and approved by the Assistant Administrator for Procurement after consultation with the Deputy Assistant Secretary of Defense (Procurement). Requests for waiver shall be processed in accordance with agency regulations.

(c) For nondefense contracts, and defense contracts of agencies other than DOD or NASA, the agency head or designee may waive CAS requirements. Agencies shall ensure consistent treatment of—

(1) Waivers within the agency; and

(2) Contractors performing under both defense and nondefense contracts.

(d) For purchases of substantially the same product from the same contractor for which a waiver was previously granted, approval authority is redelegated in the Department of Defense to the Secretaries of the Military Departments and the Director, Defense Logistics Agency.

30.202 Disclosure requirements.

30.202-1 General requirements.

(a) A Disclosure Statement is a written description of a contractor's cost accounting practices and procedures. The submission of a new or revised Disclosure Statement is not required for any nondefense contract or from any small business concern. However, if a Disclosure Statement has been submitted in connection with a CAS-covered defense contract, the contractor must also comply with such disclosed practices under nondefense CAS-covered contracts (see subparagraph (a)(1) of the clause at 52.230-3, Cost Accounting Standards).

(b) Completed Disclosure Statements are required in the following circumstances:

(1) Any business unit that is selected to receive a CAS-covered negotiated national defense contract or subcontract of $10 million or more shall submit a Disclosure Statement before award.

(2) Any company which, together with its segments, received net awards of negotiated national defense prime contracts and subcontracts subject to CAS totaling more than $10 million in its most recent cost accounting period must submit a Disclosure Statement before award of its first CAS-covered contract in the immediately following cost accounting period. However, if the first CAS-covered contract is received within 90 days of the start of the cost accounting period, the contractor is not required to file until the end of 90 days.

(c) When a Disclosure Statement is required, a separate Disclosure Statement must be submitted for each segment whose costs included in the total price of any CAS-covered contract or subcontract exceed $100,000, unless the contract or subcontract is of the type or value exempted by 30.201-1. If the cost accounting practices are identical for more than one segment, then only one Disclosure Statement, clearly identifying each such segment, need be submitted. A Disclosure Statement will also be required for each corporate or group office whose costs of any amount are allocated to one or more segments performing CAS-covered contracts.

(d) Each corporate or other home office that allocates costs to one or more disclosing segments performing CAS-covered contracts must submit a Part VIII of the Disclosure Statement.

(e) Foreign contractors and subcontractors who are required to submit a Disclosure Statement may, in lieu of filing a Form No. CASB-DS-1, make disclosure by using a disclosure form prescribed by an agency of its Government, provided that the official designated to approve waivers in 30.201-5 determines that the information disclosed by that means will satisfy requirements of subpart 30.2. The use of alternative forms has been approved for the contractors of the following countries:

(1) Canada.

(2) Federal Republic of Germany.

30.202-2 Impracticality of submission.

The agency head may determine that it is impractical to secure the Disclosure Statement, although submission is required, and authorize contract award without obtaining the Statement. This authority may not be delegated.

30.202-3 Amendment and revisions.

(a) Contractors and subcontractors are responsible for maintaining accurate Disclosure Statements and complying with disclosed practices. Amendments and revisions to Disclosure Statements may be submitted at any time and may be proposed by either the contractor or the Government. Resubmission of complete, updated, Disclosure Statements is discouraged except when extensive changes require it to assist the review process.

(b) Should the obligation to maintain the Disclosure Statement cease because the contractor no longer meets the financial thresholds, the contractor shall still be required to follow the disclosed practices for those contracts awarded during a period in which the contractor was obligated to submit a Disclosure Statement.

30.202-4 Privileged and confidential information.

If the offeror or contractor notifies the contracting officer that the Disclosure Statement contains trade secrets and commercial or financial information, which is privileged and confidential, the Disclosure Statement shall be protected and shall not be released outside the Government.

30.202-5 Filing Disclosure Statements.

(a) Disclosure must be on Form Number CASB-DS-1. Forms may be obtained from the cognizant administrative contracting officer (ACO).

(b) Offerors are required to file Disclosure Statements as follows:

(1) Original and one copy with the cognizant ACO; and

(2) One copy with the cognizant contract auditor.

(c) Amendments and revisions shall be submitted to the currently cognizant ACO and auditor.

30.202-6 Responsibilities.

(a) The contracting officer is responsible for determining when a proposed contract may require CAS coverage and for including the appropriate notice in the solicitation. The contracting officer must then ensure that the offeror has made the required solicitation certifications and that required Disclosure Statements are submitted.

(b) The contracting officer shall not award a CAS-covered contract until the ACO has made a written determination that a required Disclosure Statement is adequate unless, in order to protect the Government's interest, the contracting officer waives the requirement for an adequacy determination before award. In this event, a determination of adequacy shall be required as soon as possible after the award.

(c) The cognizant auditor is responsible for conducting reviews of Disclosure Statements for adequacy and compliance.

(d) The cognizant ACO is responsible for determinations of adequacy and compliance of the Disclosure Statement.

30.202-7 Determinations.

(a) *Adequacy determination.* The contract auditor shall conduct an initial review of a Disclosure Statement to ascertain whether it is current, accurate, and complete and shall report the results to the cognizant ACO, who shall determine whether or not it adequately describes the offeror's cost accounting practices. If the ACO identifies any areas of inadequacy, the ACO shall request a revised Disclosure Statement. If the Disclosure Statement is adequate, the ACO shall notify the offeror in writing, with copies to the auditor and contracting officer. The notice of adequacy shall state that a disclosed practice shall not, by virtue of such disclosure, be considered an approved practice for pricing proposals or accumulating and reporting contract performance cost data. Generally, the ACO shall furnish the contractor notification of adequacy or inadequacy within 30 days after the Disclosure Statement has been received by the ACO.

(b) *Compliance determination.* After the notification of adequacy, the auditor shall conduct a detailed compliance review to determine whether or not the disclosed practices comply with part 31 and the CAS and shall advise the ACO of the results. The ACO shall take action regarding noncompliance with CAS under FAR 30.602-2. The ACO may require a revised Disclosure Statement and adjustment of the prime contract price or cost allowance. Noncompliance with part 31 shall be processed separately, in accordance with normal administrative practices.

30.202-8 Subcontractor Disclosure Statements.

(a) The contractor or higher tier subcontractor is responsible for administering the CAS requirements contained in subcontracts.

(b) If the subcontractor has previously furnished a Disclosure Statement to an ACO, the subcontractor may satisfy the submission requirement by identifying to the contractor or higher tier subcontractor the ACO to whom it was submitted.

(c)(1) If the subcontractor considers the Disclosure Statement (or other similar information) privileged or confidential, the subcontractor may submit it directly to the ACO and auditor cognizant of the subcontractor, notifying the contractor or higher tier subcontractor. A preaward determination of adequacy is not required in such cases. Instead, the ACO cognizant of the subcontractor shall (i) notify the auditor that the adequacy review will be performed during the postaward compliance review and, upon completion, (ii) notify the subcontractor, the contractor or higher tier subcontractor, and the cognizant ACO's of the findings.

(2) Even though a Disclosure Statement is not required, a subcontractor may (i) claim that CAS-related reviews by contractors or higher tier subcontractors would reveal proprietary data or jeopardize the subcontractor's competitive position and (ii) request that the Government perform the required reviews.

(d) When the Government requires determinations of adequacy or inadequacy, the ACO cognizant of the subcontractor shall make such recommendation to the ACO cognizant of the prime contractor or next higher tier subcontractor. ACO's cognizant of higher tier subcontractors or prime contractors shall not reverse the determination of the ACO cognizant of the subcontractor.

(e) Postaward submission of the subcontractor's Disclosure Statement must be approved by the ACO having cognizance of the prime contractor. Before authorizing postaward submission, the ACO shall coordinate with the ACO cognizant of the subcontractor to ensure that this action will not have an adverse impact on other contracts and subcontracts subject to the CAS requirements, and with the contracting officer to obtain the information needed to make the required written determination.

(f) Any determination that it is impractical to secure a subcontractor's Disclosure Statement must be made in accordance with 30.202-2.

Subpart 30.3—CAS Rules and Regulations

30.301 Definitions.

The definitions set forth in section 31.001 also apply to this part.

Actual cost, as used in this part, means an amount determined on the basis of cost incurred as distinguished from forecasted cost. Actual cost includes standard cost properly adjusted for applicable variance.

Asset accountability unit, as used in this part, means a tangible capital asset which is a component of plant and equipment that is captialized when acquired or whose replacement is capitalized when the unit is removed, transferred, sold, abandoned, demolished, or otherwise disposed of.

Assignment of cost to cost accounting periods. (See 30.302-1(b).)

Bid and proposal (B&P) cost, as used in this part, means the cost incurred in preparing, submitting, or supporting any bid or proposal which effort is neither sponsored by a grant, nor required in the performance of a contract.

CAS-covered contract, as used in this part, means any negotiated contract or subcontract in which a CAS clause is required to be included.

Category of material, as used in this part, means a particular kind of goods, comprised of identical or interchangeable units, acquired or produced by a contractor, which are intended to be sold, or consumed or used in the performance of either direct or indirect functions.

Change to a cost accounting practice. (See 30.302-2.)

Cost accounting practice. (See 30.302-1.)

Cost objective, as used in this part, means a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.

Currently performing, as used in this part, means that a contractor has been awarded a contract, but has not yet received notification of final acceptance of all supplies, services, and data deliverable under the contract (including options).

Defense contractor, as used in this part, means any person who enters into a contract with the United States for the production of material or the performance of services for the national defense.

Defense subcontractor, as used in this part, means any person other than the United States who contracts, at any tier, to perform any part of a defense contractor's contract.

Direct cost, as used in this part, means any cost which is identified specifically with a particular final cost objective. Direct costs are not limited to items which are incorporated in the end product as material or labor. Costs identified specifically with a contract are direct costs of that contract. All costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives.

Disclosure statement, as used in this part, means the Disclosure Statement required by 30.202-1.

Entitlement, as used in this part, means an employee's right whether conditional or unconditional to receive a determinable amount of compensated personnel absence, or pay in lieu thereof.

Established catalog or market price of commercial items sold in substantial quantities to the general public is as defined in 15.804-3(c).

Funded pension cost, as used in this part, means the portion of pension costs for a current or prior cost accounting period that has been paid to a funding agency or, under a pay-as-you-go plan to plan participants or beneficiaries.

Funding agency, as used in this part, means an organization or individual which provides facilities to receive and accumulate assets to be used either for the payment of benefits under a pension plan, or for the purchase of such benefits.

Indirect cost, as used in this part, means any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective.

Indirect cost pool, as used in this part, means a grouping of incurred costs identified with two or more objectives but not identified specifically with any final cost objective.

Material inventory record, as used in this part, means any record used for the accumulation of actual or standard costs of a category of material recorded as an asset for subsequent cost allocation to one or more cost objectives.

Measurement of cost. (See 30.302-1(a).)

Multiemployer pension plan, as used in this part, means a plan to which more than one employer contributes and which is maintained pursuant to one or more collective bargaining agreements between an employee organization and more than one employer.

Negotiated subcontract, as used in this part, means any subcontract except a firm fixed-priced subcontract made by a contractor or subcontractor after receiving offers from at least two persons not associated with each other or with such contractor or subcontractor, providing (a) the solicitation to all competitors is identical, (b) price is the only consideration in selecting the subcontractor from among the competitors solicited, and (c) the lowest offer received in compliance with the solicitation from among those solicited is accepted.

Net awards, as used in this part, means the total obligated value of negotiated national defense prime contract and subcontract awards received during the reporting period minus cancellations, terminations, and other related credit transactions.

Operating revenue, as used in this part, means amounts accrued or charged to customers, clients, and tenants, for the sale of products manufactured or purchased for resale, for services, and for rental of property held primarily for leasing to others. It includes both reimbursable costs and fees under cost-type contracts and percentage-of-completion sales accruals, except it includes only the fee for management contracts under which the contractor acts essentially as an agent of the Government in the erection or operation of Government-owned facilities. It excludes incidental interest, dividends, royalty, and rental income and proceeds from the sale of assets used in the business.

Production unit, as used in this part, means a grouping of activities which either uses homogeneous inputs of direct material and direct labor or yields homogeneous outputs such that costs or statistics related to these homogeneous inputs or outputs are appropriate as bases for allocating variances.

Repairs and maintenance, as used in this part, means the total endeavor to obtain the expected service during the life of tangible capital assets. Maintenance is the regularly recurring activity of keeping assets in normal or expected operating condition. Repair is the activity of putting them back into normal or expected operating condition.

Reporting costs, as used in this part, is the provision of cost information to others. The reporting of costs involves selecting relevant cost data and presenting it in an intelligible manner for use by the receipient.

Small business, as used in this part, means any concern, firm, person, corporation, partnership, cooperative, or other business enterprise which, under 15 U.S.C. 637(b)(6) and the rules and regulations of the Small Business Administration in part 121 of title 13 of the Code of Federal Regulations, is determined to be a small business concern for the purpose of Government contracting.

30.302 Definitions, explanations, and illustrations of the terms, "cost accounting practice" and "change to a cost accounting practice."

30.302-1 Cost accounting practice.

Cost accounting practice, as used in this part, means any disclosed or established accounting method or technique which is used for allocation of cost to cost objectives, assignment of cost to cost accounting periods, or measurement of cost.

(a) *Allocation of cost to cost objectives*, as used in this part, includes both direct and indirect allocation of cost. Examples of cost accounting practices involving allocation of cost to cost objectives are the accounting methods or techniques used to accumulate cost, to determine whether a cost is to be directly or indirectly allocated to determine the composition of cost pools, and to determine the selection and composition of the appropriate allocation base.

(b) *Assignment of cost to cost accounting periods*, as used in this part, refers to a method or technique used in determining the amount of cost to be assigned to individual cost accounting periods. Examples of cost accounting practices which involve the assignment of cost to cost accounting periods are requirements for the use of specified accrual basis accounting or cash basis accounting for a cost element.

(c) *Measurement of cost*, as used in this part, encompasses accounting methods and techniques used in defining the components of cost, determining the basis for cost measurement, and establishing criteria for use of alternative cost measurement techniques. The determination of the amount paid or a change in the amount paid for a unit of goods and services is not a cost accounting practice. Examples of cost accounting practices which involve measurement of costs are—

(1) The use of either historical cost, market value, or present value;

(2) The use of standard cost or actual cost; or

(3) The designation of those items of cost which must be included or excluded from tangible capital assets or pension cost.

30.302-2 Change to a cost accounting practice.

Change to a cost accounting practice, as used in this part, means any alteration in a cost accounting practice, as defined in 30.302-1, whether or not such practices are covered by a Disclosure Statement, except for the following:

(a) The initial adoption of a cost accounting practice for the first time a cost is incurred, or a function is created, is not a change in cost accounting practice. The partial or total elimination of a cost or the cost of a function is not a change in cost accounting practice. As used here, function is an activity or group of activities that is identifiable in scope and has a purpose or end to be accomplished.

(b) The revision of a cost accounting practice for a cost which previously had been immaterial is not a change in cost accounting practice.

30.302-3 Illustrations of changes which meet the definition of "change to a cost accounting practice."

(a) The method or technique used for measuring costs has been changed.

Description	Accounting treatment
(1) Contractor changes its actuarial cost method for computing pension costs.	(1)(i) *Before change*: The contractor computed pension cos using the aggregate cost method. (ii) *After change*: The contractor computes pension cost usin the unit credit method.
(2) Contractor uses standard costs to account for its direct labor. Labor cost at standard was computed by multiplying labor-time standard by actual labor rates. The contractor changes the computation by multiplying labor-time standard by labor-rate standard.	(2)(i) *Before change*: Contractor's direct labor cost was measured with only one component set at standard. (ii) *After change*: Contractor's direct labor cost is measure with both the time and rate components set at standar

(b) The method or technique used for assignment of cost to cost accountin periods has been changed.

Description	Accounting treatment
(1) Contractor changes his established criteria for capitalizing certain classes of tangible capital assets whose acquisition costs totaled $1 million per cost accounting period.	(1)(i) *Before change*: Items having acquisition costs of b tween $200 and $400 per unit were capitalized and depr ated over a number of cost accounting periods. (ii) *After change*: The contractor charges the value of ass costing between $200 and $400 per unit to an indir expense pool which is allocated to the cost objectives the cost accounting period in which the cost was incur
(2) Contractor changes his methods for computing depreciation for a class of assets.	(2)(i) *Before change*: The contractor assigned deprecia costs to cost accounting periods using an accelera method. (ii) *After change*: The contractor assigns depreciation costs cost accounting periods using the straight line meth
(3) Contractor changes his general method of determining asset lives for classes of assets acquired prior to the effective date of CAS 409.	(3)(i) *Before change*: The contractor identified the cost counting periods to which the cost of tangible capital ass would be assigned using guideline class lives provided IRS Rev. Proc. 72-10. (ii) *After change*: The contractor changes the method which he identifies the cost accounting periods to which costs of tangible capital assets will be assigned. He n uses the expected actual lives based on past us

(c) The method or technique used for allocating costs has been changed.

Description	Accounting treatment
(1) Contractor changes his method of allocating G&A expenses under the requirements of Cost Accounting Standard 410.	(1) (i) *Before change:* The contractor operating under Cost Accounting Standard 410 has been allocating his general and administrative expense pool to final cost objectives on a total cost input base in compliance with the Standard. The contractor's business changes substantially such that there are significant new projects which have only insignificant quantities of material. (ii) *After change:* After the addition of the new work, an evaluation of the changed circumstances reveals that the continued use of a total cost input base would result in a significant distortion in the allocation of the G&A expense pool in relation to the benefits received. To remain in compliance with Standard 410, the contractor alters his G&A allocation base from a total cost input base to a value added base.
(2) The contractor changes the accounting for hardware common to all projects.	(2) (i) *Before change:* The contractor allocated the cost of purchased or requisitioned hardware directly to projects. (ii) *After change:* The contractor charges the cost of purchased or requisitioned hardware to an indirect expense pool which is allocated to projects using an appropriate allocation base.
(3) The contractor merges operating segments A and B which use different cost accounting practices in accounting for manufacturing overhead costs.	(3) (i) *Before change:* In segment A, the costs of the manufacturing overhead pool have been allocated to final cost objectives using a direct labor hours base; in segment B, the costs of the manufacturing overhead pool have been allocated to final cost objectives using a direct labor dollars base. (ii) *After change:* As a result of the merger of operations, the combined segment decides to allocate the cost of the manufacturing overhead pool to all final cost objectives, using a direct labor dollars base. Thus, for those final cost objectives referred to in segment A, the cost of the manufacturing overhead pool will be allocated to the final cost objectives of segment A using a direct labor dollars base instead of a direct labor hours base.

30.302-4 Illustrations of changes which do not meet the definition of "Change to a cost accounting practice."

Description	Accounting treatment.
(a) Changes in the interest rate levels in the national economy have invalidated the prior actuarial assumption with respect to anticipated investment earnings. The pension plan administrators adopted an increased (decreased) interest rate actuarial assumption. The company allocated the resulting pension costs to all final cost objectives.	(a) Adopting the increase (decrease) in the interest rate actuarial assumption is not a change in cost accounting practice.
(b) The basic benefit amount for a company's pension plan is increased from $8 to $10 per year of credited service. The change increases the dollar amount of pension cost allocated to all final cost objectives.	(b) The increase in the amount of the benefits is not a change in cost accounting practice.
(c) A contractor who has never paid pensions establishes for the first time a pension plan. Pension costs for the first year amounted to $3.5 million.	(c) The initial adoption of an accounting practice for the first time incurrence of a cost is not a change in cost accounting practice.
(d) A contractor maintained a Deferred Incentive Compensation Plan. After several year's experience, the plan was determined not to be attaining its objective, so it was terminated, and no future entitlements were paid.	(d) There was a termination of the Deferred Incentive Compensation Plan. Elimination of a cost is not a change in cost accounting practice.
(e) A contractor eliminates a segment that was operated for the purpose of doing research for development of products related to nuclear energy.	(e) The projects and expenses related to nuclear energy projects have been terminated. No transfer of these projects and no further work in this area is planned. This is an elimination of cost and not a change in cost accounting practice.

Description	Accounting treatment.
(f) For a particular class of assets for which technological changes have rarely affected asset lives, a contractor starts with a 5-year average of historical lives to estimate future lives. He then considers technological changes and likely use. For the past several years the process resulted in an estimated future life of 10 years for this class of assets. This year, a technological change leads to a prediction of a useful life of 7 years for the assets acquired this year for the class of assets.	(f) The change in estimate (not in method) is not a change in cost accounting practice. The contractor has not changed the method or technique used to determine the estimate. The methodology applied has indicated a change in the estimated life, and this is not a change in cost accounting practice.
(g) The marketing department of a segment has reported directly to the general manager of the segment. The costs of the marketing department have been combined as part of the segment's G&A expense pool. The company reorganizes and requires the marketing department to report directly to a vice president at corporate headquarters.	(g) After the organization change in the company's reporting structure, the parties agree that the appropriate recognition of the beneficial or causal relationship between the costs of the marketing department and the segment is to continue to combine these costs as part of the segment's G&A expense pool. Thus, the organizational change has not resulted in a change in cost accounting practice.

30.303 Effect of filing Disclosure Statement.

(a) A disclosure of a cost accounting practice by a contractor does not determine the allowability of particular items of cost. Irrespective of the practices disclosed by a contractor, the question of whether or not, or the extent to which, a specific element of cost is allowed under a contract remains for consideration in each specific instance. Contractors are cautioned that the determination of the allowability of cost items will remain a responsibility of the contracting officers pursuant to the provisions of the applicable procurement regulations.

(b) The individual Disclosure Statement may be used in audits of contracts or in negotiation of prices leading to contracts. The authority of the audit agencies and the contracting officers is in no way abrogated by the material presented by the contractor in his Disclosure Statement. Contractors are cautioned that their disclosures must be complete and accurate; the practices disclosed may have a significant impact on ways in which contractors will be required to comply with Cost Accounting Standards.

30.304 Concurrent full and modified coverage.

Contracts subject to full coverage may be performed during a period in which a previously awarded contract subject to modified coverage is being performed. Compliance with full coverage may compel the use of cost accounting practices that are not required under modified coverage. Under these circumstances the cost accounting practices applicable to contracts subject to modified coverage need not be changed. Any resulting differences in practices between contracts subject to full coverage and those subject to modified coverage shall not constitute a violation of CAS 30.401 and CAS 30.402. This principle also applies to contracts subject to modified coverage being performed during a period in which a previously awarded contract subject to full coverage is being performed.

30.305 Materiality.

In determining whether amounts of cost are material or immaterial, the following criteria shall be considered where appropriate; no one criterion is necessarily determinative:

(a) *The absolute dollar amount involved.* The larger the dollar amount, the more likely that it will be material.

(b) *The amount of contract cost compared with the amount under consideration.* The larger the proportion of the amount under consideration to contract cost, the more likely it is to be material.

(c) *The relationship between a cost item and a cost objective.* Direct cost items, especially if the amounts are themselves part of a base for allocation of indirect costs, will normally have more impact than the same amount of indirect costs.

(d) *The impact on Government funding.* Changes in accounting treatment will have more impact if they influence the distribution of costs between

vernment and non-Government
objectives than if all cost objec-
s have Government financial sup-
t.

) *The cumulative impact of indi-*
ually immaterial items. It is appro-
te to consider whether such im-
s (1) tend to offset one another, or
tend to be in the same direction
hence to accumulate into a mate-
amount.

) *The cost of administrative proc-*
ng of the price adjustment modifi-
on shall be considered. If the cost
rocess exceeds the amount to be
vered, it is less likely the amount
be material.

6 Interpretations.

determining amounts of increased
s in the clauses at 52.230-3, Cost
ounting Standards, and 52.230-5,
losure and Consistency of Cost Ac-
ting Practices, the following con-
rations apply:

) Increased costs shall be deemed
ve resulted whenever the cost
by the Government results from
ange in a contractor's cost ac-
ting practices or from failure to
ly with applicable Cost Account-
Standards, and such cost is higher
it would have been had the prac-
not been changed or applicable
Accounting Standards complied
.

If the contractor under any
-price contract, including a firm
-price contract, fails during con-
performance to follow its cost ac-
ting practices or to comply with
c ble Cost Accounting Standards,
ased costs are measured by the
rence between the contract price
d to and the contract price that
d have been agreed to had the
actor proposed in accordance
the cost accounting practices
during contract performance.
determination of the contract
that would have been agreed to
e left to the contracting parties
vill depend on the circumstances
h case.

The Government policy underly-
his interpretation is that the
d States not pay increased costs,
ing a profit enlarged beyond
n the contemplation of the parties to the contract when the contract costs, price, or profit is negotiated, by reason of a contractor's failure to use applicable Cost Accounting Standards, or to follow consistently its cost accounting practices. In making price adjustments under the Cost Accounting Standard clause at 52.230-3 in fixed price or cost reimbursement incentive contracts, or contracts providing for prospective or retroactive price redetermination, the Federal agency shall apply this requirement appropriately in the circumstances.

(d) The contractor and the contracting officer may enter into an agreement as contemplated by subdivision (a)(4)(ii) of the Cost Accounting Standards clause at 52.230-3, covering a change in practice proposed by the Government or the contractor for all of the contractor's contracts for which the contracting officer is responsible, provided that the agreement does not permit any increase in the cost paid by the Government. Such agreement may be made final and binding, notwithstanding the fact that experience may subsequently establish that the actual impact of the change differed from that agreed to.

(e) An adjustment to the contract price or of cost allowances pursuant to the Cost Accounting Standards clause at 52.230-3 may not be required when a change in cost accounting practices or a failure to follow Standards or cost accounting practices is estimated to result in increased costs being paid under a particular contract by the United States. This circumstance may arise when a contractor is performing two or more covered contracts, and the change or failure affects all such contracts. The change or failure may increase the cost paid under one or more of the contracts, while decreasing the cost paid under one or more of the contracts. In such case, the Government will not require price adjustment for any increased costs paid by the United States, so long as the cost decreases under one or more contracts are at least equal to the increased cost under the other affected contracts, provided that the contractor and the affected contracting officers agree on the method by which the price adjustments are to be made for all affected contracts. In this situation, the contracting agencies would, of course, require an adjustment of the contract price or cost allowances, as appropriate, to the extent that the increases under certain contracts were not offset by the decreases under the remaining contracts.

30.307 Cost Accounting Standards Preambles.

Appendix A of this part contains the nonregulatory preambles to the Cost Accounting Standards, preambles to related Rules and Regulations, and preambles published under the FAR System. The preambles are not regulatory, but are intended to explain why the Standards and related Rules and Regulations were written, and to provide rationale for positions taken relative to issues raised in the public comments. The preambles are printed in chronological order to provide an administrative history. As revisions are made to part 30, preambles will be published under the FAR system. Part I, Preambles to the Cost Accounting Standards, and Part II, Preambles to the Related Rules and Regulations, published by the Cost Accounting Standards Board, were originally published in Title 4 of the Code of Federal Regulations and are only published in the looseleaf edition of the FAR. Part III contains preambles published under the FAR system that are published in the Appendix A to part 30 of Title 48, as well as in the looseleaf version of the FAR.

[52 FR 35613, Sept. 22, 1987, as amended at 53 FR 27465, July 20, 1988]

Subpart 30.4—Cost Accounting Standards

30.400 General.

This subpart contains the Cost Accounting Standards (CAS). The requirements for use of these Standards are contained in subpart 30.2. Normal FAR paragraph numbering conventions are modified in subpart 30.4 to maintain the original CAS numbering and referencing scheme. For example, CAS 401 now reads 30.401.

30.401 Cost accounting standard—consistency in estimating, accumulating and reporting costs.

30.401-10 [Reserved]

30.401-20 Purpose.

The purpose of this Cost Accounting Standard is to ensure that each contractor's practices used in estimating costs for a proposal are consistent with cost accounting practices used by him in accumulating and reporting costs. Consistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike. With respect to individual contracts, the consistent application of cost accounting practices will facilitate the preparation of reliable cost estimates used in pricing a proposal and their comparison with the costs of performance of the resulting contract. Such comparisons provide one important basis for financial control over costs during contract performance and aid in establishing accountability for costs in the manner agreed to by both parties at the time of contracting. The comparisons also provide an improved basis for evaluating estimating capabilities.

30.401-30 [Reserved]

30.401-40 Fundamental requirement.

(a) A contractor's practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs.

(b) A contractor's cost accounting practices used in accumulating and reporting actual costs for a contract shall be consistent with his practices used in estimating costs in pricing the related proposal.

(c) The grouping of homogeneous costs in estimates prepared for proposal purposes shall not per se be deemed an inconsistent application of cost accounting practices under paragraphs (a) and (b) of this section when such costs are accumulated and reported in greater detail on an actual cost basis during contract performance.

401-50 Techniques for application.

a) The standard allows grouping of
mogeneous costs in order to cover
ose cases where it is not practicable
estimate contract costs by individ-
l cost element or function. However,
ts estimated for proposal purposes
all be presented in such a manner
d in such detail that any significant
t can be compared with the actual
t accumulated and reported there-
. In any event the cost accounting
actices used in estimating costs in
cing a proposal and in accumulating
d reporting costs on the resulting
tract shall be consistent with re-
ct to:
l) The classification of elements or
ctions of cost as direct or indirect;
the indirect cost pools to which
h element or function of cost is
rged or proposed to be charged;
and (3) the methods of allocating indirect costs to the contract.

(b) Adherence to the requirement of 30.401-40(a) of this standard shall be determined as of the date of award of the contract, unless the contractor has submitted cost or pricing data pursuant to Pub. L. 87-653, in which case adherence to the requirement of 30.401-40(a) shall be determined as of the date of final agreement on price, as shown on the signed certificate of current cost or pricing data. Notwithstanding 30.401-40(b), changes in established cost accounting practices during contract performance may be made in accordance with FAR Part 30.

30.401-60 Illustrations.

(a) The following examples are illustrative of applications of cost accounting practices which are deemed to be consistent.

Practices used in estimating costs for proposals	Practices used in accumulating and reporting costs of contract performance
ntractor estimates an average direct labor rate for manufactur- direct labor by labor category or function.	1. Contractor records manufacturing direct labor based on actual cost for each individual and collects such costs by labor category or function
ntractor estimates an average cost for minor standard hardware ns, including nuts, bolts, washers, etc.	2. Contractor records actual cost for minor standard hardware items based upon invoices or material transfer slips.
ntractor uses an estimated rate for manufacturing overhead to applied to an estimated direct labor base. He identifies the ns included in his estimate of manufacturing overhead and vides supporting data for the estimated direct labor base.	3. Contractor accounts for manufacturing overhead by individual items of cost which are accumulated in a cost pool allocated to final cost objectives on a direct labor base.

) The following examples are illustrative of application of cost accounting
ctices which are deemed not to be consistent.

Practices used for estimating costs for proposals	Practices used in accumulating and reporting costs of contract performance
ntractor estimates a total dollar amount for engineering labor ch includes disparate and significant elements or functions of ineering labor. Contractor does not provide supporting data onciling this amount to the estimates for the same engineering or cost functions for which he will separately account in contract formance.	4. Contractor accounts for engineering labor by cost function, i.e., drafting, designing, production engineering, etc.
ntractor estimates engineering labor by cost function, i.e., fting, production engineering, etc.	5. Contractor accumulates total engineering labor in one undifferentiated account.
ntractor estimates a single dollar amount for machining cost to er labor, material and overhead.	6. Contractor records separately the actual cost of machining labor and material as direct costs, and factory overhead as indirect costs.

01-61 Interpretation.

.401, Cost Accounting Standard—
sistency in Estimating, Accumulat-
and Reporting Costs, requires in
01-40 that a contractor's "practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs."

In estimating the cost of direct material requirements for a contract, it is a common practice to first estimate the cost of the actual quantities to be incorporated in end items. Provisions are then made for additional direct material costs to cover expected material losses such as those which occur, for example, when items are scrapped, fail to meet specifications, are lost, consumed in the manufacturing process, or destroyed in testing and qualification processes. The cost of some or all of such additional direct material requirements is often estimated by the application of one or more percentage factors to the total cost of basic direct material requirements or to some other base.

Questions have arisen as to whether the accumulation of direct material costs in an undifferentiated account where a contractor estimates a significant part of such costs by means of percentage factors is in compliance with 30.401. The most serious questions pertain to such percentage factors which are not supported by the contractor with accounting, statistical, or other relevant data from past experience, nor by a program to accumulate actual costs for comparison with such percentage estimates. The accumulation of direct costs in an undifferentiated account in this circumstance is a cost accounting practice which is not consistent with the practice of estimating a significant part of costs by means of percentage factors. This situation is virtually identical with that described in Illustration 30.401-60(b)(5), which deals with labor.

30.401 does not, however, prescribe the amount of detail required in accumulating and reporting costs. The amount of detail required may vary considerably depending on the percentage factors used, the data presented in justification or lack thereof, and the significance of each situation. Accordingly, it is neither appropriate nor practical to prescribe a single set of accounting practices which would be consistent in all situations with the practices of estimating direct material costs by percentage factors. Therefore, the amount of accounting and statistical detail to be required and maintained in accounting for this portion of direct material costs has been and continues to be a matter to be decided by Government procurement authorities on the basis of the individual facts and circumstances.

[52 FR 35622, as amended at 52 FR 36675, Sept. 30, 1987]

30.401-62 Exemption. [Reserved]

30.401-63 Effective date. [Reserved]

30.402 Cost accounting standard—consistency in allocating costs incurred for the same purpose.

30.402-10 [Reserved]

30.402-20 Purpose.

The purpose of this standard is to require that each type of cost is allocated only once and on only one basis to any contract or other cost objective. The criteria for determining the allocation of costs to a product, contract, or other cost objective should be the same for all similar objectives. Adherence to these cost accounting concepts is necessary to guard against the overcharging of some cost objectives and to prevent double counting. Double counting occurs most commonly when cost items are allocated directly to a cost objective without eliminating like cost items from indirect cost pools which are allocated to that cost objective.

30.402-30 [Reserved]

30.402-40 Fundamental requirement.

All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives. No final cost objective shall have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective. Further, no final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included in any indirect cost pool to be allocated to that or any other final cost objective.

30.402-50 Techniques for application.

(a) The Fundamental Requirement is stated in terms of cost incurred and is equally applicable to estimates of costs to be incurred as used in contract proposals.

(b) The Disclosure Statement to be submitted by the contractor will require that he set forth his cost accounting practices with regard to the distinction between direct and indirect costs. In addition, for those types of cost which are sometimes accounted for as direct and sometimes accounted for as indirect, the contractor will set forth in his Disclosure Statement the specific criteria and circumstances for making such distinctions. In essence, the Disclosure Statement submitted by the contractor, by distinguishing between direct and indirect costs. and by describing the criteria and circumstances for allocating those items which are sometimes direct and sometimes indirect, will be determinative as to whether or not costs are incurred for the same purpose. Disclosure Statement as used herein refers to the statement required to be submitted by contractors as a condition of contracting as set forth in subpart 30.2.

(c) In the event that a contractor has not submitted a Disclosure Statement the determination of whether specific costs are directly allocable to contracts shall be based upon the contractor's cost accounting practices used at the time of contract proposal.

(d) Whenever costs which serve the same purpose cannot equitably be indirectly allocated to one or more final cost objectives in accordance with the contractor's disclosed accounting practices, the contractor may either: (1) use a method for reassigning all such costs which would provide an equitable distribution to all final cost objectives, or (2) directly assign all such costs to final cost objectives with which they are specifically identified. In the event the contractor decides to make a change for either purpose, the Disclosure Statement shall be amended to reflect the revised accounting practices involved.

(e) Any direct cost of minor dollar amount may be treated as an indirect cost for reasons of practicality where the accounting treatment for such cost is consistently applied to all final cost objectives, provided that such treatment produces results which are substantially the same as the results which would have been obtained if such cost had been treated as a direct cost.

30.402-60 Illustrations.

(a) Illustrations of costs which are incurred for the same purpose:

(1) Contractor normally allocates all travel as an indirect cost and previously disclosed this accounting practice to the Government. For purposes of a new proposal, contractor intends to allocate the travel costs of personnel whose time is accounted for as direct labor directly to the contract. Since travel costs of personnel whose time is accounted for as direct labor working on other contracts are costs which are incurred for the same purpose, these costs may no longer be included within indirect cost pools for purposes of allocation to any covered Government contract. Contractor's Disclosure Statement must be amended for the proposed changes in accounting practices.

(2) Contractor normally allocates planning costs indirectly and allocates this cost to all contracts on the basis of direct labor. A proposal for a new contract requires a disproportionate amount of planning costs. The contractor prefers to continue to allocate planning costs indirectly. In order to equitably allocate the total planning costs, the contractor may use a method for allocating all such costs which would provide an equitable distribution to all final cost objectives. For example, he may use the number of planning documents processed rather than his former allocation base of direct labor. Contractor's Disclosure Statement must be amended for the proposed changes in accounting practices.

(b) Illustrations of costs which are not incurred for the same purpose:

(1) Contractor normally allocates special tooling costs directly to contracts. The costs of general purpose tooling are normally included in the indirect cost pool which is allocated to contracts. Both of these accounting

practices were previously disclosed to the Government. Since both types of costs involved were not incurred for the same purpose in accordance with the criteria set forth in the contractor's Disclosure Statement, the allocation of general purpose tooling costs from the indirect cost pool to the contract, in addition to the directly allocated special tooling costs, is not considered a violation of the standard.

(2) Contractor proposes to perform a contract which will require three firemen on 24-hour duty at a fixed-post to provide protection against damage to highly inflammable materials used on the contract. Contractor presently has a fire fighting force of 10 employees for general protection of the plant. Contractor's costs for these latter firemen are treated as indirect costs and allocated to all contracts; however, he wants to allocate the three fixed-post firemen directly to the particular contract requiring them and also allocate a portion of the cost of the general firefighting force to the same contract. He may do so but only on condition that his disclosed practices indicate that the costs of the separate classes of firemen serve different purposes and that it is his practice to allocate the general firefighting force indirectly and to allocate fixed-post firemen directly.

30.402-61 Interpretation.

30.402, Cost Accounting Standard—Consistency in Allocating Costs Incurred for the Same Purpose, provides, in 30.402-40, that "* * * no final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included in any indirect cost pool to be allocated to that or any other final cost objective."

This interpretation deals with the way 30.402 applies to the treatment of costs incurred in preparing, submitting, and supporting proposals. In essence, it is addressed to whether or not, under the Standard, all such costs are incurred for the same purpose, in like circumstances.

Under 30.402, costs incurred in preparing, submitting, and supporting proposals pursuant to a specific requirement of an existing contract ar considered to have been incurred i different circumstances from the circumstances under which costs are incurred in preparing proposals which do not result from such specific requirement. The circumstances are different because the costs of preparing proposals specifically required by the provisions of an existing contract relate only to that contract while other proposal costs relate to all work of the contractor.

This interpretation does not preclude the allocation, as indirect costs of costs incurred in preparing all proposals. The cost accounting practices used by the contractor, however, must be followed consistently and the method used to reallocate such costs of course, must provide an equitable distribution to all final cost objectives

[52 FR 35622, as amended at 52 FR 36675 Sept. 30, 1987]

30.402-62 Exemption. [Reserved]

30.402-63 Effective date. [Reserved]

30.403 Allocation of home office expenses to segments.

30.403-10 [Reserved]

30.403-20 Purpose.

(a) The purpose of this Cost Accounting Standard is to establish criteria for allocation of the expenses of a home office to the segments of the organization based on the beneficial or causal relationship between such expenses and the receiving segments. It provides for: (1) identification of expenses for direct allocation to segments to the maximum extent practical; (2) accumulation of significant nondirectly allocated expenses into logical and relatively homogeneous pools to be allocated on bases reflecting the relationship of the expenses to the segments concerned; and (3) allocation of any remaining or residual home office expenses to all segments. Appropriate implementation of this Standard will limit the amount of home office expenses classified as residual to the expenses of managing the organization as a whole.

(b) This Standard does not cover the reallocation of a segment's share of home office expenses to contracts and other cost objectives.

30.403-30 [Reserved]

30.403-40 Fundamental requirement.

(a) (1) Home office expenses shall be allocated on the basis of the beneficial or causal relationship between supporting and receiving activities. Such expenses shall be allocated directly to segments to the maximum extent practical. Expenses not directly allocated, if significant in amount and in relation to total home office expenses, shall be grouped in logical and homogeneous expense pools and allocated pursuant to paragraph (b) of this subsection. Such allocations shall minimize to the extent practical the amount of expenses which may be categorized as residual (those of managing the organization as a whole). These residual expenses shall be allocated pursuant to paragraph (c) of this subsection.

(2) No segment shall have allocated to it as an indirect cost, either through a homogeneous expense pool, or the residual expense pool, any cost, if other costs incurred for the same purpose have been allocated directly to that or any other segment.

(b) The following subparagraphs provide criteria for allocation of groups of home office expenses.

(1) *Centralized service functions.* Expenses of centralized service functions performed by a home office for its segments shall be allocated to segments on the basis of the service furnished to or received by each segment. Centralized service functions performed by a home office for its segments are considered to consist of specific functions which, but for the existence of a home office, would be performed or acquired by some or all of the segments individually. Examples include centrally performed personnel administration and centralized data processing.

(2) *Staff management of certain specific activities of segments.* The expenses incurred by a home office for staff management or policy guidance functions which are significant in amount and in relation to total home office expenses shall be allocated to segments receiving more than a minimal benefit over a base, or bases, representative of the total specific activity being managed. Staff management or policy guidance to segments is commonly provided in the overall direction or support of the performance of discrete segment activities such as manufacturing, accounting, and engineering (but see subparagraph (b)(6) of this subsection).

(3) *Line management of particular segments or groups of segments.* The expense of line management shall be allocated only to the particular segment or group of segments which are being managed or supervised. If more than one segment is managed or supervised, the expense shall be allocated using a base or bases representative of the total activity of such segments. Line management is considered to consist of management or supervision of a segment or group of segments as a whole.

(4) *Central payments or accruals.* Central payments or accruals which are made by a home office on behalf of its segments shall be allocated directly to segments to the extent that all such payments or accruals of a given type or class can be identified specifically with individual segments. Central payments or accruals are those which but for the existence of a number of segments would be accrued or paid by the individual segments. Common examples include centrally paid or accrued pension costs, group insurance costs, State and local income taxes and franchise taxes, and payrolls paid by a home office on behalf of its segments. Any such types of payments or accruals which cannot be identified specifically with individual segments shall be allocated to benefited segments using an allocation base representative of the factors on which the total payment is based.

(5) *Independent research and development costs and bid and proposal costs.* Independent research and development costs and bid and proposal costs of a home office shall be allocated in accordance with 30.420.

(6) *Staff management not identifiable with any certain specific activities of segments.* The expenses incurred by

a home office for staff management, supervisory, or policy functions, which are not identifiable to specific activities of segments shall be allocated in accordance with paragraph (c) of this subsection as residual expenses.

(c) *Residual expenses.* (1) All home office expenses which are not allocable in accordance with paragraph (a) of this subsection and subparagraphs (b)(1) through (b)(5) of this subsection shall be deemed residual expenses. Typical residual expenses are those for the chief executive, the chief financial officer, and any staff which are not identifiable with specific activities of segments. Residual expenses shall be allocated to all segments under a home office by means of a base representative of the total activity of such segments, except where paragraph (c) (2) or (3) of this subsection applies.

(2) Residual expenses shall be allocated pursuant to 30.403-50(c)(1) if the total amount of such expenses for the contractor's previous fiscal year (excluding any unallowable costs and before eliminating any amounts to be allocated in accordance with subparagraph (c)(3) of this section) exceeds the amount obtained by applying the following percentage(s) to the aggregate operating revenue of all segments for such previous year:

3.35 percent of the first $100 million;
0.95 percent of the next $200 million;
0.30 percent of the next $2.7 billion;
0.20 percent of all amounts over $3 billion.

The determination required by this paragraph for the 1st year the contractor is subject to this Standard shall be based on the pro forma application of this Standard to the home office expenses and aggregate operating revenue for the contractor's previous fiscal year.

(3) Where a particular segment receives significantly more or less benefit from residual expenses than would be reflected by the allocation of such expenses pursuant to subparagraph (c) (1) or (2) of this subsection (see 30.403-50(d)), the Government and the contractor may agree to a special allocation of residual expenses to such segment commensurate with the benefits received. The amount of a special allocation to any segment made pursu-
ant to such an agreement shall be e
cluded from the pool of residual e
penses to be allocated pursuant to su
paragraph (c) (1) or (2) of this subse
tion, and such segment's data shall b
excluded from the base used to all
cate this pool.

30.403-50 Techniques for application.

(a) (1) Separate expense grouping
will ordinarily be required to impl
ment 30.403-40. The number of grou
ings will depend primarily on the var
ety and significance of service an
management functions performed by
particular home office. Ordinarily
each service or management functio
will have to be separately identifie
for allocation by means of an appr
priate allocation technique. Howeve
it is not necessary to identify and all
cate different functions separately,
allocation in accordance with the rel
vant requirements of 30.403-40(b) ca
be made using a common allocatio
base. For example, if the personnel d
partment of a home office provid
personnel services for some or all
the segments (a centralized servic
function) and also established perso
nel policies for the same segments
staff management function), the e
penses of both functions could be all
cated over the same base, such as th
number of personnel, and the separat
functions do not have to be identifie

(2) Where the expense of a give
function is to be allocated by means
a particular allocation base, all se
ments shall be included in the bas
unless: (i) Any excluded segment d
not receive significant benefits fro
or contribute significantly to the cau
of the expense to be allocated and, (
any included segment did receive si
nificant benefits from or contribut
significantly to the cause of the e
pense in question.

(b) (1) Section 30.403-60 illustrat
various expense pools which may b
used together with appropriate alloc
tion bases. The allocation of centra
ized service functions shall be go
erned by a hierarchy of preferable a
location techniques which represen
beneficial or casual relationships. Th
preferred representation of such rel
tionships is a measure of the activit

of the organization performing the function. Supporting functions are usually labor-oriented, machine-oriented, or space-oriented. Measures of the activities of such functions ordinarily can be expressed in terms of labor hours, machine hours, or square footage. Accordingly, costs of these functions shall be allocated by use of a rate, such as a rate per labor hour, rate per machine hour or cost per square foot, unless such measures are unavailable or impractical to ascertain. In these latter cases the basis for allocation shall be a measurement of the output of the supporting function. Output is measured in terms of units of end product produced by the supporting function, as for example, number of printed pages for a print shop, number of purchase orders processed by a purchasing department, number of hires by an employment office.

(2) Where neither activity nor output of the supporting function can be practically measured, a surrogate for the beneficial, or causal relationship must be selected. Surrogates used to represent the relationship are generally measures of the activity of the segments receiving the service; for example, for personnel services reasonable surrogates would be number of personnel, labor hours, or labor dollars of the segments receiving the service. Any surrogate used should be a reasonable measure of the services received and, logically, should vary in proportion to the services received.

(c) (1) Where residual expenses are required to be allocated pursuant to 30.403-40(c)(2), the three factor formula described below must be used. This formula is considered to result in appropriate allocations of the residual expenses of home offices. It takes into account three broad areas of management concern: The employees of the organization, the business volume, and the capital invested in the organization. The percentage of the residual expenses to be allocated to any segment pursuant to the three factor formula is the arithmetical average of the following three percentages for the same period:

(i) The percentage of the segment's payroll dollars to the total payroll dollars of all segments.

(ii) The percentage of the segment's operating revenue to the total operating revenue of all segments. For this purpose, the operating revenue of any segment shall include amounts charged to other segments and shall be reduced by amounts charged by other segments for purchases.

(iii) The percentage of the average net book value of the sum of the segment's tangible capital assets plus inventories to the total average net book value of such assets of all segments. Property held primarily for leasing to others shall be excluded from the computation. The average net book value shall be the average of the net book value at the beginning of the organization's fiscal year and the net book value at the end of the year.

(d) The following paragraphs provide guidance for implementing the requirements of 30.403-40(c)(3).

(1) An indication that a segment received significantly less benefit in relation to other segments can arise if a segment, unlike all or most other segments, performs on its own many of the functions included in the residual expense. Another indication may be that, in relation to its size, comparatively little or no costs are allocable to a segment pursuant to 30.403-40(b) (1) through (5). Evidence of comparatively little communication or interpersonal relations between a home office and a segment, in relation to its size, may also indicate that the segment receives significantly less benefit from residual expenses. Conversely, if the opposite conditions prevail at any segment, a greater allocation than would result from the application of 30.403-40(c) (1) or (2) may be indicated. This may be the case, for example, if a segment relies heavily on the home office for certain residual functions normally performed by other segments on their own.

(2) Segments which may require special allocations of residual expenses pursuant to 30.403-40(c)(3) include, but are not limited to foreign subsidiaries, GOCO's, domestic subsidiaries with less than a majority ownership, and joint ventures.

(3) The portion of residual expenses to be allocated to a segment pursuant to 30.403-40(c)(3) shall be the cost of estimated or recorded efforts devoted to the segments.

(e) Home office functions may be performed by an organization which for some purposes may not be a part of the legal entity with which the Government has contracted. This situation may arise, for example, in instances where the Government contracts directly with a 'corporation which is wholly or partly owned by another corporation. In this case, the latter corporation serves as a *home office*, and the corporation with which the contract is made is a *segment* as those terms are defined and used in this Standard. For purposes of contracts subject to this Standard, the contracting corporation may only accept allocations from the other corporation to the extent that such allocations meet the requirements set forth in this Standard for allocation of home office expenses to segments.

30.403-60 Illustrations.

(a) The following table lists some typical pools, together with illustrative allocation bases, which could be used in appropriate circumstances:

Home office expense or function	Illustrative allocation bases
Centralized service functions:	
1. Personnel administration	1. Number of personnel, labor hours, payroll, numbe of hires.
2. Data processing services	2. Machine time, number of reports.
3. Centralized purchasing and subcontracting	3. Number of purchase orders, value of purchases, number of items.
4. Centralized warehousing	4. Square footage, value of material, volume.
5. Company aircraft service	5. Actual or standard rate per hour, mile, passeng mile, or similar unit.
6. Central telephone service	6. Usage costs, number of instruments.

(b) The selection of a base for allocating centralized service functions shall be governed by the criteria established in 30.403-50(b).

(c) The listed allocation bases in this section are illustrative. Other bases for allocation of home office expenses to segments may be used if they are substantially in accordance with the beneficial or casual relationships outlined in 30.403-40.

Home office expense or function	Illustrative allocation bases
Staff management of specific activities:	
1. Personnel management	1. Number of personnel, labor hours, payroll, number of hires.
2. Manufacturing policies (quality control, industrial engineering, production, scheduling, tooling, inspection and testing, etc.).	2. Manufactunng cost input, manufacturing direct labor.
3. Engineering policies	3. Total engineering costs, engineering direct labor, number of drawings.
4. Material/purchasing policies	4. Number of purchase orders, value of purchases.
5. Marketing policies	5. Sales, segment marketing costs.
Central payments or accruals:	
1. Pension expenses	1. Payroll or other factor on which total payment is based.
2. Group insurance expenses	2. Payroll or other factor on which total payment is based.
3. State and local income taxes and franchise taxes	3. Any base or method which results in an allocation that equals or approximates a segment's proportionate share of the tax imposed by the jurisdiction in which the segment does business, as measured by the same factors used to determine taxable income for that jurisdiction.

30.403-61 Interpretation.

Questions have arisen as to the requirements of 30.403, Cost Accounting Standard, Allocation of Home Office Expenses to Segments, for the purpose of allocating State and local income taxes and franchise taxes based on income (hereinafter collectively referred to as income taxes) from a home office of an organization to its segments.

By means of an illustrative allocation base in 30.403-60, the Standard provides that income taxes are to be allocated by "any base or method which results in an allocation that equals or approximates a segment's proportionate share of the tax imposed by the jurisdiction in which the segment does business, as measured by the same factors used to determine taxable income for that jurisdiction." This provision contains two essential criteria for the allocation of income taxes from a home office to segments. First, the taxes of any particular jurisdiction are to be allocated only to those segments that do business in the taxing jurisdiction. Second, where there is more than one segment in a taxing jurisdiction, the taxes are to be allocated among those segments on the basis of "the same factors used to determine the taxable income for that jurisdiction." The questions that have arisen relate primarily to whether segment book income or loss is a "factor" for this purpose.

Most States tax a fraction of total organization income, rather than the book income of segments that do business within the State. The fraction is calculated pursuant to a formula prescribed by State statute. In these situations the book income or loss of individual segments is not a factor used to determine taxable income for that jurisdiction. Accordingly, in States that tax a fraction of total organization income, rather than the book income of segments within the State, such book income is irrelevant for tax allocation purposes. Therefore, segment book income is to be used as a factor in allocating income tax expense from a home office to segments only where this amount is expressly used by the taxing jurisdiction in computing the income tax.

[52 FR 35622, as amended at 52 FR 36675, Sept. 30, 1987]

30.403-62 Exemption. [Reserved]

30.403-63 Effective date. [Reserved]

30.404 Capitalization of tangible assets.

30.404-10 [Reserved]

30.404-20 Purpose.

This Standard requires that, for purposes of cost measurement, contractors establish and adhere to policies with respect to capitalization of tangible assets which satisfy criteria set forth herein. Normally, cost measurements are based on the concept of enterprise continuity; this concept implies that major asset acquisitions will be capitalized, so that the cost applicable to current and future accounting periods can be allocated to cost objectives of those periods. A capitalization policy in accordance with this Standard will facilitate measurement of costs consistently over time.

30.404-30 [Reserved]

30.404-40 Fundamental requirement.

(a) The acquisition cost of tangible capital assets shall be capitalized. Capitalization shall be based upon a written policy that is reasonable and consistently applied.

(b) The contractor's policy shall designate economic and physical characteristics for capitalization of tangible assets.

(1) The contractor's policy shall designate a minimum service life criterion, which shall not exceed 2 years, but which may be a shorter period. The policy shall also designate a minimum acquisition cost criterion which shall not exceed $1,500, but which may be a smaller amount.

(2) The contractor's policy may designate other specific characteristics which are pertinent to his capitalization policy decisions (e.g., class of asset, physical size, identifiability and controllability, the extent of integration or independence of constituent units).

(3) The contractor's policy shall provide for identification of asset ac-

countability units to the maximum extent practical.

(4) The contractor's policy may designate higher minimum dollar limitations for original complement of low cost equipment and for betterments and improvements than the limitation established in accordance with subparagraph (b)(1) of this subsection, provided such higher limitations are reasonable in the contractor's circumstances.

(c) Tangible assets shall be capitalized when both of the criteria in the contractor's policy as required in subparagraph (b)(1) of this subsection are met, except that assets described in subparagraph (b)(4) of this section shall be capitalized in accordance with the criteria established in accordance with that paragraph.

(d) Costs incurred subsequent to the acquisition of a tangible capital asset which result in extending the life or increasing the productivity of that asset (e.g., betterments and improvements) and which meet the contractor's established criteria for capitalization shall be capitalized with appropriate accounting for replaced asset accountability units. However, costs incurred for repairs and maintenance to a tangible capital asset which either restore the asset to, or maintain it at, its normal or expected service life or production capacity shall be treated as costs of the current period.

[52 FR 35613, Sept. 22, 1987, as amended at 53 FR 27465, July 20, 1988]

30.404-50 Techniques for application.

(a) The cost to acquire a tangible capital asset includes the purchase price of the asset and costs necessary to prepare the asset for use.

(1) The purchase price of an asset shall be adjusted to the extent practical by premiums and extra charges paid or discounts and credits received which properly reflect an adjustment in the purchase price.

(i) Purchase price is the consideration given in exchange for an asset and is determined by cash paid, or to the extent payment is not made in cash, in an amount equivalent to what would be the cash price basis. Where this amount is not available, the purchase price is determined by the current value of the consideration given in exchange for the asset. For example, current value for a credit instrument is the amount immediately required to settle the obligation or the amount of money which might have been raised directly through the use of the same instrument employed in making the credit purchase. The current value of an equity security is its market value. Market value is the current or prevailing price of the security as indicated by recent market quotations. If such values are unavailable or not appropriate (thin market, volatile price movement, etc.), an acceptable alternative is the fair value of the asset acquired.

(ii) Donated assets which, at the time of receipt, meet the contractor's criteria for capitalization shall be capitalized at their fair value at that time.

(2) Costs necessary to prepare the asset for use include the cost of placing the asset in location and bringing the asset to a condition necessary for normal or expected use. Where material in amount, such costs, including initial inspection and testing, installation and similar expenses, shall be capitalized.

(b) Tangible capital assets constructed or fabricated by a contractor for its own use shall be capitalized at amounts which include all indirect costs properly allocable to such assets. This requires the capitalization of general and administrative expenses when such expenses are identifiable with the constructed asset and are material in amount (e.g., when the in-house construction effort requires planning, supervisory, or other significant effort by officers or other personnel whose salaries are regularly charged to general and administrative expenses). When the constructed assets are identical with or similar to the contractor's regular product, such assets shall be capitalized at amounts which include a full share of indirect costs.

(c) In circumstances where the acquisition by purchase or donation of previously used tangible capital assets is not an arm's length transaction, acquisition cost shall be limited to the capitalized cost of the asset to the owner who last acquired the asset through an arm's-length transaction.

reduced by depreciation charges from date of that acquisition to date of gift or sale.

(d) Under the *purchase method* of accounting for business combinations, acquired tangible capital assets shall be assigned a portion of the cost of the acquired company, not to exceed their fair value at date of acquisition. Where the fair value of identifiable acquired assets less liabilities assumed exceeds the purchase price of the acquired company in an acquisition under the *purchase method*, the value otherwise assignable to tangible capital assets shall be reduced by a proportionate part of the excess.

(e) Under the *pooling of interest method* of accounting for business combinations, the values established for tangible capital assets for financial accounting shall be the values used for determining the cost of such assets.

(f) Asset accountability units shall be identified and separately capitalized at the time the assets are acquired. However, whether or not the contractor identifies and separately capitalizes a unit initially, the contractor shall remove the unit from the asset accounts when it is disposed of and, if replaced, its replacement shall be capitalized.

30.404-60 Illustrations.

(a) *Illustrations of costs which must be capitalized.* (1) Contractor has an established policy of capitalizing tangible assets which have a service life of more than 1 year and a cost of $2,000. The contractor's policy must be modified to conform to the $1,500 policy limitation on minimum acquisition cost established by the Standard.

(i) Contractor acquires a tangible capital asset with a life of 18 months at a cost of $1,700. The Standard requires that the asset be capitalized in compliance with contractor's policy as to service life.

(ii) Contractor acquires a tangible asset with a life of 18 months at a cost of $900. The asset need not be capitalized unless the contractor's revised policy establishes a minimum cost criterion below $900.

(2) Contractor has an established policy of capitalizing tangible assets which have a service life of more than 1 year and a cost of $250. The Standard requires that, based upon contractor's policy, the asset be capitalized.

(3) Contractor establishes a major new production facility. In the process, a number of large and small items of equipment were acquired to outfit it. The contractor has an established policy of capitalizing individual items of tangible assets which have a service life of over 1 year and a cost of $500, and all items meeting these requirements were capitalized. In addition, the contractor's policy requires capitalization of an original complement which has a service life of over 1 year and a cost of $5,000. Items of durable equipment acquired for the production facility costing less than $500 each aggregated $50,000. Based upon the contractor's policy, the durable equipment items must be capitalized as the original complement of low cost equipment. (The concept of original complement applies to such items as books in a new library, impact wrenches in a new factory, work benches and racks in a new production facility, or furniture and fixtures in a new office building.)

(4) Contractor has an established policy for treating its heavy presses and their power supplies as separate asset accountability units. A power supply is replaced during the service life of the related press. The Standard requires that, based upon the contractor's policy, the new power supply be capitalized with appropriate accounting for the replaced unit.

(b) *Illustrations of costs which need not be capitalized.* (1) The contractor has an established policy of capitalizing tangible assets which have a service life of 2 years and a cost of $500. The contractor acquires an asset with a useful life of 18 months and a cost of $5,000. The tangible asset should be expensed because it does not meet the 2 year criterion. .

(2) The contractor establishes a new assembly line. In outfitting the line, the contractor acquires $5,000 of small tools. On similar assembly lines under similar conditions, the original complement of small tools was expensed because the complement was replaced annually as a result of loss, pilferage, breakage, and physical wear and tear.

Because the unit of original complement does not meet the contractor's service life criterion for capitalization (1 year), the small tools may be expensed.

[52 FR 35613, Sept. 22, 1987, as amended at 53 FR 27465, July 20, 1988]

30.404-61 Interpretation. [Reserved]

30.404-62 Exemption. [Reserved]

30.404-63 Effective date.

The effective date of the modifications to 30.404-40 (b) (1), 30.404-60 (a)(1), and 30.404-60 (a)(1)(i), which increase the minimum acquisition cost criterion for capitalization of tangible capital assets to $1,500, is September 19, 1988. The modification shall be applied to accrued expenditures for acquisition of tangible capital assets on or after the start of the contractor's next cost accounting period, beginning after receipt of a contract to which the modification is applicable.

[53 FR 27465, July 20, 1988]

30.405 Accounting for unallowable costs.

30.405-10 [Reserved]

30.405-20 Purpose.

(a) The purpose of this Cost Accounting Standard is to facilitate the negotiation, audit, administration and settlement of contracts by establishing guidelines covering: (1) identification of costs specifically described as unallowable, at the time such costs first become defined or authoritatively designated as unallowable; and (2) the cost accounting treatment to be accorded such identified unallowable costs in order to promote the consistent application of sound cost accounting principles covering all incurred costs. The Standard is predicated on the proposition that costs incurred in carrying on the activities of an enterprise—regardless of the allowability of such costs under Government contracts—are allocable to the cost objectives with which they are identified on the basis of their beneficial or causal relationships.

(b) This Standard does not govern the allowability of costs. This is a function of the appropriate procurement or reviewing authority.

30.405-30 [Reserved]

30.405-40 Fundamental requirement.

(a) Costs expressly unallowable or mutually agreed to be unallowable, including costs mutually agreed to be unallowable directly associated costs, shall be identified and excluded from any billing, claim, or proposal applicable to a Government contract.

(b) Costs which specifically become designated as unallowable as a result of a written decision furnished by a contracting officer pursuant to contract disputes procedures shall be identified if included in or used in the computation of any billing, claim, or proposal applicable to a Government contract. This identification requirement applies also to any costs incurred for the same purpose under like circumstances as the costs specifically identified as unallowable under either this paragraph or paragraph (a) of this subsection.

(c) Costs which, in a contracting officer's written decision furnished pursuant to contract disputes procedures, are designated as unallowable directly associated costs of unallowable costs covered by either paragraph (a) or (b) of this subsection shall be accorded the identification required by paragraph (b) of this subsection.

(d) The costs of any work project not contractually authorized, whether or not related to performance of a proposed or existing contract, shall be accounted for, to the extent appropriate, in a manner which permits ready separation from the costs of authorized work projects.

(e) All unallowable costs covered by paragraphs (a) through (d) of this subsection shall be subject to the same cost accounting principles governing cost allocability as allowable costs. In circumstances where these unallowable costs normally would be part of a regular indirect-cost allocation base or bases, they shall remain in such base or bases. Where a directly associated cost is part of a category of costs normally included in an indirect-cost pool that will be allocated over a base containing the unallowable cost with which it is associated, such a directly associated cost shall be retained in the indirect-cost pool and be allocated through the regular allocation process.

(f) Where the total of the allocable and otherwise allowable costs exceeds a limitation-of-cost or ceiling-price provision in a contract, full direct and indirect cost allocation shall be made to the contract cost objective, in accordance with established cost accounting practices and Standards which regularly govern a given entity's allocations to Government contract cost objectives. In any determination of unallowable cost overrun, the amount thereof shall be identified in terms of the excess of allowable costs over the ceiling amount, rather than through specific identification of particular cost items or cost elements.

30.405-50 Techniques for application.

(a) The detail and depth of records required as backup support for proposals, billings, or claims shall be that which is adequate to establish and maintain visibility of identified unallowable costs (including directly associated costs), their accounting status in terms of their allocability to contract cost objectives, and the cost accounting treatment which has been accorded such costs. Adherence to this cost accounting principle does not require that allocation of unallowable costs to final cost objectives be made in the detailed cost accounting records. It does require that unallowable costs be given appropriate consideration in any cost accounting determinations governing the content of allocation bases used for distributing indirect costs to cost objectives. Unallowable costs involved in the determination of rates used for standard costs, or for indirect-cost bidding or billing, need be identified only at the time rates are proposed, established, revised or adjusted.

(b) The visibility requirement of paragraph (a) of this subsection, may be satisfied by any form of cost identification which is adequate for purposes of contract cost determination and verification. The Standard does not require such cost identification for purposes which are not relevant to the determination of Government contract cost. Thus, to provide visibility for incurred costs, acceptable alternative practices would include: (1) the segregation of unallowable costs in separate accounts maintained for this purpose in the regular books of account; (2) the development and maintenance of separate accounting records or workpapers; or (3) the use of any less formal cost accounting techniques which establishes and maintains adequate cost identification to permit audit verification of the accounting recognition given unallowable costs. Contractors may satisfy the visibility requirements for estimated costs either: (1) By designation and description (in backup data, workpapers, etc.) of the amounts and types of any unallowable costs which have specifically been identified and recognized in making the estimates; or (2) by description of any other estimating technique employed to provide appropriate recognition of any unallowable costs pertinent to the estimates.

(c) Specific identification of unallowable costs is not required in circumstances where, based upon considerations of materiality, the Government and the contractor reach agreement on an alternate method that satisfies the purpose of the Standard.

30.405-60 Illustrations.

(a) An auditor recommends disallowance of certain direct labor and direct material costs, for which a billing has been submitted under a contract, on the basis that these particular costs were not required for performance and were not authorized by the contract. The contracting officer issues a written decision which supports the auditor's position that the questioned costs are unallowable. Following receipt of the contracting officer's decision, the contractor must clearly identify the disallowed direct labor and direct material costs in his accounting records and reports covering any subsequent submission which includes such costs. Also, if the contractor's base for allocation of any indirect cost pool relevant to the subject contract consists of direct labor, direct material, total prime cost, total cost input, etc., he must include the disallowed direct labor and material costs in his allocation base for such pool. Had the contracting officer's decision been against the auditor, the contractor would not, of course, have been required to account separately for the costs questioned by the auditor.

(b) A contractor incurs, and separately identifies, as a part of his manufacturing overhead, certain costs which are expressly unallowable under the existing and currently effective regulations. If manufacturing overhead is regularly a part of the contractor's base for allocation of general and administrative (G&A) or other indirect expenses, the contractor must allocate the G&A or other indirect expenses to contracts and other final cost objectives by means of a base which includes the identified unallowable manufacturing overhead costs.

(c) An auditor recommends disallowance of the total direct indirect costs attributable to an organizational planning activity. The contractor claims that the total of these activity costs are allowable under the Federal Acquisition Regulation as *Economic planning costs* (FAR 31.205-12); the auditor contends that they constitute *Organization costs* (FAR 31.205-27) and therefore are unallowable. The issue is referred to the contracting officer for resolution pursuant to the contract disputes clause. The contracting officer issues a written decision supporting the auditor's position that the total costs questioned are unallowable under the FAR. Following receipt of the contracting officer's decision, the contractor must identify the disallowed costs and specific other costs incurred for the same purpose in like circumstances in any subsequent estimating, cost accumulation or reporting for Government contracts, in which such costs are included. If the contracting officer's decision had supported the contractor's contention, the costs questioned by the auditor would have been allowable *Economic planning costs*, and the contractor would not have been required to provide special identification.

(d) A defense contractor was engaged in a program of expansion and diversification of corporate activities. This involved internal corporate reorganization, as well as mergers and acquisitions. All costs of this activity were charged by the contractor as corporate or segment general and administrative (G&A) expense. In the contractor's proposals for final Segment G&A rates (including corporate home office allocations) to be applied in determining allowable costs of its defense contracts subject to FAR part 31, the contractor identified and excluded the expressly unallowable costs (as listed in FAR 31.205-12) incurred for incorporation fees and for charges for special services of outside attorneys, accountants, promoters, and consultants. In addition, during the course of negotiation of interim bidding and billing G&A rates, the contractor agreed to classify as unallowable various in-house costs incurred for the expansion program, and various directly associated costs of the identifiable unallowable costs. On the basis of negotiations and agreements between the contractor and the contracting officers' authorized representatives, interim G&A rates were established, based on the net balance of allowable G&A costs. Application of the rates negotiated to proposals, and on an interim basis to billings, for covered contracts constitutes compliance with the Standard.

(e) An official of a company, whose salary, travel, and subsistence expenses are charged regularly as general and administrative (G&A) expenses, takes several business associates on what is clearly a business entertainment trip. The entertainment costs of such trips is expressly unallowable because it constitutes entertainment expense, and is separately identified by the contractor. The contractor does not regularly include his G&A expenses in any indirect-expense allocation base. In these circumstances, the official's travel and subsistence expenses would be directly associated costs for identification with the unallowable entertainment expense. However, unless this type of activity constituted a significant part of the official's regular duties and responsibilities on which his salary was based, no part of the official's salary would be required to be identified as a directly associated cost of the unallowable entertainment expense.

30.405-61 Interpretation. [Reserved]

30.405-62 Exemption. [Reserved]

30.405-63 Effective date. [Reserved]

30.406 Cost accounting standard—cost accounting period.

30.406-10 [Reserved]

30.406-20 Purpose.

The purpose of this Cost Accounting Standard is to provide criteria for the selection of the time periods to be used as cost accounting periods for contract cost estimating, accumulating, and reporting. This Standard will reduce the effects of variations in the flow of costs within each cost accounting period. It will also enhance objectivity, consistency, and verifiability, and promote uniformity and comparability in contract cost measurements.

30.406-30 [Reserved]

30.406-40 Fundamental requirement.

(a) A contractor shall use this fiscal year as his cost accounting period, except that:

(1) Costs of an indirect function which exists for only a part of a cost accounting period may be allocated to cost objectives of that same part of the period as provided in 30.406-50(a).

(2) An annual period other than the fiscal year may, as provided in 30.406-50(d), be used as the cost accounting period if its use is an established practice of the contractor.

(3) A transitional cost accounting period other than a year shall be used whenever a change of fiscal year occurs.

(4) Where a contractor's cost accounting period is different from the reporting period required by Renegotiation Board regulations, the latter may be used for such reporting.

(b) A contractor shall follow consistent practices in his selection of the cost accounting period or periods in which any types of expense and any types of adjustment to expense (including prior-period adjustments) are accumulated and allocated.

(c) The same cost accounting period shall be used for accumulating costs in an indirect cost pool as for establishing its allocation base, except that the contracting parties may agree to use a different period for establishing an allocation base as provided in 30.406-50(e).

30.406-50 Techniques for application.

(a) The cost of an indirect function which exists for only a part of a cost accounting period may be allocated on the basis of data for that part of the cost accounting period if the cost is (1) material in amount, (2) accumulated in a separate indirect cost pool, and (3) allocated on the basis of an appropriate direct measure of the activity or output of the function during that part of the period.

(b) The practices required by 30.406-40(b) of this Standard shall include appropriate practices for deferrals, accruals, and other adjustments to be used in identifying the cost accounting periods among which any types of expense and any types of adjustment to expense are distributed. If an expense, such as taxes, insurance or employee leave, is identified with a fixed, recurring, annual period which is different from the contractor's cost accounting period, the Standard permits continued use of that different period. Such expenses shall be distributed to cost accounting periods in accordance with the contractor's established practices for accruals, deferrals and other adjustments.

(c) Indirect cost allocation rates, based on estimates, which are used for the purpose of expediting the closing of contracts which are terminated or completed prior to the end of a cost accounting period need not be those finally determined or negotiated for that cost accounting period. They shall, however, be developed to represent a full cost accounting period, except as provided in paragraph (a) of this subsection.

(d) A contractor may, upon mutual agreement with the Government, use as his cost accounting period a fixed annual period other than his fiscal year, if the use of such a period is an established practice of the contractor and is consistently used for managing and controlling the business, and appropriate accruals, deferrals or other adjustments are made with respect to such annual periods.

(e) The contracting parties may agree to use an annual period which does not coincide precisely with the cost accounting period for developing the data used in establishing an allocation base: *Provided,*

(1) The practice is necessary to obtain significant administrative convenience, (2) the practice is consistently followed by the contractor, (3) the annual period used is representative of the activity of the cost accounting period for which the indirect costs to be allocated are accumulated, and (4) the practice can reasonably be estimated to provide a distribution to cost objective of the cost accounting period not materially different from that which otherwise would be obtained.

(f) When a transitional cost accounting period is required under the provisions of 30.406-40(a)(3), the contractor may select any one of the following:

(1) The period, less than a year in length, extending from the end of his previous cost accounting period to the beginning of his next regular cost accounting period; (2) a period in excess of a year, but not longer than 15 months, obtained by combining the period described in subparagraph (f)(1) of this subsection with the previous cost accounting period; or (3) a period in excess of a year, but not longer than 15 months, obtained by combining the period described in subparagraph (f)(1) of this section with the next regular cost accounting period. A change in the contractor's cost accounting period is a change in accounting practices for which an adjustment in the contract price may be required in accordance with paragraph (a)(4)(ii) or (iii) of the contract clause set out at FAR 52.230-3.

30.406-60 Illustrations.

(a) A contractor allocates general management expenses on the basis of total cost input. In a proposal for a covered negotiated fixed-price contract, he estimates the allocable expenses based solely on the estimated amount of the general management expense pool and the amount of the total cost input base estimated to be incurred during the 8 months in which performance is scheduled to be commenced and completed. Such a proposal would be in violation of the requirements of this Standard that the calculation of the amounts of both the indirect cost pools and the allocation bases be based on the contractor's cost accounting period.

(b) A contractor whose cost accounting period is the calendar year, installs a computer service center to begin operations on May 1. The operating expense related to the new service center is expected to be material in amount, will be accumulated in a separate indirect cost pool, and will be allocated to the benefiting cost objectives on the basis of measured usage. The total operating expenses of the computer service center for the 8-month part of the cost accounting period may be allocated to the benefiting cost objectives of that same 8-month period.

(c) A contractor changes his fiscal year from a calendar year to the 12-month period ending May 31. For financial reporting purposes, he has a 5-month transitional *fiscal year.* The same 5-month period must be used as the transitional cost accounting period; it may not be combined as provided in 30.406-50(f), because the transitional period would be longer than 15 months. The new fiscal year must be adopted thereafter as his regular cost accounting period. The change in his cost accounting period is a change in accounting practices; adjustments of the contract prices may thereafter be required in accordance with subparagraph (a)(4)(ii) or (iii) of the contract clause at 52.230-3.

(d) Financial reports to stockholders are made on a calendar year basis for the entire contractor corporation. However, the contracting segment does all internal financial planning, budgeting, and internal reporting on the basis of a *model year.* The contracting parties agree to use a *model year* and they agree to overhead rates on the *model year* basis. They also agree on a technique for prorating fiscal year assignment of corporate home office expenses between model years. This practice is permitted by the Standard.

(e) Most financial accounts and contract cost records are maintained on the basis of a fiscal year which ends November 30 each year. However, employee vacation allowances are regularly managed on the basis of a *vacation year* which ends September 30 each year. Vacation expenses are estimated uniformly during each *vacation year.* Adjustments are made each October to adjust the accrued liability to actual, and the estimating rates are modified to the extent deemed appropriate. This use of a separate annual period for determining the amounts of vacation expense is permitted under 30.406-50(b).

30.406-61 Interpretation. [Reserved]

30.406-62 Exemption. [Reserved]

30.406-63 Effective date. [Reserved]

30.407 Use of standard costs for direct material and direct labor.

30.407-10 [Reserved]

30.407-20 Purpose.

(a) The purpose of this Cost Accounting Standard is to provide criteria under which standard costs may be used for estimating, accumulating, and reporting costs of direct material and direct labor; and to provide criteria relating to the establishment of standards, accumulation of standard costs, and accumulation and disposition of variances from standard costs. Consistent application of these criteria where standard costs are in use will improve cost measurement and cost assignment.

(b) This Cost Accounting Standard is not intended to cover the use of preestablished measures solely for estimating.

30.407-30 [Reserved]

30.407-40 Fundamental requirement.

Standard costs may be used for estimating, accumulating, and reporting costs of direct material and direct labor only when all of the following criteria are met:

(a) Standard costs are entered into the books of account.

(b) Standard costs and related variances are appropriately accounted for at the level of the production unit.

(c) Practices with respect to the setting and revising of standards, use of standard costs, and disposition of variances are stated in writing and are consistently followed.

30.407-50 Techniques for application.

(a) (1) A contractor's written statement of practices with respect to standards shall include the bases and criteria (such as engineering studies, experience, or other supporting data) used in setting and revising standards; the period during which standards are to remain effective; the level (such as ideal or realistic) at which material-quantity standards and labor-time standards are set; and conditions (such as those expected to prevail at the beginning of a period) which material-price standards and labor-rate standards are designed to reflect.

(2) Where only either the material price or material quantity is set at standard, with the other component stated at actual, the result of the multiplication shall be treated as material cost at standard. Similarly, where only either the labor rate or labor time is set at standard, with the other component stated at actual, the result of the multiplication shall be treated as labor cost at standard.

(3) A labor-rate standard may be set to cover a category of direct labor only if the functions performed within that category are not materially disparate and the employees involved are interchangeable with respect to the functions performed.

(4) A labor-rate standard may be set to cover a group of direct labor workers who perform disparate functions only under either one of the following conditions:

(i) Where that group of workers all work in a single production unit yielding homogeneous outputs (in this case, the same labor-rate standard shall be applied to each worker in that group), or

(ii) Where that group of workers, in the performance of their respective functions, forms an integral team (in this case, a labor-rate standard shall be set for each integral team).

(b) (1) Material-price standards may be used and their related variances may be recognized either at the time purchases of material are entered into the books of account or at the time material cost is allocated to production units.

(2) Where material-price standards are used and related variances are recognized at the time purchases of material are entered into the books of account, they shall be accumulated separately by homogeneous groupings of material. Examples of homogeneous groupings of material are:

(i) Where prices of all items in that grouping of material are expected to fluctuate in the same direction and at substantially the same rate, or

(ii) Where items in that grouping of material are held for use in a single production unit yielding homogeneous outputs.

(3) Where material-price variances are recognized at the time purchases of material are entered into the books of account, variances of each homogeneous grouping of material shall be allocated (except as provided in paragraph (b)(4) of this section), at least annually, to items in purchased-items inventory and to production units receiving items from that homogeneous grouping of material, in accordance with either one of the following practices, which shall be consistently followed:

(i) Items in purchased-items inventory of a homogeneous grouping of material are adjusted from standard cost to actual cost; the balance of the material-price variance, after reflecting these adjustments, shall be allocated to production units on the basis of the total of standard cost of material received from that homogeneous grouping of material by each of the production units; or

(ii) Items, at standard cost, in purchased-items inventory of a homogeneous grouping of material, are treated, collectively, as a production unit; the material-price variance shall be allocated to production units on the basis of standard cost of material received from that homogeneous grouping of material by each of the production units.

(4) Where material-price variances are recognized at the time purchases of material are entered into the books of account, variances of each homogeneous grouping of material which are insignificant may be included in appropriate indirect cost pools for allocation to applicable cost objectives.

(5) Where a material-price variance is allocated to a production unit in accordance with subparagraph (b)(3) of this subsection, it may be combined with material-quantity variance into one material-cost variance for that production unit. A separate material-cost variance shall be accumulated for each production unit.

(6) Where material-price variances are recognized at the time material cost is allocated to production units, these variances and material-quantity variances may be combined into one material-cost variance account.

(c) Labor-cost variances shall be recognized at the time labor cost is introduced into production units. Labor-rate variances and labor-time variances may be combined into one labor-cost variance account. A separate labor-cost variance shall be accumulated for each production unit.

(d) A contractor's established practice with respect to the disposition of variances accumulated by production unit shall be in accordance with one of the following subparagraphs:

(1) Variances are allocated to cost objectives (including ending in-process inventory) at least annually. Where a variance related to material is allocated, the allocation shall be on the basis of the material cost at standard, or, where outputs are homogeneous, on the basis of units of output. Similarly, where a variance related to labor is allocated, the allocation shall be on the basis of the labor cost at standard or labor hours at standard, or, where outputs are homogeneous, on the basis of units of output; or

(2) Variances which are immaterial may be included in appropriate indirect cost pools for allocation to applicable cost objectives.

(e) Where variances applicable to covered contracts are allocated by memorandum worksheet adjustments rather than in the books of account, the bases used for adjustment shall be in accordance with those stated in subparagraphs (b)(3) and (d) of this subsection.

30.407-60 Illustrations.

(a) Contractor A's written practice is to set his material-price standard for an item on the basis of average purchase prices expected to prevail during the calendar year. For that item whose usage from month to month is stable, a purchase contract is generally signed on May 1 of each year for a one-year commitment. The current purchase contract calls for a purchase price of $3 per pound; an increase of 5 percent, or 15¢ per pound, has been announced by the vendor when the new purchase contract comes into effect next May. Contractor A sets his material-price standard for this item t $3.10 per pound for the year [$3.00×4+$3.15×8]÷12). Since Contractor A sets his material-price standard in accordance with his written practice, he complies with provisions f 30.407-40(c) of this Cost Accounting Standard.

(b) Contractor B accumulates, in one ccount, labor cost at standard for a epartment in which several categories of direct labor of disparate functions, in different combinations, are sed in the manufacture of various issimilar outputs of the department. ontractor B's department is not a roduction unit as defined in 30.407-0(a)(7) of this Cost Accounting tandard. Modifying his practice so as o comply with the definition of production unit in 30.407-30(a)(7), he ould accumulate the standard costs nd variances separately, (1) for each the several categories of direct bor, or (2) for each of several subdepartments, with homogeneous output r each of the subdepartments.

(c) Contractor C allocates variances the end of each month. During the onth of March, a production unit s accumulated the following data th respect to labor:

	Labor hours at standard	Labor dollars at standard	Labor cost variance
Balance, March 1	5,000	$25,000	$2,000
Additions in March	15,000	75,000	5,000
Total	20,000	100,000	7,000
Transfers-out in March	8,000	40,000	
Balance, March 31	12,000	60,000	

Using labor hours at standard as the base, Contractor C establishes a labor-cost variance rate of $.35 per standard labor hour ($7,000÷20,000), and deducts $2,800 ($.35×8,000) from the labor-cost variance account, leaving a balance of $4,200 ($7,000—$2,800). Contractor C's practice complies with provisions of 30.407-50(d)(1) of this Cost Accounting Standard.

(d) Contractor D, who uses materials the prices of which are expected to fluctuate at different rates, recognizes material-price variances at the time purchases of material are entered into the books of account. He maintains one purchase-price variance account for the whole plant. Purchased items are requisitioned by various production units in the plant. Since prices of material are expected to fluctuate at different rates, this plant-wide grouping does not constitute a homogeneous grouping of material. Contractor D's practice does not comply with provisions of 30.407-50(b)(2) of this Cost Accounting Standard. However, if he would maintain several purchased-items inventory accounts, each representing a homogeneous grouping of material, and maintain a material-price variance account for each of these homogeneous groupings of material, Contractor D's practice would comply with 30.407-50(b)(2) of this Cost Accounting Standard.

(e) Contractor E recognizes material-price variances at the time purchases of material are entered into the books of account and allocates variances at the end of each month. During the month of May, a homogeneous grouping of material has accumulated the following data:

	Material cost at standard	Material price variance
Inventory, May 1	$150,000	$20,000
Additions in May	1,850,000	120,000
Total	2,000,000	140,000
Requisitions:		
Production unit 1	900,000	
Production unit 2	450,000	
Production unit 3	300,000	
Production unit 4	150,000	
Inventory, May 31	200,000	

Contractor E establishes a material-price variance rate of 7% ($140,000÷$2,000,000) and allocates as follows:

	Material cost at standard	Material-price variance rate (percent)	Material-price variance allocation
Production unit 1	$900,000	7	$63,000
Production unit 2	450,000	7	31,500
Production unit 3	300,000	7	21,000
Production unit 4	150,000	7	10,500
Ending inventory of homogeneous grouping of material	200,000	7	14,000
Total	2,000,000		140,000

Contractor E's practice complies with provisions of 30.407-50(b)(3)(ii) of this Cost Accounting Standard.

(f) Contractor F makes year-end adjustments for variances attributable to covered contracts. During the year just ended, a covered contract was processed in four production units, each with homogeneous outputs. Data with respect to output and to labor of each of the four production units are as follows:

Production unit	Total units of output	Total units used by the covered contract	Total labor cost at standard	Total labor-cost variance
1	100,000	10,000	$400,000	$20,000
2	30,000	6,000	900,000	30,000
3	20,000	5,000	600,000	10,000
4	10,000	4,000	500,000	20,000

Since the outputs of each production unit are homogeneous, Contractor F uses the units of output as the basis of making memorandum worksheet adjustments concerning applicable variances, and establishes the followin figures:

	Labor-cost variance per unit of output	Units used by the covered contract	Labor-cost variance attributable to the covered contra
Production unit 1	$0.20	10,000	$2,000
Production unit 2	1.00	6,000	6,000
Production unit 3	.50	5,000	2,500
Production unit 4	2.00	4,000	8,000
Total labor-cost variance attributable to the covered contract			18,500

Contractor F makes a year-end adjustment of $18,500 as the labor-cost variances attributable to the covered contract. Contractor F's practice complies with provisions of 30.407-50(e) of this Cost Accounting Standard.

30.407-61 Interpretation. [Reserved]

30.407-62 Exemption. [Reserved]

30.407-63 Effective date. [Reserved]

30.408 Accounting for costs of compensated personal absence.

30.408-10 [Reserved]

30.408-20 Purpose.

The purpose of this Standard is to improve, and provide uniformity in, the measurement of costs of vacation, sick leave, holiday, and other compensated personal absence for a cost accounting period, and thereby increase the probability that the measured costs are allocated to the proper cost objectives.

30.408-30 [Reserved]

30.408-40 Fundamental requirement.

(a) The costs of compensated personal absence shall be assigned to the cost accounting period or periods in which the entitlement was earned.

(b) The costs of compensated personal absence for an entire cost accounting period shall be allocated pro rata on an annual basis among the final cost objectives of that period.

30.408-50 Techniques for application.

(a) *Determinations.* Each plan or custom for compensated personal absence shall be considered separately in determining when entitlement is earned. If a plan or custom is changed or a new plan or custom is adopted, then a new determination shall be made beginning with the first cost accounting period to which such new or changed plan or custom applies.

(b) *Measurement of entitlement.* (1) For purposes of compliance with 30.408-40(a), compensated personal absence is earned at the same time and in the same amount as the employer becomes liable to compensate the employee for such absence if the employer terminates the employee's employment for lack of work or other reasons not involving disciplinary action, in accordance with a plan or custom of the employer. Where a new employee must complete a probationary period before the employer becomes liable, the employer may nonetheless treat such service as creating entitlement in any computations required by this Standard, provided that he does so consistently.

(2) Where a plan or custom provides for entitlement to be determined as of the first calendar day or the first business day of a cost accounting period based on service in the preceding cost accounting period, the entitlement shall be considered to have been earned, and the employer's liability to have arisen, as of the close of the preceding cost accounting period.

(3) In the absence of a determinable liability, in accordance with subparagraph (b)(1) of this subsection, compensated personal absence will be considered to be earned only in the cost accounting period in which it is paid.

(c) *Determination of employer's liability.* In computing the cost of compensated personal absence, the computation shall give effect to the employer's liability in accordance with the following paragraphs:

(1) The estimated liability shall include all earned entitlement to compensated personal absence which exists at the time the liability is determined, in accordance with paragraph (b) of this subsection.

(2) The estimated liability shall be reduced to allow for anticipated nonutilization, if material.

(3) The liability shall be estimated consistently either in terms of current or of anticipated wage rates. Estimates may be made with respect to individual employees, but such individual estimates shall not be required if the total cost with respect to all employees in the plan can be estimated with reasonable accuracy by the use of sample data, experience or other appropriate means.

(d) *Adjustments.* (1) The estimate of the employer's liability for compensated personal absence at the beginning of the first cost accounting period for which a contractor must comply with this Standard shall be based on the contractor's plan or custom applicable to that period, notwithstanding that some part of that liability has not previously been recognized for contract costing purposes. Any excess of the amount of the liability as determined in accordance with paragraph (c) of this subsection over the corresponding amount of the liability as determined in accordance with the contractor's previous practice shall be held in suspense and accounted for as described in subparagraph (d)(3) of this subsection.

(2) If a plan or custom is changed or a new plan or custom is adopted, and the new determination made in accordance with paragraph (a) of this subsection results in an increase in the estimate of the employer's liability for compensated personal absence at the beginning of the first cost accounting period for which the new plan is effective over the estimate made in accordance with the contractor's prior practice, then the amount of such increase shall be held in suspense and accounted for as described in subparagraph (d)(3) of this subsection.

(3) At the close of each cost accounting period, the amount held in suspense shall be reduced by the excess of the amount held in suspense at the beginning of the cost accounting period over the employer's liability (as estimated in accordance with paragraph (c) of this subsection) at the end of that cost accounting period. The cost of compensated personal ab-

sence assigned to that cost accounting period shall be increased by the amount of the excess.

(e) *Allocations.* Except where the use of a longer or shorter period is permitted by the provisions of the Cost Accounting Standard on Cost Accounting Period (30.406 of this subpart), the costs of compensated personal absence shall be allocated to cost objectives on a pro-rata basis which reflects the total of such costs and the total of the allocation base for the entire cost accounting period. However, this provision shall not preclude revisions to an allocation rate during a cost accounting period based on revised estimates of period totals.

30.408-60 Illustrations.

(a) Company A's vacation plan provides that on the anniversary of each employee's hiring date, that employee shall become eligible to receive a 2-week vacation with pay. Vacation entitlement must be used within 2 years or forfeited. An employee who leaves the company voluntarily will be paid for any remaining unused vacation entitlement which was earned through the employee's last anniversary date. An employee who is laid off for lack of work will also be paid a pro-rata vacation allowance for service since the employee's last anniversary date. Company A accrues vacation costs each month based on an estimate of the anniversary years which will be completed in that month. At the end of its cost accounting period, Company A adjusts its estimated liability to agree with its actual liability for completed years of service on an individual employee basis.

(1) In order to comply with 30.408-50(c), Company A must increase its estimated liability for vacation pay at all times to include the estimated additional amount which would be payable to employees in the event of layoff. The additional liability may be calculated on an individual employee basis or it may be estimated for the employees as a group by the use of sample or historical data.

(2) The following illustrates one method of estimating Company A's liability at the end of its cost accounting period, December 31, with respect to individual employees, in accordance with 30.408-50(c).

John Doe, Anniversary date July 10:	
Unused entitlement resulting from completed service years, 24 hrs. at $5	$120
Full months of service since anniversary, 5: Pro-rata entitlement on lay-off=80 hrs. x 5/12=33.3 hrs. at 15	167
Total	287
Less estimated allowance for forfeitures, 3½ percent	10
Net liability	277

(b) Company B has a vacation plan similar to Company A's, but Company B does not pay pro-rata vacation pay on lay-off for service since the last anniversary date. Company B must include in its estimate of its liability at the end of its cost accounting period only that unused vacation entitlement which results from completed years of service, with allowance for forfeitures if material.

(c) Company C's sick leave plan provides that an employee will accumulate one-half day of sick leave entitlement for each full month of service. Sick leave entitlement may be accumulated without limit, but an employee is paid for sick leave only during actual illness; the Company does not pay for unused sick leave on lay-off. Despite the fact that Company C might be able to estimate the amount which will be paid for sick leave in a future cost accounting period with a high degree of accuracy, it has no liability for payment for unused sick leave entitlement in the event of lay-off. Therefore, in accordance with 30.408-50(b)(3), it must assign to each cost accounting period only the costs of sick leave which it pays in that period.

(d) Company D's vacation plan provides that on July 1, each employee who has been employed by the Company for at least 1 year shall be entitled to 2 weeks of vacation. All vacation must be taken between July 1 and September 30. An employee who terminates after September 30 and before July 1 receives no vacation pay. Company D has a cost accounting period which ends on December 31; however, Company D customarily accrues its anticipated liability for vacation pay at July 1 in 12 equal installments over the *vacation year* starting on July 1 of the previous year and ending on June 30 of the current year. Company D has no liability for vacation pay at January 1 or at December 31. In accordance with 30.408-50(b)(3), the amount of vacation cost which Company D must assign to each cost accounting period is the amount of such costs paid in that period. Therefore, Company D may not use the *vacation year* ending June 30 to apportion these costs between cost accounting periods.

(e) Company E's cost accounting period ends on December 31. Its vacation plan provides that on January 1, each employee who has been employed for at least 1 year shall become entitled to 2 weeks of vacation. The Company does not recognize a liability for vacation pay at December 31 because an employee must be employed on January 1 to be eligible.

(1) Despite the requirement that the employee also be employed on January 1, the necessary service was completed in the preceding cost accounting period. If the other terms of the plan are such that in accordance with this Standard, Company E must recognize its vacation costs on the accrual basis, then in accordance with 30.408-50(b)(2), Company E must estimate its vacation costs as if the liability arose on December 31 rather than on the following January 1.

(2) Assume that Company E must comply with this Standard beginning on January 1, 1976. Assume that the employees of Company E earned $90,000 in vacation pay in 1975, all of which will be taken in 1976. Assume, further, that because of reduced employment levels, the employees of Company E will earn only $80,000 in vacation pay in 1976, $5,000 of which will be paid in 1976 because of layoffs. The following example illustrates the computation of vacation pay costs for Company E in 1976:

1976 beginning liability:	
With Standard (30.408-50(d)(1))	$90,000
Without Standard	0
Amount to be held in suspense (30.408-50(d)(1))	90,000
1976 ending liability	75,000
Plus: Paid in 1976	95,000
Subtotal	170,000
Less: 1976 beginning liability	90,000
1976 vacation cost, basic amount	80,000
Amount in suspense at beginning of 1976	90,000
Less: 1976 ending liability	75,000
Suspense to be written off in 1976; additional 1976 vacation cost (30.408-50(d)(3))	15,000
1976 basic vacation cost	80,000
Plus: 1976 reduction of suspense	15,000
1976 total vacation cost	95,000

(3) Assume, further, that all of the vacation entitlement which remained at December 31, 1976 ($75,000) is taken in 1977. Also, Company E hires a substantial number of additional employees in 1977, so that the amount of vacation entitlement earned in 1977 is $85,000. The following example illustrates the computation of vacation pay costs for Company E in 1977:

1977 ending liability	$85,000
Plus: Paid in 1977	75,000
Subtotal	160,000
Less: 1977 beginning liability	75,000
1977 vacation cost, basic amount	85,000
Amount in suspense at beginning of 1977 [1]	75,000
1977 ending liability [1]	85,000
1977 basic vacation cost	85,000
Plus: 1977 reduction of suspense [1]	0
1977 total vacation cost	85,000

[1] Because the 1977 ending liability exceeds the amount in suspense at the beginning of 1977, there is no reduction of suspense in 1977.

(4) Assume further, that Company E goes out of business in 1978. All employees are terminated and paid both for the $85,000 vacation liability at the end of 1977 and an additional $40,000 earned in 1978. The following example illustrates the computation of vacation pay costs for Company E in 1978:

1978 ending liability	0
Plus: Paid in 1978	$125,000
Subtotal	125,000
Less: 1978 beginning liability	85,000
1978 vacation cost, basic amount	40,000
Amount in suspense at beginning of 1978	75,000

Less: 1978 ending liability	0
Suspense to be written off in 1978; additional 1978 vacation cost (30.408-50(d)(3))	75,000
1978 basic vacation cost	40,000
Plus: 1978 reduction in suspense	75,000
1978 total vacation cost	115,000

(f) All of the salary costs of Company F's salaried employees are charged to service, administrative, or overhead functions. No accounting entries are made to segregate costs of compensated personal absence of these employees from their other salary costs, although other records are maintained to control the total amount of such absences.

(1) This policy does not violate the requirement of 30.408-40(b) if such salaries are charged to overhead or indirect cost pools for subsequent allocation to final cost objectives over annually determined allocation bases which are appropriate for those pools.

(2) If the same policy were followed in the case of engineers whose salaries were directly allocated to two or more final cost objectives, or to both intermediate and final cost objectives, so that costs of compensated personal absence were charged directly to the jobs on which the individuals were working when paid, then this would violate the requirement of 30.408-40(b) that these costs be allocated among cost objectives on the basis of the costs of the entire cost accounting period. Only if all salaries were directly allocated to a single final cost objective, as might be the case with personnel assigned to an overseas base for the performance of a single contract, would this practice be in accord with that requirement.

(g) Company G determines a *charging rate* for each employee. The charging rate includes an allowance for compensated personal absence based on average experience. As the employee performs services, the related cost objectives are charged for the services at the charging rate, the employee is paid at his base rate, and the excess is credited to the accrued liability for each benefit. As benefits are paid, the costs are charged against the accrued liabilities. The amount of each accrued liability is adjusted at the end of the costs accounting period, and any difference is adjusted through appropriate overhead accounts in accordance with company policy.

(1) This method is not a violation of 30.408-40(b) if it results in allocating the estimated annual costs of compensated personal absence at a rate which reflects the anticipated costs of the entire cost accounting period.

(2) The computation itself must comply with the criteria of 30.408-40(a). For example, if the terms of the Company's sick leave plan are such that in accordance with this Standard, the costs should be recognized in the cost accounting period when they are paid, then the computation should be intended to amortize the expected costs of sick leave over the activity of that cost accounting period, leaving no accrued liability for sick leave at the end of the cost accounting period.

30.408-61 Interpretation. [Reserved]

30.408-62 Exemption. [Reserved]

30.408-63 Effective date. [Reserved]

30.409 Cost accounting standard—depreciation of tangible capital assets.

30.409-10 [Reserved]

30.409-20 Purpose.

The purpose of this Standard is to provide criteria and guidance for assigning costs of tangible capital assets to cost accounting periods and for allocating such costs in cost objectives within such periods in an objective and consistent manner. The Standard is based on the concept that depreciation costs identified with cost accounting periods and benefiting cost objectives within periods should be a reasonable measure of the expiration of service potential of the tangible assets subject to depreciation. Adherence to this Standard should provide a systematic and rational flow of the costs of tangible capital assets to benefited cost objectives over the expected service lives of the assets. This Standard does not cover nonwasting assets or natural resources which are subject to depletion.

30.409-30 [Reserved]

30.409-40 Fundamental requirement.

(a) The depreciable cost of a tangible capital asset (or group of assets) shall be assigned to cost accounting periods in accordance with the following criteria:

(1) The depreciable cost of a tangible capital asset shall be its capitalized cost less its estimated residual value.

(2) The estimated service life of a tangible capital asset (or group of assets) shall be used to determine the cost accounting periods to which the depreciable cost will be assigned.

(3) The method of depreciation selected for assigning the depreciable cost of a tangible capital asset (or group of assets) to the cost accounting periods representing its estimated service life shall reflect the pattern of consumption of services over the life of the asset.

(4) The gain or loss which is recognized upon disposition of a tangible capital asset shall be assigned to the cost accounting period in which the disposition occurs.

(b) The annual depreciation cost of a tangible capital asset (or group of assets) shall be allocated to cost objectives for which it provides service in accordance with the following criteria:

(1) Depreciation cost may be charged directly to cost objectives only if such charges are made on the basis of usage and only if depreciation costs of all like assets used for similar purposes are charged in the same manner.

(2) Where tangible capital assets are part of, or function as, an organizational unit whose costs are charged to other cost objectives based on measurement of the services provided by the organizational unit, the depreciation cost of such assets shall be included as part of the cost of the organizational unit.

(3) Depreciation costs which are not allocated in accordance with subparagraph (b) (1) or (2) of this subsection, shall be included in appropriate indirect cost pools.

(4) The gain or loss which is recognized upon disposition of a tangible capital asset, where material in amount, shall be allocated in the same manner as the depreciation cost of the asset has been or would have been allocated for the cost accounting period in which the disposition occurs. Where such gain or loss is not material, the amount may be included in an appropriate indirect cost pool.

30.409-50 Techniques for application.

(a) Determination of the appropriate depreciation charges involves estimates both of service life and of the likely pattern of consumption of services in the cost accounting periods included in such life. In selecting service life estimates and in selecting depreciation methods, many of the same physical and economic factors should be considered. The following are among the factors which may be taken into account: quantity and quality of expected output, and the timing thereof; costs of repair and maintenance, and the timing thereof; standby or incidental use and the timing thereof; and technical or economic obsolescence of the asset (or group of assets), or of the product or service it is involved in producing.

(b) Depreciation of a tangible capital asset shall begin when the asset and any others on which its effective use depends are ready for use in a normal or acceptable fashion. However, where partial utilization of a tangible capital asset is identified with a specific operation, depreciation shall commence on any portion of the asset which is substantially completed and used for that operation. Depreciable spare parts which are required for the operation of such tangible capital assets shall be accounted for over the service life of the assets.

(c) A consistent policy shall be followed in determining the depreciable cost to be assigned to the beginning and ending cost accounting periods of asset use. The policy may provide for any reasonable starting and ending dates in computing the first and last year depreciable cost.

(d) Tangible capital assets may be accounted for by treating each individual asset as an accounting unit, or by combining two or more assets as a single accounting unit, provided such treatment is consistently applied over the service life of the asset or group of assets.

(e) Estimated service lives initially established for tangible capital assets (or groups of assets) shall be reasonable approximations of their expected actual periods of usefulness, considering the factors mentioned in paragraph (a) of this subsection. The estimate of the expected actual periods of usefulness need not include the additional period tangible capital assets are retained for standby or incidental use where adequate records are maintained which reflect the withdrawal from active use.

(1) The expected actual periods of usefulness shall be those periods which are supported by records of either past retirement or, where available, withdrawal from active use (and retention for standby or incidental use) for like assets (or groups of assets) used in similar circumstances appropriately modified for specifically identified factors expected to influence future lives. The factors which can be used to modify past experience include:

(i) Changes in expected physical usefulness from that which has been experienced such as changes in the quantity and quality of expected output.

(ii) Changes in expected economic usefulness, such as changes in expected technical or economic obsolescence of the asset (or group of assets), or of the product or service produced.

(2) Supporting records shall be maintained which are adequate to show the age at retirement or, if the contractor so chooses, at withdrawal from active use (and retention for standby or incidental use) for a sample of assets for each significant category. Whether assets are accounted for individually or by groups, the basis for estimating service life shall be predicated on supporting records of experienced lives for either individual assets or any reasonable grouping of assets as long as that basis is consistently used. The burden shall be on the contractor to justify estimated service lives which are shorter than such experienced lives.

(3) The records required in subparagraphs (e) (1) and (2) of this subsection, if not available on the date when the requirements of this Standard must first be followed by a contractor, shall be developed from current and historical fixed asset records and be available following the second fiscal year after that date. They shall be used as a basis for estimates of service lives of tangible capital assets acquired thereafter. Estimated service lives used for financial accounting purposes (or other accounting purposes where depreciation is not recorded for financial accounting purposes for some noncommercial organizations), if not unreasonable under the criteria specified in paragraph (e) of this subsection, shall be used until adequate supporting records are available.

(4) Estimated service lives for tangible capital assets for which the contractor has no available data or no prior experience for similar assets shall be established based on a projection of the expected actual period of usefulness, but shall not be less than asset guideline periods (mid-range) established for asset guideline classes under the Revenue Procedure 72-10 published by the Internal Revenue Service, and any additions, supplements or revisions thereto, which are in effect as of the first day of the cost accounting period in which the assets are acquired. Use of this alternative procedure shall cease as soon as the contractor is able to develop estimates which are appropriately supported by his own experience.

(5) The contracting parties may agree on the estimated service life of individual tangible capital assets where the unique purpose for which the equipment was acquired or other special circumstances warrant a shorter estimated service life than the life determined in accordance with the other provisions of this 30.409-50(e) and where the shorter life can be reasonably predicted.

(f) (1) The method of depreciation used for financial accounting purposes (or other accounting purposes where depreciation is not recorded for financial accounting purposes) shall be used for contract costing unless (i) such method does not reasonably reflect the expected consumption of services for the tangible capital asset (or group of assets) to which applied, or (ii) the method is unacceptable for Federal income tax purposes. If the contractor's method of depreciation used for financial accounting purposes (or other accounting purposes as provided above) does not reasonably reflect the expected consumption of services or is unacceptable for Federal income tax purposes, he shall establish a method of depreciation for contract costing which meets these criteria, in accordance with subparagraph (f)(3) of this subsection.

(2) After the date of initial applicability of this Standard, selection of methods of depreciation for newly acquired tangible capital assets, which are different from the methods currently being used for like assets in similar circumstances, shall be supported by projections of the expected consumption of services of those assets (or groups of assets) to which the different methods of depreciation shall apply. Support in accordance with subparagraph (f)(3) of this subsection shall be based on the expected consumption of services of either individual assets or any reasonable grouping of assets as long as the basis selected for grouping assets is consistently used.

(3) The expected consumption of asset services over the estimated service life of a tangible capital asset (or group of assets) is influenced by the factors mentioned in paragraph (a) of this subsection which affect either potential activity or potential output of the asset (or group of assets). These factors may be measured by the expected activity or the expected physical output of the assets, as for example: hours of operation, number of operations performed, number of units produced, or number of miles traveled. An acceptable surrogate for expected activity or output might be a monetary measure of that activity or output generated by use of tangible capital assets, such as estimated labor dollars, total cost incurred or total revenues, to the extent that such monetary measures can reasonably be related to the usage of specific tangible capital assets (or groups of assets). In the absence of reliable data for the measurement or estimation of the consumption of asset services by the techniques mentioned, the expected consumption of services may be represented by the passage of time. The appropriate method of depreciation should be selected as follows:

(i) An accelerated method of depreciation is appropriate where the expected consumption of asset services is significantly greater in early years of asset life.

(ii) The straight-line method of depreciation is appropriate where the expected consumption of asset services is reasonably level over the service life of the asset (or group of assets).

(g) The estimated service life and method of depreciation to be used for an original complement of low-cost equipment shall be based on the expected consumption of services over the expected useful life of the complement as a whole and shall not be based on the individual items which form the complement.

(h) Estimated residual values shall be determined for all tangible capital assets (or groups of assets). For tangible personal property, only estimated residual values which exceed ten percent of the capitalized cost of the asset (or group of assets) need be used in establishing depreciable costs. Where either the declining balance method of depreciation or the class life asset depreciation range system is used consistent with the provisions of this Standard, the residual value need not be deducted from capitalized cost to determine depreciable costs. No depreciation cost shall be charged which would significantly reduce book value of a tangible capital asset (or group of assets) below its residual value.

(i) Estimates of service life, consumption of services, and residual value shall be reexamined for tangible capital assets (or groups of assets) whenever circumstances change significantly. Where changes are made to the estimated service life, residual value, or method of depreciation during the life of a tangible capital asset, the remaining depreciable costs for cost accounting purposes shall be limited to the undepreciated cost of the assets and shall be assigned only to the cost accounting period in which the change is made and to subsequent periods.

(j) (1) Gains and losses on disposition of tangible capital assets shall be considered as adjustments of depreciation costs previously recognized and shall be assigned to the cost accounting period in which disposition occurs except as provided in subparagraphs (j) (2) and (3) of this subsection. The gain or loss for each asset disposed of is the difference between the net amount realized, including insurance proceeds in the event of involuntary conversion, and its undepreciated balance. However, the gain to be recognized for contract costing purposes shall be limited to the difference between the original acquisition cost of the asset and its undepreciated balance.

(2) Gains and losses on the disposition of tangible capital assets shall not be recognized where:

(i) Assets are grouped and such gains and losses are processed through the accumulated depreciation account, or, (ii) the asset is given in exchange as part of the purchase price of a similar asset and the gain or loss is included in computing the depreciable cost of the new asset. Where the disposition results from an involuntary conversion and the asset is replaced by a similar asset, gains and losses may either be recognized in the period of disposition or used to adjust the depreciable cost base of the new asset.

(3) The contracting parties may account for gains and losses arising from mass or extraordinary dispositions in a manner which will result in treatment equitable to all parties.

(4) Gains and losses on disposition of tangible capital assets transferred in other than an arms-length transaction and subsequently disposed of within 12 months from the date of transfer shall be assigned to the transferor.

(k) Where, in accordance with 30.409-40(b)(1), the depreciation costs of like tangible capital assets used for similar purposes are directly charged to cost objectives on the basis of usage, average charging rates based on cost shall be established for the use of such assets. Any variances between total depreciation cost charged to cost objectives and total depreciation cost for the cost accounting period shall be accounted for in accordance with the contractor's established practice for handling such variances.

(l) Practices for determining depreciation methods, estimated service lives and estimated residual values need not be changed for assets acquired prior to compliance with this Standard if otherwise acceptable under applicable procurement regulations. However, if changes are effected such changes must conform to the criteria established in this Standard and may be effected on a prospective basis to cover the undepreciated balance of cost by agreement between the contracting parties pursuant to negotiation under (a)(4)(B) or (C) of the Contract Clause set out at FAR 52.230-2.

30.409-60 Illustrations.

The following examples are illustrative of the provisions of this Standard.

(a) X, Y, and Z companies purchase identical milling machines to be used for similar purposes.

(1) Company X estimates service life for tangible capital assets on a individual asset basis. Its experience with similar machines is that the average replacement period is 14 years. Under the provisions of the Standard, Company X shall use the estimated service life of 14 years for the milling machine unless it can demonstrate changed circumstances or new circumstances to support a different estimate.

(2) Company Y estimates service life for tangible capital assets by grouping assets of the same general kind and with similar service lives. Accordingly, all machine tools are accounted for as a single group. The average replacement life for machine tools for Company Y is 12 years. In accordance with the provisions of the Standard, Company Y shall use a life of 12 years for the acquisition unless it can support a different estimate for the entire group.

(3) Company Z estimates service life for tangible capital assets by grouping assets according to use without regard to service lives. Accordingly, all machinery and equipment is accounted for as a single group. The average replacement life for machinery and equipment in Company Z is 10 years

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In accordance with the provisions of the Standard, Company Z shall use an estimated service life of ten years for the acquisition unless it can support a different estimate for the entire group.

(b) Company X desires to charge depreciation of the milling machine described in paragraph (a) of this subsection, directly to final cost objectives. Usage of the milling machine can be measured readily based on hours of operation. Company X may charge depreciation cost directly on a unit of time basis provided he uses one depreciation charging rate for all like milling machines in the machine shop and charges depreciation for all such milling machines directly to benefiting cost objectives.

(c) A contractor acquires, and capitalizes as an asset accountability unit, a new lathe. The estimated service life is 10 years for the lathe. He acquires, and capitalizes as an original complement of low-cost equipment related to the lathe, a collection of tool holders, chucks, indexing heads, wrenches, and the like. Although individual items comprising the complement have an average life of six years, replacements of these items will be made as needed and, therefore, the expected useful life of the complement is equal to the life of the lathe. An estimated service life of 10 years should be used for the original complement.

(d) A contractor acquires a test facility with an estimated physical life of ten years, to be used on contracts for a new program. The test facility was acquired for $5 million. It is expected that the program will be completed in 6 years and the test facility acquired is not expected to be required for other products of the contractor. Although the facility will last 10 years, the contracting parties may agree in advance to depreciate the facility over 6 years.

(e) Contractor acquires a building by donation from its local Government. The building had been purchased new by another company and subsequently acquired by the local Government. Contractor capitalizes the building at its fair value. Under the Standard the depreciable cost of the asset based on that value may be accounted for over its estimated service life and allocated to cost objectives in accordance with contractor's cost allocation practices.

(f) A major item of equipment which was acquired prior to the applicability of this Standard was estimated, at acquisition, to have a service life of 12 years and a residual value of no more than 10 percent of acquisition cost. After 4 years of service, during which time this Standard has become applicable, a change in the production situation results in a well-supported determination to shorten the estimated service life to a total of 7 years. The revised estimated residual value is 15 percent of acquisition cost. The annual depreciation charges based on this particular asset will be appropriately increased to amortise the remaining cost, less the current estimate of residual value, over the remaining 3 years of expected usefulness. This change is not a change of cost accounting practice, but a correction of numeric estimates. The requirement of 30.409-50(l) for an adjustment pursuant to subdivision (a)(4)(ii) or (iii) of the CAS clause does not apply.

(g) The support required by 30.409-50(e) can, in all likelihood, be derived by sampling from almost any reasonable fixed asset records. Of course, the more complete the data in the records which are available, the more confidence there can be in determinations of asset service lives. The following descriptions of sampling methods are illustrations of techniques which may be useful even with limited fixed asset records.

(1) A company maintains an inventory of assets in use. The company should select a sampling time period which, preferably, is significantly longer than the anticipated life of the assets for which lives are to be established. Of course, the inventory must be available for each year in the sampling time period. The company would then select a random sample of items in each year except the most recent year of the time period. Each item in the sample would be compared to the subsequent year's inventory to determine if the asset is still in service; if not, then the asset had been retired in the year from which the sample was drawn. The item is then traced to

prior year inventories to determine the year in which acquired.

NOTE: Sufficient items must be drawn in each year to ensure an adequate sample.

(2) A company maintains an inventory of assets in use and also has a record of retirements. In this case the company does not have to compare the sample to subsequent years to determine if disposition has occurred. As in Example (1) above, the sample items are traced to prior years to determine the year in which acquired.

(3) A company maintains retirement records which show acquisition dates. The company should select a sampling time period which, preferably, is significantly longer than the anticipated life of the assets for which lives are to be estimated. The company would then select a random sample of items retired in each year of the sampling time period and tabulate age at retirement.

(4) A company maintains only a record of acquisitions for each year. The company should select a random sample of items acquired in the most recent complete year and determine from current records or observations whether each item is currently in service. The acquisitions of each prior year should be sampled in turn to determine if sample items are currently in service. This sampling should be performed for a time period significantly longer than the anticipated life of assets for which the lives are to be established, but can be discontinued at the point at which sample items no longer appear in current use. From the data obtained, mortality tables can be constructed to determine average asset life.

(5) A company does not maintain accounting records on fully depreciated assets. However, property records are maintained, and such records are retained for 3 years after disposition of an asset in groups by year of disposition. An analysis of these retirements may be made by selecting the larger dollar items for each category of assets for which lives are to be determined (for example, at least 75 percent of the acquisition values retired each year). The cases cited above are only examples and many other examples could have been used. Also, in an example, a company's individual ci cumstances must be considered i order to take into account possibl biased results because of changes i organizations, products, acquisitio policies, economic factors, etc. The results from example (g)(5) of this subsection, for instance, might be substantially distorted if the 3 year period was unusual with respect to dispositions. Therefore, the examples are illustrative only and any sampling performed in compliance with this Standard should take into account all relevant information to ensure that reasonable results are obtained.

30.409-61 Interpretation. [Reserved]

30.409-62 Exemption. [Reserved]

30.409-63 Effective date. [Reserved]

30.410 Allocation of business unit general and administrative expenses to final cost objectives.

30.410-10 [Reserved]

30.410-20 Purpose.

The purpose of this Cost Accounting Standard is to provide criteria for the allocation of business unit general and administrative (G&A) expenses to business unit final cost objectives based on their beneficial or causal relationship. These expenses represent the cost of the management and administration of the business unit as a whole. The Standard also provides criteria for the allocation of home office expenses received by a segment to the cost objectives of that segment. This Standard will increase the likelihood of achieving objectivity in the allocation of expenses to final cost objectives and comparability of cost data among contractors in similar circumstances.

30.410-30 [Reserved]

30.410-40 Fundamental requirement.

(a) Business unit G&A expenses shall be grouped in a separate indirect cost pool which shall be allocated only to final cost objectives.

(b) (1) The G&A expense pool of a business unit for a cost accounting period shall be allocated to final cost objectives of that cost accounting period by means of a cost input base representing the total activity of the business unit except as provided in subparagraph (b)(2) of this subsection. The cost input base selected shall be the one which best represents the total activity of a typical cost accounting period.

(2) The allocation of the G&A expense pool to any particular final cost objectives which receive benefits significantly different from the benefits accruing to other final cost objectives shall be determined by special allocation (30.410-50(j)).

(c) Home office expenses received by a segment shall be allocated to segment cost objectives as required by 30.410-50(g).

(d) Any costs which do not satisfy the definition of G&A expense but which have been classified by a business unit as G&A expenses, can remain in the G&A expense pool unless they can be allocated to business unit cost objectives on a beneficial or causal relationship which is best measured by a base other than a cost input base.

30.410-50 Techniques for application.

(a) G&A expenses of a segment incurred by another segment shall be removed from the incurring segment's G&A expense pool. They shall be allocated to the segment for which the expenses were incurred on the basis of the beneficial or causal relationship between the expenses incurred and all benefiting or causing segments. If the expenses are incurred for two or more segments, they shall be allocated using an allocation base common to all such segments.

(b) The G&A expense pool may be combined with other expenses for allocation to final cost objectives provided that—

(1) The allocation base used for the combined pool is appropriate both for the allocation of the G&A expense pool under this Standard and for the allocation of the other expenses; and

(2) Provision is made to identify the components and total of the G&A expense pool separately from the other expenses in the combined pool.

(c) Expenses which are not G&A expenses and are insignificant in amount may be included in the G&A expense pool for allocation to final cost objectives.

(d) The cost input base used to allocate the G&A expense pool shall include all significant elements of that cost input which represent the total activity of the business unit. The cost input base selected to represent the total activity of a business unit during a cost accounting period may be—total cost input, value-added cost input, or single element cost input. The determination of which cost input base best represents the total activity of a business unit must be judged on the basis of the circumstances of each business unit.

(1) A total cost input base is generally acceptable as an appropriate measure of the total activity of a business unit.

(2) Value-added cost input shall be used as an allocation base where inclusion of material and subcontract costs would significantly distort the allocation of the G&A expense pool in relation to the benefits received, and where costs other than direct labor are significant measures of total activity. A value-added cost input base is total cost input less material and subcontract costs.

(3) A single element cost input base; e.g., direct labor hours or direct labor dollars, which represents the total activity of a business unit may be used to allocate the G&A expense pool where it produces equitable results. A single element base may not produce equitable results where other measures of activity are also significant in relation to total activity. A single element base is inappropriate where it is an insignificant part of the total cost of some of the final cost objectives.

(e) Where, prior to the effective date of this Standard, a business unit's disclosed or established cost accounting practice was to use a cost of sales or sales base, that business unit may use the transition method set out in Appendix A hereof.

(f) Cost input shall include those expenses which by operation of this Standard are excluded from the G&A expense pool and are not part of a combined pool of G&A expenses and other expenses allocated using the same allocation base.

(g) (1) Allocations of the home office expenses of (i) line management of particular segments or groups of segments, (ii) residual expenses, and (iii) directly allocated expenses related to the management and administration of the receiving segment as a whole shall be included in the receiving segment's G&A expense pool.

(2) Any separate allocation of the expenses of home office (i) centralized service functions, (ii) staff management of specific activities of segments, and (iii) central payments or accruals, which is received by a segment shall be allocated to the segment cost objectives in proportion to the beneficial or causal relationship between the cost objectives and the expense if such allocation is significant in amount. Where a beneficial or causal relationship for the expense is not identifiable with segment cost objectives, the expense may be included in the G&A expense pool.

(h) Where a segment performs home office functions and also performs as an operating segment having a responsibility for final cost objectives, the expense of the home office functions shall be segregated. These expenses shall be allocated to all benefiting or causing segments, including the segment performing the home office functions, pursuant to disclosed or established accounting practices for the allocation of home office expenses to segments.

(i) For purposes of allocating the G&A expense pool, items produced or worked on for stock or product inventory shall be accounted for as final cost objectives in accordance with the following paragraphs:

(1) Where items are produced or worked on for stock or product inventory in a given cost accounting period, the cost input to such items in that period shall be included only once in the computation of the G&A expense allocation base and in the computation of the G&A expense allocation rate for that period and shall not be included in the computation of the base or rate for any other cost accounting period.

(2) A portion of the G&A expense pool shall be allocated to items produced or worked on for stock or product inventory in the cost accounting period or periods in which such items are produced at the rates determined for such periods except as provided in subparagraph (i)(3) of this subsection.

(3) Where the contractor does not include G&A expense in inventory as part of the cost of stock or product inventory items, the G&A rate of the cost accounting period in which such items are issued to final cost objectives may be used to determine the G&A expenses applicable to issues of stock or product inventory items.

(j) Where a particular final cost objective in relation to other final cost objectives receives significantly more or less benefit from G&A expense than would be reflected by the allocation of such expenses using a base determined pursuant to paragraph (d) of this subsection, the business unit shall account for this particular final cost objective by a special allocation from the G&A expense pool to the particular final cost objective commensurate with the benefits received. The amount of a special allocation to any such final cost objective shall be excluded from the G&A expense pool required by 30.410-40(a), and the particular final cost objective's cost input data shall be excluded from the base used to allocate this pool.

30.410-60 Illustrations.

(a) Business Unit A has been including the cost of scientific computer operations in its G&A expense pool. The scientific computer is used predominately for research and development, rather than for the management and administration of the business unit as a whole. The costs of the scientific computer operation do not satisfy the Standard's definition of G&A expense; however, they may remain in the G&A expense pool unless they can be allocated to business unit cost objectives on a beneficial or causal relationship which is best measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

(b) Segment B performs a budgeting function, the cost of which is included in its G&A expense pool. This function includes the preparation of budgets for another segment. The cost of preparing the budgets for the other segment should be removed from B's G&A expense pool and transferred to the other segment.

(c) (1) Business Unit C has a personnel function which is divided into two parts (i) a vice president of personnel who establishes personnel policy and overall guidance, and (ii) a personnel department which handles hirings, testing, evaluations, etc. The expense of the vice president is included in the G&A expense pool. The expense of the personnel department is allocated to the other indirect cost pools based on the beneficial or causal relationship between that expense and the indirect cost pools. This procedure is in compliance with the requirements of this Standard.

(2) Unit C has included selling costs as part of its G&A expense pool. Business Unit C wishes to continue to include selling costs in its G&A expense pool. Under the provisions of this Standard, Unit C may continue to include selling costs in its G&A pool, and these costs will be allocated over a cost input base selected in accordance with the provisions of 30.410-50(d).

(3) Business Unit C has included R&D and B&P costs in its G&A ex- ense pool. Unit C has used a cost of ales base to allocate its G&A expense ool. As of January 1, 1978 (assumed or purposes of this illustration), the ate on which Unit C must first allo- ate its G&A expense pool in accord- nce with the requirements of this tandard, Unit C has among its final st objectives several cost reimburse- ent contracts and fixed price con- acts subject to the CAS clause (re- rred to as the pre-existing con- acts). If Unit C chooses to use the ansition method in 30.410-50(e):

(i) Unit C shall allocate IR&D and &P costs during the transition riod (from January 1, 1978, to and cluding the cost accounting period ring which the pre-existing con- cts are completed), to the pre-exist- contracts as part of its G&A ex- nse pool using a cost of sales base pursuant to 30.410-50(e) and Appendix A.

(ii) During the transition period such costs, as part of the G&A expense pool, shall be allocated to new cost reimbursement contracts and new fixed price contracts subject to the CAS clause using a cost input base as required by 30.410-50 (d) and (e) and Appendix A.

(iii) Beginning with the cost accounting period after the transition period the IR&D and B&P costs, as part of the G&A expense pool, shall be allocated to all final cost objectives using a cost input base as required by 30.410-50(d). If Unit C chooses not to use the transition method in 30.410-50(e), the contractual provision requiring appropriate equitable adjustment of the prices of affected prime contracts and subcontracts will be implemented.

(4) Business Unit C has accounted for and allocated IR&D and B&P costs in a cost pool separate and apart from the G&A expense pool, Unit C may continue to account for these costs in a separate cost pool under the provision of this Standard. If Unit C is to use a total cost input base, these costs when accounted for and allocated in a cost pool separate and apart from the G&A expense pool will become part of the total cost input base used by Unit C to allocate the G&A expense pool.

(5) Business Unit C has included selling costs as part of its G&A expense pool. Unit C has used a cost of sales base to allocate the G&A expense pool. Unit C desires to continue to allocate selling costs using the costs of sales base. Under the provisions of this Standard, Unit C would account for selling costs as a cost pool separate and apart from the G&A expense pool, and continue to allocate these costs over a cost of sales base. If Unit C uses a total cost input base to allocate the G&A expense pool, the selling costs will become part of the total cost input base.

(d) (1) Business Unit D has accounted for selling costs in a cost pool separate and apart from its G&A expense pool and has allocated these costs using a cost of sales base. Under the provisions of this Standard, Unit D may continue to account for those costs in a separate pool and allocate them using a cost of sales base. Unit D has a total cost input base to allocate its G&A expense pool. The selling costs will become part of the cost input base used by Unit D to allocate the G&A expense pool.

(2) During a cost accounting period, Business Unit D buys $2,000,000 of raw materials. At the end of that cost accounting period, $500,000 of raw materials inventory have not been charged out to contracts or other cost objectives. The $500,000 of raw materials are not part of the total cost input base for the cost accounting period, because they have not been charged to the production of goods and services during that period. If all of the $2,000,000 worth of raw material had been charged to cost objectives during the cost accounting period, the cost input base for the allocation of the G&A expense pool would include the entire $2,000,000.

(3) Business Unit D manufactures a variety of testing devices. During a cost accounting period, Unit D acquires and uses a small building, constructs a small production facility using its own resources, and keeps for its own use one unit of a testing device that it manufactures and sells to its customers. The acquisition cost of the building is not part of the total cost input base; however, the depreciation taken on the building would be part of the total cost input base. The costs of construction of the small production facility are not part of the total cost input base. The requirements of 30.404 provide that those G&A expenses which are identifiable with the constructed asset and are material in amount shall be capitalized as part of the cost of the production facility. If there are G&A expenses material in amount and identified with the constructed asset, these G&A expenses would be removed from the G&A expense pool prior to the allocation of this pool to final cost objectives. The cost of the testing device shall be part of the total cost input base per the requirements of 30.404 which provides that the costs of constructed assets identical with the contractor's regular product shall include a full share o indirect cost.

(e) (1) Business Unit E produces Item Z for stock or product inventory. The business unit does not include G&A expense as part of the inventory cost of these items for costing or financial reporting purposes. A production run of these items occurred during Cost Accounting Period 1. A number of the units produced were not issued during Period 1 and are issued in Period 2. However, those units produced in Period 1 shall be included in the cost input of that period for calculating the G&A expense allocation base and shall not be included in the cost input of Period 2.

(2) Business Unit E should apply the G&A expense rate of Period 1 to those units of Item Z issued during Period 1 and may apply the rate of Period 2 to the units issued in Period 2.

(3) If the practice of Business Unit E is to include G&A expense as part of the cost of stock or product inventory, the inventory cost of all units of Item Z produced in Period 1 and remaining in inventory at the end of Period 1, should include G&A expense using the G&A rate of Period 1.

(f) (1) Business Unit F produced Item X for stock or product inventory. The business unit does not include G&A expense as part of the inventory cost of these items. A production run of these items was started, finished, and placed into inventory in a single cost accounting period. These items are issued during the next cost accounting period.

(2) The cost of items produced for stock or product inventory should be included in the G&A base in the same year they are produced. The cost of such items is not to be included in the G&A base on the basis of when they are issued to final cost objectives. Therefore, the time of issuance of these items from inventory to a final cost objective is irrelevant in computing the G&A base.

(g) The normal productive activity of Business Unit G includes the construction of base operating facilities for others. G uses a total cost input base to allocate G&A expense to final cost objectives. As part of a contract to construct an operating facility, G agrees to acquire a large group of trucks and other mobile equipment to equip the base operating facility. G does not usually supply such equipment. The cost of the equipment constitutes a significant part of the contract cost. A special G&A allocation to this contract shall be agreed to by the parties if they agree that in the circumstances the contract as a whole receives substantially less benefit from the G&A expense pool than that which would be represented by a cost allocation based on inclusion of the contract cost in the total cost input base.

(h) (1) The home office of Segment H separately allocates to benefiting or causing segments significant home office expenses of (i) staff management functions relative to manufacturing, (ii) staff management functions relative to engineering, (iii) central payment of health insurance costs, and (iv) residual expenses. H receives these expenses as separate allocations. H maintains three indirect cost pools: (i) G&A expense, (ii) manufacturing overhead, and (iii) engineering overhead; all home office expenses allocated to H are included in H's G&A expense pool.

(2) This accounting practice of H does not comply with 30.410-50(g)(2). Home office residual expenses should be in the G&A expense pool, and the expenses of the staff management functions relative to manufacturing and engineering should be included in the manufacturing overhead and engineering overhead pools, respectively. The health insurance costs should be allocated in proportion to the beneficial and causal relationship between these costs and H's cost objectives.

APPENDIX A TO 30.410—TRANSITION FROM A COST OF SALES OR SALES BASE TO A COST INPUT BASE

A business unit may use the method described below for transition from the use of a cost of sales or sales base to a cost input base.

(1) Calculate the cost of sales or sales base in accordance with the cost accounting practice disclosed or established prior to the date established by 30.410-80(b) of this Cost Accounting Standard.

(2) Calculate the G&A expense allocation rate using the base determined in subparagraph (1) of this Appendix and use that rate to allocate from the G&A expense pool to the final cost objectives which were in existence prior to the date on which the business unit must first allocate costs in accordance with the requirements of this Cost Accounting Standard.

(3) Calculate a cost input base in compliance with 30.410-50(d) of this Appendix.

(4) Calculate the G&A expense rate using the base determined in subparagraph (3) of this Appendix and use that rate to allocate from the G&A expense pool to those final cost objectives which arise under contracts entered into on or after the date on which the business unit must first allocate costs in accordance with the requirements of this Cost Accounting Standard.

(5) The calculations set forth in paragraphs (1)-(4) of this Appendix shall be performed for each cost accounting period during which final cost objectives described in (2) are being performed.

(6) The business unit shall establish an inventory suspense account. The amount of the inventory suspense account shall be equal to the beginning inventory of contracts subject to the CAS clause of the cost accounting period in which the business unit must first allocate costs in accordance with the requirements of this Cost Accounting Standard.

(7) In any cost accounting period, after the cost accounting periods described in (5) of this Appendix, if the ending inventory of contracts subject to the CAS clause is less than the balance of the inventory suspense account, the business unit shall calculate two G&A expense allocation rates, one to allocate G&A expenses to contracts subject to the CAS clause and one applicable to other work.

(a) The G&A expense pool shall be divided in the proportion which the cost input of the G&A expense allocation base of the contracts subject to the CAS clause bears to the total of the cost input allocation base, selected in accordance with 30.410-50(d), for the cost accounting period.

(b) The G&A expenses applicable to contracts subject to the CAS clause shall be reduced by an amount determined by multiplying the difference between the balance of the inventory suspense account and the ending inventory of contracts subject to the CAS clause by the cost of sales rate, as determined under (1) of this Appendix, of the cost accounting period in which a business unit must first allocate costs in accordance with the requirements of this Cost Accounting Standard.

(8) In any cost accounting period in which such a reduction is made, the balance of the inventory suspense account shall be reduced

to be equal to the ending inventory of contracts subject to the CAS claure of that cost accounting period.

* * * * *

The following illustrates how a business unit would use this transition method.

1. Business Unit R has been using a cost of sales base to allocate its G&A expense pool to final cost objectives. Unit R uses a calendar year as its cost accounting period. On October 1, 1976 (assumed for purposes of this illustration) Cost Accounting Standard 410 becomes effective. On October 2, 1976, Unit R receives a 3-year contract containing the Cost Accounting Standards clause. As a result, Unit R must comply with the requirements of the Standard in the cost accounting period beginning in January 1978.

As of January 3, 1978, Business Unit R has the following contracts:

(1) Contract I—A 4-year contract awarded in January, 1975.

(2) Contract II—A 3-year contract which was negotiated in March 1976, and was awarded on October 2, 1976.

(3) Contract III—A 4-year contract awarded on January 2, 1978.

If Business Unit R chooses to use the transition method provided in 30.410-50(e), it will allocate the G&A expense pool to these contracts as follows:

(a) Contract I—Since Contract I was in existence prior to January 1, 1978, the G&A expense pool shall be allocated to it using a cost of sales base as provided in 30.410-50(e).

(b) Contract II—Since this contract was in existence prior to January 1, 1978, the G&A expense pool shall be allocated to it using a cost of sales base as provided in 30.410-50(e).

(c) Contract III—Since this contract was awarded after January 1, 1978, the G&A expense pool shall be allocated to this contract using a cost input base.

Having chosen to use 30.410-50(e), Business Unit R will use the transition method of allocating the G&A expense pool to final cost objectives until all contracts awarded prior to January 1, 1978, are completed (1979 if the contracts are completed on schedule). Beginning with the cost accounting period subsequent to that time, 1980, Unit R will use a cost input base to allocate the G&A expense pool to all cost objectives. Unit R will also carry forward an inventory suspense account in accordance with the requirements of this Standard.

2.A. Business Unit N is first required to allocate its costs in accordance with the requirements of 30.410 during the fiscal year beginning January 1, 1978. Unit N has used a cost of sales base to allocate its G&A expense pool.

During the years 1978, 1979, 1980, Business Unit N reported the following data:

	Contracts prior to Jan. 1, 1978				Contracts after Jan. 1, 1978		
	Total	Non-CAS work	CAS-fixed price work	CAS-cost contracts	Non-CAS work	CAS-fixed price work	CAS-cost contracts
Year 1978:							
Beginning inventory	$500	300	200	0	0	0	0
Cost input	+3000	400	600	700	500	500	300
Total	3500	700	800	700	500	500	300
Cost of sales	−3000	600	550	700	450	400	300
Ending inventory	500	100	250	0	50	100	0
Year 1979:							
Beginning inventory	500	100	250	0	50	100	0
Cost input	+3000	400	600	700	500	500	300
Total	3500	500	850	700	550	600	300
Cost of sales	−2500	450	650	700	150	250	300
Ending inventory	1000	50	200	0	400	350	0
Year 1980:							
Beginning inventory	1000	50	200	0	400	350	0
Cost input	+3000	400	600	700	500	500	300
Total	4000	450	800	700	900	850	300
Cost of sales	−3250	450	800	700	450	550	300
Ending inventory	750	0	0	0	450	300	0

NOTES:
Operating data is in thousands of dollars.
G. & A. expense $375,000 in accordance with the requirements of this standard.

Work existing prior to January 1, 1978, may include—

(1) Government contracts which contain the CAS clause;

(2) Government contracts which do not contain the CAS clause;

(3) Contracts other than Government contracts or customer orders; and

(4) Production not specifically identified with contracts or customer orders under production or work orders existing prior to the date on which a business unit must first allocate its costs in compliance with this Standard and which are limited in time or quantity.

Production under standing or unlimited work orders, continuous flow processes and the like, not identified with contracts or customer orders are to be treated as final cost objectives awarded after the date on which a business unit must first allocate its costs in compliance with the requirements of this Standard.

Business Unit N may allocate the G&A expense pool as follows:

[In dollars]

	Year 1978		Year 1979		Year 1980	
1. G. & A. expense pool		375		375		375
Cost of sales rate	375/3,000=	.125	375/2,500=	.15	375/3,250=	.115
Cost input rate	375/3,000=	.125	375/3,000=	.125	375/3,000=	.125
2. G. & A. allocations:						
Prior contracts:						
Non-CAS work	600×0.125=	75.00	450×0.15=	67.50	450×0.115=	51.75
CAS-fixed price work	550×0.125=	68.75	650×0.15=	97.50	800×0.115=	92.00
CAS-cost contracts	700×0.125=	87.50	700×0.15=	105.00	700×0.115=	80.50
After contracts:						
Non-CAS work	500×0.125=	62.50	500×0.125=	62.50	500×0.125=	62.50
CAS-fixed price work	500×0.125=	62.50	500×0.125=	62.50	500×0.125=	62.50
CAS-cost contracts	300×0.125=	37.50	300×0.125=	37.50	300×0.125=	37.55
		393.75	432.50		386.80	
3. Inventory suspense account [1]		200				
G. & A. rate applicable		.125				

[1] Beginning inventory of contracts subject to the CAS clause, January 1978.

2.B. In cost accounting period 1982, Business Unit N has an ending inventory of contracts subject to the CAS clause of $100,000. This is the first cost accounting period after the transition in which the amount of the ending inventory is less than the amount of the inventory suspense account. During this cost accounting period, Business Unit N had G&A expenses of $410,000 and cost input of $3,500,000; $1,500,000 applicable to contracts subject to the CAS clause and $2,000,000 applicable to other work.

Business Unit N would compute its G&A expense allocation rate applicable to contracts subject to the CAS clause as follows:

(1) Amount of inventory suspense account	$200,000
Amount of ending inventory	100,000
Difference	100,000
G. & A. rate applicable (see 2.A. above)	×0.125
Adjustment to G. & A. expense applicable to contracts subject to the CAS clause	12,500
(2) G. & A. expense pool	410,000
G. & A. expenses applicable to contracts subject to the CAS clause ($1,500,000/$3,500,000 ×$410,000)	175,890
G. & A. expenses applicable to other work	234,110
(3) G. & A. expenses applicable to contracts subject to the CAS clause	175,890
Adjustment to G. & A. expenses applicable to contracts subject to the CAS clause	−12,500
G. & A. expenses allocable to contracts subject to the CAS clause	163,390

(4) G. & A. expense allocation rate applicable to contracts subject to the CAS clause for cost accounting period 1982—$163,390/$1,500,000=0.109.

The amount of the inventory suspense account would be reduced to $100,000.

30.410-61 Interpretation. [Reserved]

30.410-62 Exemption. [Reserved]

30.410-63 Effective date. [Reserved]

30.411 Cost accounting standard—accounting for acquisition costs of material.

30.411-10 [Reserved]

30.411-20 Purpose.

(a) The purpose of this Cost Accounting Standard is to provide criteria for the accounting for acquisition costs of material. The Standard includes provisions on the use of inventory costing methods. Consistent application of this Standard will improve the measurement and assignment of costs to cost objectives.

(b) This Cost Accounting Standard does not cover accounting for the acquisition costs of tangible capital assets nor accountability for Government-furnished materials.

30.411-30 [Reserved]

30.411-40 Fundamental requirement.

(a) The contractor shall have, and consistently apply, written statements of accounting policies and practices for accumulating the costs of material and for allocating costs of material to cost objectives.

(b) The cost of units of a category of material may be allocated directly to a cost objective provided the cost objective was specifically identified at the time of purchase or production of the units.

(c) The cost of material which (1) is used solely in performing indirect functions, or (2) is not a significant element of production cost, whether or not incorporated in an end product, may be allocated to an indirect cost pool. When significant, the cost of such indirect material not consumed in a cost accounting period shall be established as an asset at the end of the period.

(d) Except as provided in paragraphs (b) and (c) of this subsection, the cost of a category of material shall be accounted for in material inventory records.

(e) In allocating to cost objectives the costs of a category of material issued from company-owned material inventory, the costing method used shall be selected in accordance with the provisions of 30.411-50, and shall be used in a manner which results in systematic and rational costing of issues of material to cost objectives. The same costing method shall, within the same business unit, be used for similar categories of materials.

30.411-50 Techniques for application.

(a) Material cost shall be the acquisition cost of a category of material, whether or not a material inventory record is used. The purchase price of material shall be adjusted by extra charges incurred or discounts and credits earned. Such adjustments shall be charged or credited to the same cost objective as the purchase price of the material, except that where it is not practical to do so, the contractor's policy may provide for the consistent inclusion of such charges or credits in an appropriate indirect cost pool.

(b) One of the following inventory costing methods shall be used when issuing material from a company-owned inventory:

(1) The first-in, first-out (FIFO) method.

(2) The moving average cost method.

(3) The weighted average cost method.

(4) The standard cost method.

(5) The last-in, first-out (LIFO) method.

(c) The method of computation used for any inventory costing method selected pursuant to the provisions of this Standard shall be consistently followed.

(d) Where the excess of the ending inventory over the beginning inventory of material of the type described in 30.411-40(c) is estimated to be significant in relation to the total cost included in the indirect cost pool, the cost of such unconsumed material shall be established as an asset at the end of the period by reducing the indirect cost pool by a corresponding amount.

30.411-60 Illustrations.

(a) Contractor "A" has one contract which requires two custom-ordered, high-value, airborne cameras. The contractor's established policy is to order such special items specifically identified to a contract as the need arises and to charge them directly to the contract. Another contract is received which requires three more of these cameras, which the contractor purchases at a unit cost which differs from the unit cost of the first two cameras ordered. When the purchase orders were placed, the contractor identified the specific contracts on which the cameras being purchased were to be used. Although these cameras are identical, the actual cost of each camera is charged to the contract for which it was acquired without establishing a material inventory record. This practice would not be a violation of this Standard.

(b) (1) A Government contract requires use of electronic tubes identified as "W." The contractor expects to receive other contracts requiring the use of tubes of the same type. In accordance with its written policy, the contractor establishes a material inventory record for electronic tube "W," and allocates the cost of units issued to the existing Government contract by the FIFO method. Such a practice would conform to the requirements of this Standard.

(2) The contractor is awarded several additional contracts which require an electronic tube which the contractor concludes is similar to the one described in subparagraph (b)(1) of this subsection and which is identified as "Y." At the time a purchase order for these tubes is written, the contractor cannot identify the specific number of tubes to be used on each contract. Consequently, the contractor establishes an inventory record for these tubes and allocates their cost to the contracts on an average cost method. Because a FIFO method is used for a similar category of material within the same business unit, the use of an average cost method for "Y" would be a violation of this Standard.

(c) A contractor complies with the Cost Accounting Standard on standard costs (30.407), and he uses a standard cost method for allocating the costs of essentially all categories of material. Also, it is the contractor's established practice to charge the cost of purchased parts which are incorporated in his end products, and which are not a significant element of production cost to an indirect cost pool. Such practices conform to this Standard.

(d) A contractor has one established inventory for type "R" transformers. The contractor allocates by the LIFO method the current costs of the individual units issued to Government contracts. Such a practice would conform to the requirements of this Standard.

(e) A contractor has established inventories for various categories of material which are used on Government contracts. During the year the contractor allocates the costs of the units of the various categories of material issued to contracts by the moving average cost method. The contractor uses the LIFO method for tax and financial reporting purposes and, at year end, applies a pooled LIFO inventory adjustment for all categories of material to Government contracts. This application of pooled costs to Government contracts would be a violation of this Standard because the lump sum adjustment to all of the various categories of material is, in effect, a noncurrent repricing of the material issues.

30.411-61 Interpretation. [Reserved]

30.411-62 Exemption. [Reserved]

30.411-63 Effective date. [Reserved]

30.412 Cost accounting standard for composition and measurement of pension cost.

30.412-10 [Reserved]

30.412-20 Purpose.

The purpose of this Standard is to provide guidance for determining and measuring the components of pension cost. The Standard establishes the basis on which pension costs shall be assigned to cost accounting periods. The provisions of this Cost Accounting Standard should enhance uniformity and consistency in accounting for pension costs and thereby increase the probability that those costs are properly allocated to cost objectives.

30.412-30 [Reserved]

30.412-40 Fundamental requirement.

(a) *Components of pension cost.* (1) For defined-benefit pension plans, the components of pension cost for a cost accounting period are (i) the normal cost of the period, (ii) a part of any unfunded actuarial liability, (iii) an interest equivalent on the unamortized portion of any unfunded actuarial liability, and (iv) an adjustment for any actuarial gains and losses.

(2) For defined-contribution pension plans, the pension cost for a cost accounting period is the net contribution required to be made for that period, after taking into account dividends and other credits, where applicable.

(b) *Measurement of pension cost.* (1) For defined-benefit pension plans, the amount of pension cost of a cost accounting period shall be determined by use of an actuarial cost method which measures separately each of the components of pension cost set forth in subparagraph (a)(1) of this subsection, or which meets the requirements set forth in 30.412-50(b)(2).

(2) Each actuarial assumption used to measure pension cost shall be separately identified and shall represent the contractor's best estimates of anticipated experience under the plan, taking into account past experience and reasonable expectations. The validity of the assumptions used may be evaluated on an aggregate, rather than on an assumption-by-assumption, basis.

(c) *Assignment of pension cost.* The amount of pension cost computed for a cost accounting period is assignable only to that period. Except for pay-as-you-go plans, the cost assignable to a period is allocable to cost objectives of that period to the extent that liquidation of the liability for such cost can be compelled or liquidation is actually effected in that period. For pay-as-you-go plans, the entire cost assignable to a period is allocable to cost objectives of that period only if the payment of benefits earned by plan participants can be compelled. If such payment is optional with the company, the amount of assignable costs allocable to cost objectives of that period is limited to the amount of benefits actually paid to retirees or beneficiaries in that period.

30.412-50 Techniques for application.

(a) *Components of pension cost.* (1) Any portion of an unfunded actuarial liability included as a separately identified part of the pension cost of a cost accounting period shall be included in equal annual installments. Each installment shall consist of an amortized portion of the unfunded actuarial liability plus an interest equivalent on the unamortized portion of such liability. The period of amortization shall be established as follows:

(i) If amortization of an unfunded actuarial liability has begun prior to the date this Standard first becomes applicable to a contractor, no change in the amortization period is required by this Standard.

(ii) If amortization of an unfunded actuarial liability has not begun prior to the date this Standard first becomes applicable to a contractor, the amortization period shall begin with the period in which the Standard becomes applicable and shall be no more than 30 years nor less than 10 years. However, if the plan was in existence as of January 1, 1974, the amortization period shall be no more than 40 years nor less than 10 years.

(iii) Each unfunded actuarial liability resulting from the institution of new pension plans or from adoption of improvements to pension plans subsequent to the date this Standard first becomes applicable to a contractor shall be amortized over no more than 30 years nor less than 10 years.

(2) Pension costs applicable to prior years that were specifically unallowable in accordance with then existing Government contractual provisions shall be separately identified and eliminated from any unfunded actuarial liability being amortized pursuant to the provision of subparagraph (a)(1) of this subsection, or from future normal costs if the actuarial cost method in use does not separately develop an unfunded actuarial liabil-

ity. Interest earned on funded unallowable pension costs, based on the valuation rate of return, need not be included by contractors as a reduction of future years' computations of pension costs made pursuant to this Standard.

(3) A contractor shall establish and consistently follow a policy for selecting specific amortization periods for unfunded actuarial liabilities, if any, that are developed under the actuarial cost method in use. Such policy may give consideration to factors such as the size and nature of unfunded actuarial liabilities.

(4) Actuarial assumptions used in calculating the amount of an unfunded actuarial liability shall be the same as those used for other components of pension cost. If any assumptions are changed during an amortization period, the resulting increase or decrease in an unfunded actuarial liability shall be separately amortized over no more than 30 years nor less than 10 years.

(5) Actuarial gains and losses shall be identified separately from unfunded actuarial liabilities that are being amortized pursuant to the provisions of this Standard. The accounting treatment to be afforded to such gains and losses shall be consistently applied for each pension plan.

(6) An excise tax assessed pursuant to a law or regulation because of inadequate or delayed funding of a pension plan is not a component of pension cost.

(7) If any portion of the pension cost computed for a cost accounting period is not funded in that period, no amount for interest on the portion not funded in that period shall be a component of pension cost of any future cost accounting period. Conversely, if a contractor prematurely funds pension costs in a current cost accounting period, the interest earned on such premature funding, based on the valuation rate of return, may be excluded from future years' computations of pension cost made pursuant to this Standard.

(8) For purposes of this Standard, defined-benefit pension plans funded exclusively by the purchase of individual or group permanent insurance or annuity contracts shall be treated as defined-contribution pension plans. However, all other defined-benefit pension plans administered wholly or in part through insurance company contracts shall be subject to the provisions of this Standard relative to defined-benefit pension plans.

(9) If a pension plan is supplemented by a separately-funded plan which provides retirement benefits to all of the participants in the basic plan, the two plans shall be considered as a single plan for purposes of this Standard. If the effect of the combined plans is to provide defined-benefits for the plan participants, the combined plan shall be treated as a defined-benefit plan for purposes of this Standard.

(10) A multiemployer pension plan established pursuant to the terms of a collective bargaining agreement shall be considered to be a defined-contribution pension plan for purposes of this Standard.

(11) A pension plan applicable to colleges and universities that is part of a State pension plan shall be considered to be a defined-contribution pension plan for purposes of this Standard.

(b) *Measurement of pension cost.* (1) The amount of pension cost assignable to cost accounting periods shall be measured by the accrued benefit cost method or by a projected benefit cost method which identifies separately normal costs, any unfunded actuarial liability, and periodic determinations of actuarial gains and losses, except as provided in subparagraph (b)(2) of this subsection.

(2) Any other projected benefit cost method may be used, provided that:

(i) The method is used by the contractor in measuring pension costs for financial accounting purposes;

(ii) The amount of pension cost assigned to a cost accounting period computed under such method is reduced by the excess, if any, of the value of the assets of the pension fund over the actuarial liability of the plan as determined by a projected benefit cost method set forth in subparagraph (b)(1) of this subsection;

(iii) The contractor accumulates supplementary information identifying the actuarial gains and losses (and, separately, gains or losses resulting from changed actuarial assumptions) that have occurred since the last determination of gains and losses and the extent to which such gains and losses have been amortized through subsequent pension contributions or offset by gains and losses in subsequent cost accounting periods, and

(iv) The cost of future pension benefits is spread over the remaining average working lives of the work force.

(3) Irrespective of the projected benefit cost method used, the calculation of normal cost shall be based on a percentage of payroll for plans where the pension benefit is a function of salaries and wages and on employee service for plans where the pension benefit is not a function of salaries and wages.

(4) The cost of benefits under a pay-as-you-go pension plan shall be measured in the same manner as are the costs of defined-benefit plans whose benefits are provided through a funding agency.

(5) Actuarial assumptions should reflect long-term trends so as to avoid distortions caused by short-term fluctuations.

(6) Pension cost shall be based on provisions of existing pension plans. This shall not preclude contractors from making salary projections for plans whose benefits are based on salaries and wages, or from considering improved benefits for plans which provide that such improved benefits must be made.

(7) If the evaluation of the validity of actuarial assumptions shows that, in the aggregate, the assumptions were not reasonable, the contractor shall (i) identify the major causes for the resultant actuarial gains or losses and (ii) provide information as to the basis and rationale used for retaining or revising such assumptions for use in the ensuing cost accounting period(s).

(c) *Assignment of pension cost.* (1) Amounts funded in excess of the pension cost computed for a cost accounting period pursuant to the provisions of this Standard shall be applied to pension costs of future cost accounting periods.

(2) Evidence that the liquidation of a liability for pension cost can be compelled includes (i) provisions of law such as the funding provisions of the Employee Retirement Income Security Act of 1974, except as provided in subparagraph (c)(3) of this subsection, (ii) a contractual agreement which requires liquidation of the liability, or (iii) the existence of rights by a third party to required liquidation of the liability.

(3) Any portion of pension cost computed for a cost accounting period that is deferred to future periods pursuant to a waiver granted under provisions of the Employee Retirement Income Security Act of 1974, shall not be assigned to the current period. Rather, such costs shall be assigned to the cost accounting period(s) in which the funding takes place.

(4) A liability for pension cost for a cost accounting period (or, for pay-as-you-go plans, for payments to retirees or beneficiaries for a period) shall be considered to be liquidated in the period if funding is effected by the date established for filing a Federal income tax return (including authorized extensions). For contractors not required to file Federal income tax returns, the date shall be that established for filing Federal corporation income tax returns.

30.412-60 Illustrations.

(a) *Components of pension cost.* (1) Contractor A has a defined-benefit pension plan for its employees. The contractor's policy has been to compute and fund as annual pension cost normal cost plus only interest on the unfunded actuarial liability. Pursuant to 30.412-40(a)(1), the components of pension cost for a cost accounting period must now include not only the normal cost for the period and interest on the unfunded actuarial liability, but also an amortized portion of the unfunded actuarial liability. The amortization of the liability and the interest equivalent on the unamortized portion of the liability must be computed in equal annual installments.

(2) Contractor B has insured pension plans for each of two small groups of employees. One plan is funded through a group permanent insurance contract; the other plan is funded through a group deferred annuity con-

tract. Both plans provide for defined benefits. Pursuant to 30.413-50(a)(8), for purposes of this Standard the plan financed through a group permanent insurance contract shall be considered to be a defined-contribution pension plan; the net premium required to be paid for a cost accounting period (after deducting dividends and any credits) shall be the pension cost for that period. However, the group deferred annuity plan is subject to the provisions of this Standard that are applicable to defined-benefit plans.

(3) Contractor C provides pension benefits for certain hourly employees through a multiemployer defined-benefit plan. Under the collective bargaining agreement, the contractor pays six cents into the fund for each hour worked by the covered employees. Pursuant to 30.412-50(a)(10), the plan shall be considered to be a defined-contribution pension plan. The payments required to be made for a cost accounting period shall constitute the assignable pension cost for that period.

(4) Contractor D provides pension benefits for certain employees hrough a defined-contribution pen- ion plan. However, the contractor has separate fund which is used to sup- lement pension benefits provided for ll of the participants in the basic plan n order to provide a minimum month- y retirement income to each partici- ant. Pursuant to 30.412-50(a)(9), the wo plans shall be considered as a ingle plan for purposes of this Stand- rd. Because the effect of the supple- ental fund is to provide defined-ben- fits for the plan's participants, the rovisions of this Standard relative to efined-benefit pension plans shall be pplicable to the combined plan.

(b) *Measurement of pension cost.* (1) ontractor E has a pension plan hose costs are assigned to cost ac- unting periods by use of an actuarial st method which does not separately entify actuarial gains and losses or e effect on pension cost resulting om changed actuarial assumptions. this cost method is used to measure sts for financial accounting pur- ses, it may be used for purposes of is Standard, provided that the con- ctor develops the supplementary information set forth in 30.412-50(b)(2)(iii) regarding such gains and losses and changed actuarial assumptions. In addition, the contractor must develop an actuarial liability determined by a projected benefit cost method set forth in 30.412-50(b)(1). If the resultant actuarial liability is less than the value of the pension fund, the pension cost computed for the cost accounting period must be reduced by that amount (30.412-50(b)(2)(ii)).

(2) For a number of years Contractor F has had a pay-as-you-go pension plan which provides for payments of $200 a month to employees after retirement. The contractor is currently making such payments to several retired employees and charges such payments against current income as its pension cost. For the current cost accounting period, the contractor paid benefits totaling $24,000. Contractor F's method of accounting for pension cost does not comply with the provisions of this Standard relative to pay-as-you-go plans as set forth in 30.412-40(c) and 30.412-50(b)(4). The contractor should:

(i) Compute, by use of an actuarial cost method, its actuarial liability for benefits earned by plan participants. This entire liability is always unfunded for a pay-as-you-go plan.

(ii) Compute a level amount which, including an interest equivalent, would amortize the unfunded actuarial liability over a period of no less than 10 or more than 40 years.

(iii) Compute, by use of the actuarial cost method selected, a normal cost for the period.

The sum of subdivisions (b)(2)(ii) and (iii) of this subsection represents the amount of pension cost assignable to the period. If payment of benefits earned by plan participants can be compelled, the entire amount of cost assignable to the period is allocable to cost objectives of that period. If such payments cannot be compelled, the amount of assignable cost allocable to cost objectives of that period is limited to the amount of benefits actually paid in that period ($24,000).

(3) Contractor G has two defined-benefit pension plans which provide for fixed dollar payments to hourly

employees. Under one plan, the contractor's actuary believes that the contractor will be required to increase the level of benefits by specified percentages over the next several years. In calculating pension costs, the contractor may not assume future benefits greater than that currently required by the plan. With regard to the second plan, a collective bargaining agreement negotiated with the employee's labor union provided that pension benefits will increase by specified percentages over the next several years. Because the improved benefits are required to be made, the contractor can consider such increased benefits in computing pension costs for the current cost accounting period (30.412-50(b)(6)).

(c) *Assignment of pension cost.* Contractor H has a trusteed pension plan for its salaried employees. It computes $1 million of pension cost for a cost accounting period. Pursuant to the funding provisions of the Employee Retirement Income Security Act of 1974, the company must fund at least $800,000. Because liquidation of the liability for the portion of pension cost required by law to be funded ($800,000) can be compelled, such cost is allocable to cost objectives of the period, in accordance with 30.412-40(c). If Contractor H can be compelled by the trustee or the plan participants to fund the remaining $200,000, the liability therefor is also allocable to cost objectives of that period.

30.412-61 Interpretation. [Reserved]

30.412-62 Exemption. [Reserved]

30.412-63 Effective date. [Reserved]

30.413 Adjustment and allocation of pension cost.

30.413-10 [Reserved]

30.413-20 Purpose.

A purpose of this Standard is to provide guidance for adjusting pension cost by measuring actuarial gains and losses and assigning such gains and losses to cost accounting periods. The Standard also provides the bases on which pension cost shall be allocated to segments of an organization. The provisions of this Cost Accounting Standard should enhance uniformity and consistency in accounting for pension costs.

30.413-30 [Reserved]

30.413-40 Fundamental requirement.

(a) *Assignment of actuarial gains and losses.* Actuarial gains and losses shall be calculated annually and shall be assigned to the cost accounting period for which the actuarial valuation is made and subsequent periods.

(b) *Valuation of the assets of a pension fund.* The value of all pension fund assets shall be determined under an asset valuation method which takes into account unrealized appreciation and depreciation of pension fund assets, and shall be used in measuring the components of pension cost.

(c) *Allocation of pension cost to segments.* Contractors shall allocate pension cost to each segment having participants in a pension plan. A separate calculation of pension cost for a segment is required when the conditions set forth in 30.413-50(c) (2) and (3) are present. When these conditions are not present, allocations may be made by calculating a composite pension cost for two or more segments and allocating this cost to these segments by means of an allocation base.

30.413-50 Techniques for application.

(a) *Assignment of actuarial gains and losses.* (1) In accordance with the provisions of 30.412, actuarial gains and losses shall be identified separately from unfunded actuarial liabilities being amortized.

(2) Actuarial gains and losses determined under a pension plan whose costs are measured by an immediate-gain actuarial cost method shall be amortized over a 15-year period in equal annual installments, beginning with the date as of which the actuarial valuation is made. The installment for a cost accounting period shall consist of an element for amortization of the gain or loss and an element for interest on the unamortized balance at the beginning of the period. If the actuarial gain or loss determined for a cost accounting period is not material, the entire gain or loss may be included as

a component of the current or ensuing year's pension cost.

(3) Actuarial gains and losses applicable to a pension plan whose costs are measured by a spread-gain actuarial cost method shall be included as part of current and future normal cost and spread over the remaining average working lives of the work force.

(b) *Valuation of the assets of a pension fund.* (1) The actuarial value of the assets of a pension fund shall be used (i) in measuring actuarial gains and losses, and (ii) for purposes of measuring other components of pension cost.

(2) The actuarial value of the assets of a pension fund may be determined by the use of any recognized asset valuation method which provides equivalent recognition of appreciation and depreciation of pension fund assets. However, the total asset value produced by the method used shall fall within a corridor from 80 to 120 percent of the market value of the assets, determined as of the valuation date. If the method produces a value that falls outside the corridor, the value of the assets shall be adjusted to equal the nearest boundary of the corridor.

(3) The method selected for valuing pension fund assets shall be consistently applied from year to year within each plan.

(4) The provisions of subparagraphs b) (1) through (3) of this subsection are not applicable to plans that are unded with insurance companies under contracts where the insurance ompany guarantees benefit payments.

(c) *Allocation of pension cost to segments.* (1) For contractors who com- ute a composite pension cost covering lan participants in two or more seg- ents, the base to be used for allocat- g such costs shall be representative the factors which the pension bene- s are based. For example, a base nsisting of salaries and wages shall used for pension costs that are cal- lated as a percentage of salaries and ges; a base consisting of the number employees shall be used for pension ts that are calculated as an amount employee.

(2) Separate pension cost for a segment shall be calculated whenever any of the following conditions exist for that segment, provided that such condition(s) materially affect the amount of pension cost allocated to the segment:

(i) There is a material termination gain or loss attributable to the segment,

(ii) The level of benefits, eligibility for benefits, or age distribution is materially different for the segment than for the average of all segments, or

(iii) The appropriate assumptions relating to termination, retirement age, or salary scale are, in the aggregate, materially different for the segment than for the average of all segments. Calculations of termination gains or losses shall give consideration to factors such as unexpected early retirements, benefits becoming fully vested, and reinstatements or transfers without loss of benefits. An amount may be estimated for future reemployments.

(3) Pension cost shall also be separately calculated for a segment under circumstances where—

(i) The pension plan for that segment becomes merged with that of another segment, and

(ii) The ratios of assets to actuarial liabilities for each of the merged plans are materially different from one another after applying the benefits in effect after the merger.

(4) Whenever the pension cost of a segment is required to be calculated separately pursuant to subparagraphs (c) (2) and (3) of this subsection, such calculations shall be prospective only; pension costs need not be redetermined for prior years.

(5) For a segment whose pension costs are required to be calculated separately pursuant to subparagraph (c)(2) of this subsection, there shall be an initial allocation of a share in the undivided pension fund assets to that segment, as follows:

(i) If the necessary data are readily determinable, the amount of assets to be allocated to the segment shall be the amount of funds contributed by, or on behalf of, the segment, increased by income received on such funds, and decreased by benefits and expenses paid from such funds; (ii) if the data specified in subdivision (i) of this subparagraph (c)(5), are not readily determinable the actuarial value of the pension fund's assets shall be allocated to the segment in a manner consistent with the actuarial cost method or methods used to compute pension cost. For a segment whose pension costs are required to be calculated separately pursuant to subparagraph (c)(3) of this subsection the initial allocation of assets to the segment shall be the market value of the segment's assets as of the date of the merger.

(6) If, prior to the time a contractor is required to use this Standard, it has been calculating pension cost separately for individual segments, the amount of assets previously allocated to those segments need not be changed.

(7) After the initial allocation of assets, the contractor shall maintain a record of the portion of subsequent contributions, income, benefit payments, and expenses attributable to the segment and paid from the pension fund; income and expenses shall include a portion of any investment gains and losses attributable to the assets of the pension fund. Fund income and expenses shall be allocated to the segment in the same proportion that the assets allocated to the segment bears to total fund assets as of the beginning of the period for which fund income and expenses are being allocated.

(8) If plan participants transfer among segments, contractors need not transfer assets or liabilities unless a transfer is sufficiently large to distort the segments' ratio of fund assets to actuarial liabilities.

(9) Contractors who separately calculate the pension cost of one or more segments may calculate such cost either for all pension plan participants assignable to the segment(s) or for only the active participants of the segment(s). If costs are calculated only for active participants, a separate segment shall be created for all of the inactive participants of the pension plan and the cost thereof shall be calculated. When a contractor makes such an election, assets shall be allocated to the segment for inactive participants in accordance with paragraphs (c) (5), (6), and (7) of this section. When an employee of a segment becomes inactive, assets shall be transferred from that segment to the segment established to accumulate the assets and actuarial liabilities for the inactive plan participants. The amount of funds transferred shall be that portion of the actuarial liabilities for these inactive participants that have been funded. If inactive participants become active, funds and liabilities shall similarly be transferred to the segments to which the participants are assigned. Such transfers need be made only as of the last day of a cost accounting period. The total annual pension cost for a segment having active lives shall be the amount calculated for the segment plus an allocated portion of the pension cost calculated for the inactive participants. Such an allocation shall be on the same basis as that set forth in subparagraph (c)(1) of this subsection.

(10) Where pension cost is separately calculated for one or more segments, the acturaial cost method used for a plan shall be the same for all segments, as required by 30.412-50(b). Unless a separate calculation of pension cost for a segment is made because of a condition set forth in subdivision (c)(2)(iii) of this subsection, the same actuarial assumptions may be used for all segments covered by a plan.

(11) If a pension plan has participants in the home office of a company, the home office shall be treated as a segment for purposes of allocating the cost of the pension plan. Pension cost allocated to a home office shall be a part of the costs to be allocated in accordance with the appropriate requirements of 30.403.

(12) If a segment is closed, the contractor shall determine the difference between the actuarial liability for the segment and the market value of the assets allocated to the segment, irrespective of whether or not the pension plan is terminated. The determination of the actuarial liability shall give consideration to any requirements imposed by agencies of the United States Government. In computing the market value of assets for the segment, if the contractor has not al-

ready allocated assets to the segment, such an allocation shall be made in accordance with the requirements of subdivisions (c)(5) (i) and (ii) of this section. The market value of the assets allocated to the segment shall be the segment's proportionate share of the total market value of the assets of the pension fund. The calculation of the difference between the market value of the assets and the actuarial liability shall be made as of the date of the event (e.g., contract termination) that caused the closing of the segment. If such a date cannot be readily determined, or if its use can result in an inequitable calculation, the contracting parties shall agree on an appropriate date. The difference between the market value of the assets and the actuarial liability for the segment represents an adjustment of previously-determined pension costs.

30.413-60 Illustrations.

(a) *Assignment of actuarial gains and losses.* Contractor A has a defined-benefit pension plan whose costs are measured under an immediate-gain actuarial cost method. The contractor makes actuarial valuations every other year. In the past, at each valuation date, the contractor has calculated the actuarial gains and losses that have occurred since the previous valuation date and has merged such gains and losses with the unfunded actuarial liabilities that are being amortized. Pursuant to 30.413-40(a), the contractor must make an actuarial valuation annually. Any actuarial gains or losses measured must be separately amortized over a 15-year period beginning with the period for which the actuarial valuation is made (30.413-50(a) (1) nd (2)).

(b) *Valuation of the assets of a pension fund.* Contractor B has a defined enefit pension plan, the assets of hich are invested in equity securities, ebt securities, and real property. The ontractor, whose cost accounting eriod is the calendar year, has an nnual actuarial valuation of the penon fund in June of each year; the efctive date of the valuation is the benning of that year. The contractor's ethod for valuing the assets of the nsion fund is as follows: debt securities expected to be held to maturity are valued on an amortized basis running from initial cost at purchase to par value at maturity; land and buildings are valued at cost less depreciation taken to date; all equity securities and debt securities not expected to be held to maturity are valued on the basis of a 5-year moving average of market values. In making an actuarial valuation, the contractor must compare the values reached under the asset valuation method used with the market values of all of the assets (30.413-40(b)). In this case, the assets are valued as of January 1 of that year. The contractor established the following values as of the valuation date.

	Asset valuation method	Market
Cash	$100,000	$100,000
Equity securities	6,000,000	7,800,000
Debt securities expected to be held to maturity	550,000	600,000
Other debt securities	600,000	750,000
Land and buildings, net of depreciation	400,000	750,000
Total	$7,650,000	$10,000,000

Section 30.413-50(b)(2) requires that the total value of the assets of the pension fund fall within a corridor from 80 to 120 percent of market. The corridor for the plan's assets as of January 1 is from $12 million to $8 million. Because the asset value reached by the contractor—$7,650,000—falls outside the corridor, the value reached must be adjusted to equal the nearest boundary of the corridor: $8 million. In subsequent years the contractor must continue to use the same method for valuing assets (30.413-50(b)(3)). If the value produced falls inside the corridor, such value shall be used in measuring pension cost.

(c) *Allocation of pension cost to segments.* (1) Contractor C has a defined-benefit pension plan covering employees at five segments. Pension cost is computed by use of an immediate-gain actuarial cost method. One segment (X) is devoted primarily to performing work for the Government. During the current cost accounting period, Segment X had a large and unforeseeable reduction of employees because of a contract termination at the convenience of the Government and because the contractor did not receive an anticipated follow-on contract to one that was completed during the period. As a result, the plan has a large net termination gain. As a consequence of this gain a separate calculation of the pension cost for Segment X would result in a materially different allocation of costs to that segment than would a composite calculation and allocation by means of a base. Accordingly, pursuant to 30.413-50(c)(2), the contractor must calculate a separate pension cost for Segment X. In doing so, the entire termination gain must be assigned to Segment X and amortized over 15 years. If the actuarial assumptions for Segment X continue to be substantially the same as for the other segments, the termination gain may be separately amortized and allocated only to Segment X; all other Segment X computations may be included as part of the composite calculation. After the gain is amortized, the contractor is no longer required to separately calculate the costs for Segment X unless subsequent events require such separate calculation.

(2) Contractor D has a defined-benefit pension plan covering employees at 10 segments, all of which have some contracts subject to Cost Accounting Standards. The contractor uses a spread-gain actuarial cost method and calculates pension cost by developing a pension cost rate and applying that rate to the salaries and wages of the work force. One of the segments (Segment Y) is entirely devoted to Government work. The contractor's policy is to place junior employees in this segment. The age distribution of the employees of the segment is so different from that of the other segments that the pension cost for Segment Y would be materially different if computed separately than if computed as part of a computation which averages the ages of all employees covered by the plan. Pursuant to 30.413-50(c)(2), the contractor must compute the pension cost for Segment Y as if it were a separate pension plan. Accordingly, the contractor must allocate a portion of the pension fund's assets to Segment Y. Memorandum records may be used in making the allocation. However, because this portion cannot be readily determined, 30.413-50(c)(5)(ii) permits the allocation to be made on the basis of the actuarial cost method or methods used to calculate prior years' pension cost for the plan. Once the assets have been allocated, in future cost accounting periods the contractor shall make separate pension cost calculations for Segment Y based on the actual age distribution for the segment. Because the factors comprising pension cost for the other nine segments are relatively equal, the contractor may compute pension cost for these nine segments by using composite factors and developing a percentage of payroll for the nine segments. The pension cost allocated to each of the nine segments shall be the product of the percentages developed and the payroll of each segment (30.413-50(c)(1)).

(3) Contractor E has a defined-benefit pension plan which covers employees at 12 segments. The contractor uses composite actuarial assumptions to develop a pension cost for all segments. Three of these segments primarily perform Government work; the work at the other nine segments is primarily commercial. Employee turnover at the segments performing commercial work is relatively stable. However, employment experience at the Government segments has been very volatile; there have been large fluctuations in employment levels and the contractor assumes that this pattern of employment will continue to occur. It is evident that separate termination assumptions for the Government segments and the commercial segments will result in materially different pension costs for the Government segments. Therefore, the cost for these segments must be separately calculated, using the appropriate termination assumptions for these segments (30.413-50(c)(2)(iii)).

(4) Contractor F has a defined-benefit pension plan covering employees at 25 segments. Twelve of these segments primarily perform Government work; the remaining segments perform primarily commercial work. The contractor's records show that the termina-

tion experience and projections for the 12 segments are so different from that of the average of all of the segments that separate pension cost calculations are required for these segments pursuant to 30.413-50(c)(2). However, because the termination experience and projections are about the same for all 12 segments, contractor F may calculate a composite pension cost for the 12 segments and allocate the cost to these segments by use of an appropriate allocation base.

(5) After this Standard becomes applicable to Contractor G, it acquires Contractor H and makes it Segment H. Prior to the merger, each contractor had its own defined-benefit pension plan. Under the terms of the merger, Contractor H's pension plan and plan assets were merged with those of Contractor G. The actuarial assumptions, current salary scale, and other plan characteristics and about the same for Segment H and Contractor G's other segments. However, based on the same benefits at the time of the merger, the plan of Contractor H had a disproportionately larger unfunded actuarial liability than did Contractor G's plan. Any combining of the assets and actuarial liabilities of both plans would result in materially different pension cost allocation to Contractor G's segments than if pen- ion cost were computed for Segment H on the basis that it had a separate ension plan. Accordingly, pursuant to 0.413-50(c)(5), Contractor G must al- ocate to Segment H a portion of the ssets of the combined plan. The mount to be allocated shall be the arket value of Segment H's pension lan assets at the date of the merger, djusted for subsequent receipts and xpenditures applicable to the seg- ent (30.413-50(c)(7)). Contractor G ust use these amounts of assets as a sis for calculating the annual pen- on cost applicable to Segment H.

(6) Contractor I has a defined-bene- pension plan covering employees at ven segments. The contractor has en making a composite pension cost lculation for all of the segments. wever, the contractor determines at, pursuant to this Standard, sepa- e pension costs must be calculated one of the segments. In accordance with 30.413-50(c)(9), the contractor elects to allocate fund assets only for the active participants of that segment. The contractor must then create a segment to accumulate the assets and actuarial liabilities for the plan's inactive participants. When active participants of a segment become inactive, the contractor must transfer assets to the segment for inactive participants to cover the actuarial liabilities for the participants that become inactive. However, the amount to be transferred shall be proportionate to the percentage of such liabilities that are funded.

(7) Contractor J has a defined-benefit pension plan covering employees at 10 segments. The contractor makes a composite pension cost calculation for all segments. The contractor's records show that the termination experience for one segment—primarily performing Government work—has been significantly different from the average turnover experience of the other segments. Moreover, the contractor assumes that such different experience will continue. Because of this fact, and because the application of a different termination assumption would result in significantly different costs being charged to the Government, the contractor must develop separate pension cost for that segment. In accordance with 30.413-50(c)(2), the amount of pension cost must be based on an acceptable termination assumption for that segment; however, as provided in 30.413-50(c)(10), all other assumptions for that segment may be the same as those for the remaining segments.

(8) Contractor K has a 5-year contract to operate a Government-owned facility. The employees of that facility are covered by the contractor's overall defined-benefit pension plan which covers salaried and hourly employees at other locations. At the conclusion of the 5-year period, the Government decides not to renew the contract. Although some employees are hired by the successor contractor, as far as Contractor K is concerned, the facility is closed. Pursuant to 30.413-50(c)(12), Contractor K must compute an unfunded actuarial liability for the pension plan for that facility. The contractor first calculates the actuarial li-

ability as of the date the contract expired. Because many of Contractor K's employees are terminated from the pension plan, the Internal Revenue Service considers it to be a partial plan termination, and thus requires that the terminated employees become fully vested in their accrued benefits to the extent such benefits are funded. Taking this factor into consideration, the actuary calculates the actuarial liability as amounting to $12.5 million. The contractor must then determine the market value of the pension fund assets allocable to the facility, pursuant to 30.413-50(c)(5), as of the date agreed to by the contracting parties (30.413-50(c)(12))—the date the contract expired. In making this determination, the contractor establishes the ratio of the actuarial value of the assets allocable to the segment to the total actuarial value of the assets of the pension fund. The product of this ratio and the market value of all pension fund assets is the market value of the assets allocated to the segment. In this case, the market value of the segment's assets amounted to $13.8 million. Thus, for this facility the value of pension fund assets exceeded the actuarial liability by $1.3 million. This amount indicates the extent to which the Government over-contributed to the pension plan for the segment and, accordingly, indicates the extent to which prior years' pension costs are subject to adjustment.

30.413-61 Interpretation. [Reserved]

30.413-62 Exemption. [Reserved]

30.413-63 Effective date. [Reserved]

30.414 Cost accounting standard—cost of money as an element of the cost of facilities capital.

30.414-10 [Reserved]

30.414-20 Purpose.

The purpose of this Cost Accounting Standard is to establish criteria for the measurement and allocation of the cost of capital committed to facilities as an element of contract cost. Consistent application of these criteria will improve cost measurement by providing for allocation of cost of contractor investment in facilities capital to negotiated contracts.

30.414-30 [Reserved]

30.414-40 Fundamental requirement.

(a) A contractor's facilities capital shall be measured and allocated in accordance with the criteria set forth in this Standard. The allocated amount shall be used as a base to which a cost of money rate is applied.

(b) The cost of money rate shall be based on interest rates determined by the Secretary of the Treasury, pursuant to Pub. L. 92-41 (85 Stat. 97).

(c) The cost of capital committed to facilities shall be separately computed for each of contract using facilities capital cost of money factors computed for each cost accounting period.

30.414-50 Techniques for application.

(a) The investment base used in computing the cost of money for facilities capital shall be computed from accounting data used for contract cost purposes. The form and instructions stipulated in this Standard shall be used to make the computation.

(b) The cost of money rate for any cost accounting period shall be the arithmetic mean of the interest rates specified by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat 97). Where the cost of money must be determined on a prospective basis the cost of money rate shall be based on the most recent available rate published by the Secretary of the Treasury.

(c) (1) A facilities capital cost of money factor shall be determined for each indirect cost pool to which a significant amount of facilities capital has been allocated and which is used to allocate indirect costs to final cost objectives.

(2) The facilities capital cost of money factor for an indirect cost pool shall be determined in accordance with Form CASB CMF, and its instructions which are set forth in Appendix A. One form will serve for all the indirect cost pools of a business unit.

(3) For each CAS-covered contract, the applicable cost of capital committed to facilities for a given cost ac-

counting period is the sum of the products obtained by multiplying the amount of allocation base units (such as direct labor hours, or dollars of total cost input) identified with the contract for the cost accounting period by the facilities capital cost of money factor for the corresponding indirect cost pool. In the case of process cost accounting systems the contracting parties may agree to substitute an appropriate statistical measure for the allocation base units identified with the contract.

30.414-60 Illustrations.

The use of Form CASB CMF and other computations anticipated for this Cost Accounting Standard are illustrated in Appendix B.

30.414-61 Interpretation. [Reserved]

30.414-62 Exemption.

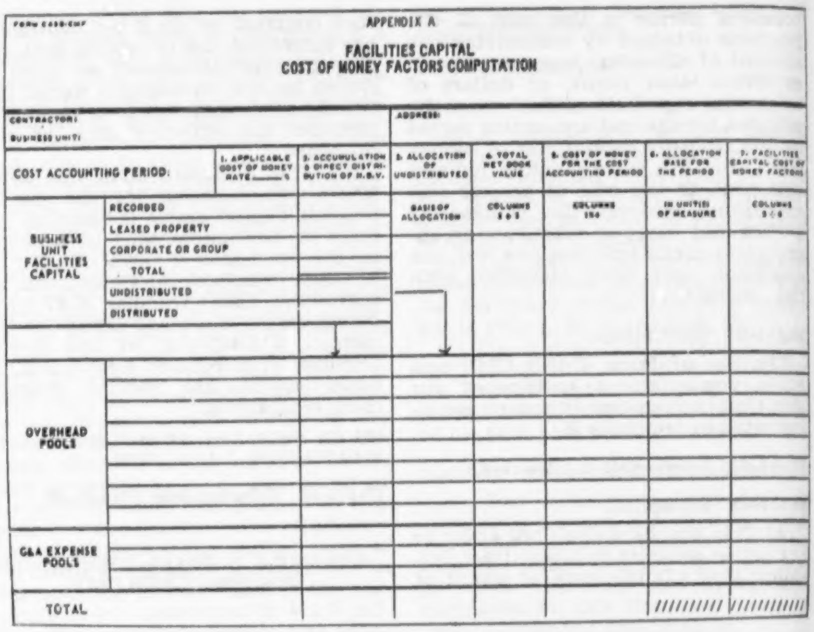
(a) This Standard shall not apply to any prime contract or subcontract providing that (1) the date of award of such contract, or (2) if the contractor has submitted cost or pricing data, the date of final agreement on price as shown on the contractor's signed certificate of current cost or pricing data, precedes the effective date of this Standard.

(b) This Standard shall not apply where compensation for the use of tangible capital assets is based on use rates or allowances such as provided by the provisions of OMB Circular A-21 (Cost Principles for Educational Institutions), OMB Circular A-87 (Cost Principles for State and Local Governments), § 15.402-1(a) of the Armed Services Procurement Regulation, or other appropriate Federal procurement regulations.

[52 FR 35613, Sept. 22, 1987. Redesignated at 53 FR 27465, July 20, 1988]

30.414-63 Effective date. [Reserved]

APPENDIX A TO 30.414—INSTRUCTIONS FOR FORM CASB CMF



FORM CASB-CMF

APPENDIX A

FACILITIES CAPITAL
COST OF MONEY FACTORS COMPUTATION

CONTRACTOR:

BUSINESS UNIT:

ADDRESS:

COST ACCOUNTING PERIOD:		1. APPLICABLE COST OF MONEY RATE ___ %	2. ACCUMULATION & DIRECT DISTRIBUTION OF N.B.V.	3. ALLOCATION OF UNDISTRIBUTED	4. TOTAL NET BOOK VALUE	5. COST OF MONEY FOR THE COST ACCOUNTING PERIOD	6. ALLOCATION BASE FOR THE PERIOD	7. FACILITIES CAPITAL COST OF MONEY FACTORS
BUSINESS UNIT FACILITIES CAPITAL	RECORDED			BASIS OF ALLOCATION	COLUMNS 2 + 3	COLUMNS 1 × 4	IN UNIT(S) OF MEASURE	COLUMNS 5 ÷ 6
	LEASED PROPERTY							
	CORPORATE OR GROUP							
	TOTAL							
	UNDISTRIBUTED							
	DISTRIBUTED							
OVERHEAD POOLS								
G&A EXPENSE POOLS								
TOTAL							/////////	/////////

Purpose

The purpose of this form is to (a) accumulate total facilities capital net book values allocated to each business unit for the contractor cost accounting period, and (b) convert those values to facilities capital cost of money factors applicable to each overhead or G&A expense allocation base employed within a business unit.

Basis

All data pertain to the cost accounting period for which the contractor prepares overhead and G&A expense allocations. The cost of money computations should be compatible with those allocation procedures. More specifically, facilities capital values used should be the same values that are used to generate depreciation or amortization that is allowed for Federal Government contract costing purposes; land which is integral to the regular operation of the business unit shall be included.

Applicable Cost of Money Rate (Col. 1)

Enter here the rate as computed in accordance with 30.414-50(b).

Accumulation and Direct Distribution of Net Book Value (Col. 2)

Recorded, Leased Property, Corporate. The net book value of facilities capital items in this column shall represent the average balances outstanding during the cost accounting period. This applies both to items that are subject to periodic depreciation or amortization and also to such items as land that are not subject to periodic write-offs. Unless there is a major fluctuation, it will be adequate to ascertain the net book of these assets at the beginning and end of each cost accounting period, and to compute an average of those two sets of figures. "Recorded" facilities are the facilities capital items owned by the contractor, carried on the books of the business unit, and used in its regular business activity. "Leased property" is the capitalized value of leases for which constructive costs of ownership are allowed in lieu of rental costs under Government procurement regulations. Corporate or group facilities are the business unit's allocable share of corporate-owned and leased facilities. The net book value of items of facilities capital which are held or controlled by the home office shall be allocated to the business unit on a basis consistent with the home office expense allocation.

Distributed and Undistributed. All facilities capital items that are identified in the contractor's records as solely applicable to an organizational unit corresponding to a specific overhead, G&A or other indirect cost pool which is used to allocate indirect costs to final cost objectives, are listed against the applicable pools and are classified as "distributed." "Undistributed" is the remainder of the business unit's facilities capital. The sum of "distributed" and "undistributed" must also correspond to the amount shown on the "total" line.

Allocation of Distributed. List in the narrative column all the overhead and G&A expense pools to which "distributed" facilities capital items have been allocated. Enter the corresponding amounts in (Col. 2). The sum of all the amounts shown against specific overhead and G&A expense pools must correspond to the amount shown in the "distributed" line.

Allocation of Undistributed (Col. 3)

Business unit "undistributed" facilities are allocated to overhead and the G&A expense pools on any reasonable basis that approximates the actual absorption of depreciation or amortization of such facilities. For instance, the basis of allocation of undistributed assets in each business unit between; e.g., engineering overhead pool and the manufacturing overhead pool, should be related to the manner in which the expenses generated by these assets are allocated between the two overhead pools. Detailed analysis of this allocation is not required where essentially the same results an be obtained by other means. Where the ost accounting system for purposes of Govrnment contract costing uses more than ne "charging rate" for allocating indirect osts accumulated in a single cost pool, one epresentative base may be substituted for he multiplicity of bases used in the allocaion process. The net book value of service enter facilities capital items appropriately llocated should be included in this column. he sum of the entries in Column 3 is equal o the entry in the undistributed line, olumn 2.

A supporting work sheet of this allocation hould be prepared if there is more than ne service center or other similar "intermeate" cost objective involved in the reallotion process.

Alternative Allocation Process—As an alrnative to the above allocation process all e undistributed assets for one or more rvice centers or similar intermediate cost jectives may be allocated to the G&A exnse pool. Consequently, the cost of money r these undistributed assets will be distribed to the final cost objectives on the same is that is used to allocate G&A expense. is procedure may be adopted for any cost ounting period only when the contract parties agree (a) that the depreciation amortization generated by these undistributed assets is immaterial or (b) that the results of this alternative procedure are not likely to differ materially from those which would be obtained under the "regular" allocation process described previously.

Total Net Book Value (Col. 4)

The sum of Columns 2 and 3. The total of this column should agree with the business unit's total shown in Column 2.

Cost of Money for the Cost Accounting Period (Col. 5)

Multiply the amounts in Column 4 by the percentage rate in Column 1.

Allocation Base for the Period (Col. 6)

Show here the total units of measure used to allocate overhead and G&A expense pools (e.g., direct labor dollars, machine hours, total cost input, etc.). Include service centers that make charges to final cost objectives. Each base unit-of-measure must be compatible with the bases used for applying overhead in the Federal Government contract cost computation.

The total base unit of measure used for allocation in this column refers to all work done in an organizational unit associated with the indirect cost pool and not to Government work alone.

Facilities Capital Cost of Money Factors (Col. 7)

The quotients of cost of money for the cost accounting period (Col. 5) separately divided by the corresponding overhead or G&A expense allocation bases (Col. 6). Carry each computation to five decimal places. This factor represents the cost of money applicable to facilities capital allocated to each unit of measure of the overhead or G&A expense allocation base.

APPENDIX B TO 30.414—EXAMPLE—ABC CORPORATION

ABC Corporation has a home office that controls three operating divisions (Business Units A, B & C). The home office includes an administrative computer center whose costs are allocated separately to the business units. The separate allocation conforms to the requirements specified in the Cost Accounting Standard No. 403. Tables I through VI deal with home office expense allocations to business units.

The A Division is a business unit as defined by the CASB, and it uses one engineering and one manufacturing overhead pool to accumulate costs for charging overhead to final cost objectives. In addition, the indirect cost allocation process also uses two "service centers" with their own indirect cost pools: occupancy and technical computer center.

The costs accumulated in the occupancy pool are allocated among manufacturing overhead, engineering overhead, and the technical computer center on the basis of floor space occupied. The costs accumulated in the technical computer center cost pool are allocated to users on the basis of a CPU hourly rate. Some of these allocations are made to engineering or manufacturing overhead while others are allocated direct to final cost objectives.

At the business unit level, all the indirect expense incurred is regarded either as an engineering or manufacturing expense. Thus the sole item that enters into the business unit G&A expense pool is the allocation received by the A Division from the home office.

Operating results for the A Division are given in Table VII. Facilities capital items for the division are given in Table IX.

The example is based on a single set of illustrative contract cost data given in Table VIII. Since two methods, the "regular" and the "alternative" method, are potentially available for computing cost of money on facilities capital items two sets of different results can be considered.

In addition, total cost input is used in the example as the allocation base for the G&A expense. Two variations of this example have been prepared to illustrate the impact of excluding or including cost of money from total cost input. Variation I, summarized in Table XIII, excludes cost of money from the cost input allocation base. Variation II, summarized in Tables XVII and XVIII, includes cost of money in the cost input allocation base.

Throughout the example, where appropriate, cross references have been made to the text of the relevant parts of the Standard.

VARIATION I—TOTAL COST INPUT ALLOCATION BASE EXCLUDES COST OF MONEY—TABLE I—NET BOOK VALUE OF HOME OFFICE FACILITIES CAPITAL

	Dec. 31, 1974	Dec. 31, 1975
Administrative computer center facilities capital	$550,000	$450,00
Other home office facilities capital	420,000	380,00
Total	970,000	830,00

The assets in the above table generate allowable depreciation or amortization, as explained in instructions for Form CAS CMF (Basis). Thus, they should be included in the asset base for cost of money computation.

TABLE II—HOME OFFICE FACILITIES CAPITAL ANNUAL AVERAGE BALANCES

Administrative computer center facilities capital	$500,00
Other home office facilities capital	400,00
Total	900,00

The above averages are based on data in Table I computed in accordance with the criteria in instructions for Form CAS CMF (Recorded, Leased Property, Corporate).

$970,000+$830,000=$1,800,000÷2=$900,000

TABLE III—HOME OFFICE DEPRECIATION AND AMORTIZATION FOR 1975

Administrative computer center facilities capital	$100,00
Other home office facilities capital	40,00
Total	140,00

TABLE IV—ALLOCATION OF ABC HOME OFFICE EXPENSES TO DIVISIONS (*business units*)

	Total expense	Allocation to business units		
		A	B	C
Administrative computer center	$1,800,000	$900,000	$900,000	
Other home office	4,800,000	2,400,000	1,200,000	$1,200,00
Total	6,600,000	3,300,000	2,100,000	1,200,00

The above allocation is carried out in accordance with CAS 403. The expense allocated to individual business units above ncludes depreciation and amortization as reflected in Table V

TABLE V—DEPRECIATION AND AMORTIZATION COMPONENT OF ABC HOME OFFICE EXPENSE

	Total depreciation and amortization expense	Allocation to business units		
		A	B	C
Administrative computer center	$100,000	$50,000	$50,000	
Other home office	40,000	20,000	10,000	$10,000
Total	140,000	70,000	60,000	10,000

TABLE VI—ALLOCATION OF HOME OFFICE FACILITIES CAPITAL TO BUSINESS UNITS

(a) Depreciation and amortization allocation in Table V converted to percentages

	Total depreciation and amortization expense (in percent)	Allocation to business units (in percent)		
		A	B	C
dministrative computer center	100	50	50	
ther home office	100	50	25	25

) Application of percentages in (a) to average net book values in Table II, in accordance with criteria in Instructions for Form CASB CMF (Recorded, Leased Property, Corporate).

	Total net book value	Allocation to business units		
		A	B	C
ministrative computer center facilities capital	$500,000	$250,000	$250,000	
her home office facilities capital	400,000	200,000	100,000	$100,000
Total	900,000	450,000	350,000	100,000

TABLE VII—"A" DIVISION 1975 OPERATING RESULTS

	Total cost input and G. & A.	Fixed price CAS-covered contracts	Cost reimbursement, CAS-covered contracts	Commercial and other work
t material:				
Purchased parts	$2,000,000	$100,000	$100,000	$1,800,000
Subcontract items	21,530,000	11,750,000	7,206,000	2,575,000
Total	23,530,000	11,850,000	7,306,000	4,375,000
l labor and overhead:				
ngineering labor	2,000,000	1,500,000	500,000	
ngineering overhead (80 pct of direct engineering labor)	1,600,000	1,200,000	400,000	
anufacturing labor	3,000,000	1,200,000	200,000	1,600,000
anufacturing overhead (200 pct of direct management labor)	6,000,000	2,400,000	400,000	3,200,000
direct charges:				
chnical computer center direct charge—2,280 h at $250/h	570,000	200,000	370,000	
Total cost input (excluding cost of money)	36,700,000	18,350,000	9,175,000	9,175,000
. (8.99 pct of cost input)	3,300,000	1,650,000	825,000	825,000
Total	40,000,000	20,000,000	10,000,000	10,000,000

TABLE VIII—COST DATA FOR THE CONTRACT

Purchased parts	$85,000
Subcontract items	990,000
Technical computer time 280 h at $250/h	70,000
Engineering labor	330,000
Engineering overhead at 80 pct	264,000
Manufacturing labor	1,210,000
Manufacturing overhead at 200 pct	2,420,000
Total cost input (excluding cost of money)	5,369,000
G. & A. at 8.99 pct	483,000
Total cost input and G. & A. (excluding cost of money)	5,852,000

TABLE IX—DIVISION A FACILITIES CAPITAL

Average net book values are computed in accordance with Instructions to Form CASB CMF. Average figures only are given, the underlying beginning and ending balances for 1975 have not been reproduced.

Name of indirect cost pool the asset is associated with	Average net book value	Annual depreciation
Engineering overhead	$320,000	$40,000
Manufacturing overhead	4,500,000	900,000
Technical computer center	450,000	90,000
Occupancy	3,000,000	200,000
Facilities capital recorded by division A (see Form CASB CMF instructions for description of recorded)	8,270 000	1,230,000
Allocated from home office, table VI	450,000	
Total division A	8,720,000	

TABLE X—ALLOCATION OF UNDISTRIBUTED FACILITIES CAPITAL

(a) *Occupancy Pool Assets.* Total occupancy pool expenses are assumed to be $1,000,000 of which $200,000 is depreciation per Table IX. Allocation of the $3,000,000 net book value of assets per Table IX is performed on the basis of floor space utilization.

Indirect cost pool	Occupancy expense and depreciation allocation	Percent of total floor space utilized	Asset allocation
Engineering	$200,000	20	$600,000
Manufacturing	750,000	75	2,250,000
Technical computer	50,000	5	150,000
Total	1,000,000	100	3,000,000

(b) *Technical Computer Center Assets.* Total technical computer center expenses for the year are assumed to be $770,000 including $90,000 depreciation per Table IX and $50,000 charge from the occupancy pool per paragraph (a) of this table. A charging rate of $250 per hour is computed assuming a total of 3,080 chargeable CPU hours per annum. The net book value of assets amounting to $600,000 [$450,000 per Table IX plus the $150,000 allocated per (a) above] is allocated on the basis of CPU hours utilized.

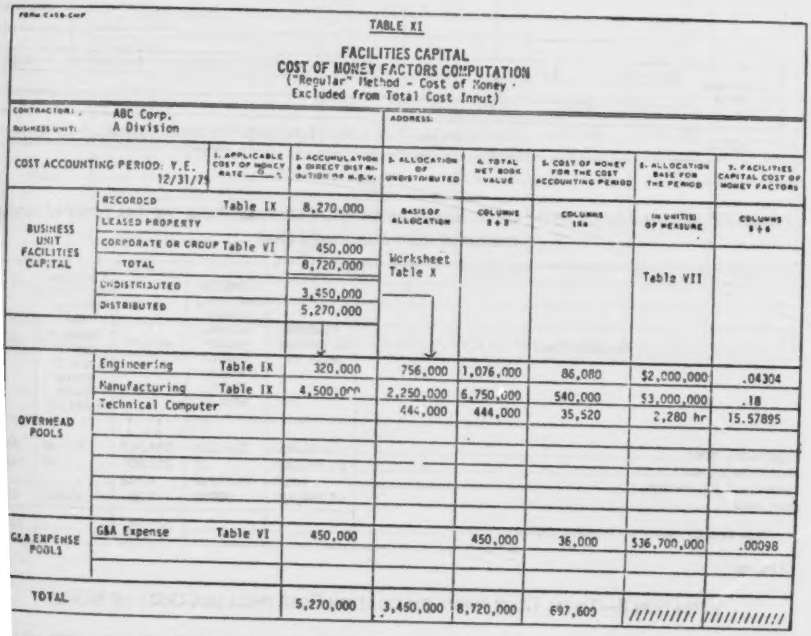
Overhead pool or cost objective	Hours charged	Amount charged	Percent	Asset allocation
Fixed price contracts, table VII	800	$200,000	26	$156,000
Cost reimbursement contracts, table VII	1,480	370,000	48	288,000
Engineering overhead pool	800	200,000	26	156,000
Total	3,080	770,000	100	600,000

(c) SUMMARY OF UNDISTRIBUTED FACILITIES CAPITAL ALLOCATION. Undistributed (per Table IX).

Technical computer center	$450,000
Occupancy	3,000,000
Total	3,450,000

Distribution per paragraph (a) or (b) of this table of balances to overhead pools that result in charges direct to final cost objectives.

Overhead pool	(a)	(b)	Total
Engineering	$600,000	$156,000	$756,000
Manufacturing	2,250,000		2,250,000
Technical computer center (direct charge to contracts)		444,000	444,000
Total	2,850,000	600,000	3,450,000



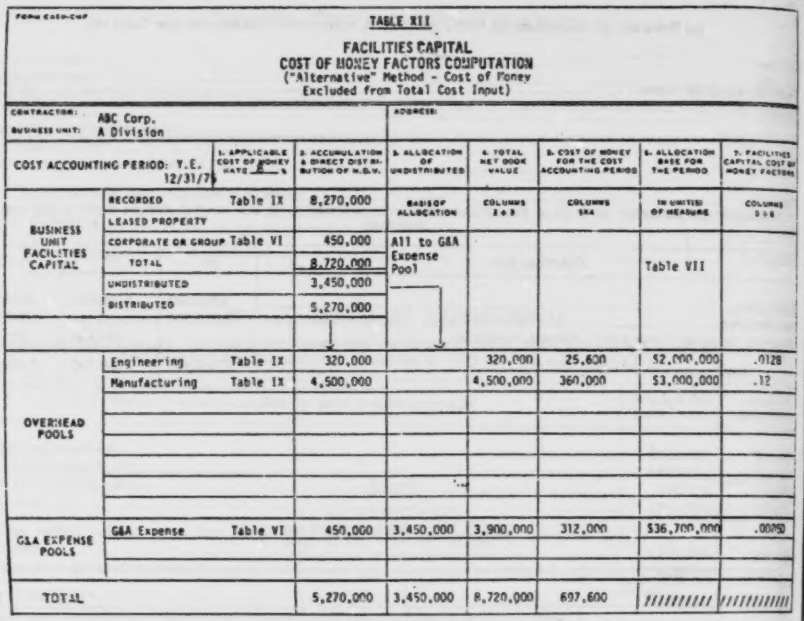
FORM CASB-CMF

TABLE XI

FACILITIES CAPITAL
COST OF MONEY FACTORS COMPUTATION
("Regular" Method - Cost of Money - Excluded from Total Cost Input)

CONTRACTOR: ABC Corp.
BUSINESS UNIT: A Division
ADDRESS:

	COST ACCOUNTING PERIOD: Y.E. 12/31/79	1. APPLICABLE COST OF MONEY RATE 8 %	2. ACCUMULATION & DIRECT DISTRIBUTION OF N.B.V.	3. ALLOCATION OF UNDISTRIBUTED	4. TOTAL NET BOOK VALUE	5. COST OF MONEY FOR THE COST ACCOUNTING PERIOD	6. ALLOCATION BASE FOR THE PERIOD	7. FACILITIES CAPITAL COST OF MONEY FACTORS
				BASIS OF ALLOCATION	COLUMNS 2 + 3	COLUMNS 1 × 4	(IN UNIT(S) OF MEASURE)	COLUMNS 5 ÷ 6
BUSINESS UNIT FACILITIES CAPITAL	RECORDED	Table IX	8,270,000					
	LEASED PROPERTY							
	CORPORATE OR GROUP	Table VI	450,000					
	TOTAL		8,720,000	Worksheet Table X			Table VII	
	UNDISTRIBUTED		3,450,000					
	DISTRIBUTED		5,270,000					
OVERHEAD POOLS	Engineering	Table IX	320,000	756,000	1,076,000	86,080	$2,000,000	.04304
	Manufacturing	Table IX	4,500,000	2,250,000	6,750,000	540,000	$3,000,000	.18
	Technical Computer			444,000	444,000	35,520	2,280 hr	15.57895
G&A EXPENSE POOLS	G&A Expense	Table VI	450,000		450,000	36,000	$36,700,000	.00098
TOTAL			5,270,000	3,450,000	8,720,000	697,600	//////////	////////////



FORM CASB-CMF

TABLE XII

FACILITIES CAPITAL
COST OF MONEY FACTORS COMPUTATION
("Alternative" Method - Cost of Money
Excluded from Total Cost Input)

CONTRACTOR: ABC Corp.
BUSINESS UNIT: A Division

ADDRESS:

		1. APPLICABLE COST OF MONEY RATE 8 %	2. ACCUMULATION & DIRECT DISTRIBUTION OF N.B.V.	3. ALLOCATION OF UNDISTRIBUTED	4. TOTAL NET BOOK VALUE	5. COST OF MONEY FOR THE COST ACCOUNTING PERIOD	6. ALLOCATION BASE FOR THE PERIOD	7. FACILITIES CAPITAL COST OF MONEY FACTORS
COST ACCOUNTING PERIOD: Y.E. 12/31/7								
BUSINESS UNIT FACILITIES CAPITAL	RECORDED	Table IX	8,270,000	BASIS OF ALLOCATION	COLUMNS 2 + 3	COLUMNS 1X4	IN UNIT(S) OF MEASURE	COLUMNS 5 ÷ 6
	LEASED PROPERTY							
	CORPORATE OR GROUP	Table VI	450,000	All to G&A Expense Pool			Table VII	
	TOTAL		8,720,000					
	UNDISTRIBUTED		3,450,000					
	DISTRIBUTED		5,270,000					
OVERHEAD POOLS	Engineering	Table IX	320,000		320,000	25,600	$2,000,000	.0128
	Manufacturing	Table IX	4,500,000		4,500,000	360,000	$3,000,000	.12
G&A EXPENSE POOLS	G&A Expense	Table VI	450,000	3,450,000	3,900,000	312,000	$36,700,000	.00850
TOTAL			5,270,000	3,450,000	8,720,000	697,600	//////////	//////////

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TABLE XIII—SUMMARY OF COST OF MONEY COMPUTATION ON FACILITIES CAPITAL (*cost of money excluded from total cost input*)

Allocation base	Allocated to contract table VIII	Computation using regular facilities, capital cost of money factor, table XI	Amount	Computation using alternative facilities capital, cost of money factor, table XII	Amount
Engineering labor	$330,000	0.04304	$14,203	0.0128	$4,224
Manufacturing labor	$1,210,000	.18	217,800	.12	145,20
Technical computer time	[1] 280	15.57895	4,362		
Cost input	$5,369,000	.00098	5,261	.00850	45,63
Total cost of money on facilities capital			241,626		195,06

[1] Hours.

VARIATION II—TOTAL COST INPUT ALLOCATION BASE INCLUDES COST OF MONEY

TABLE XIV—RECOMPUTATION OF "A" DIVISION TOTAL COST INPUT TO REFLECT INCLUSION OF COST OF MONEY

(a) Regular method:

Total cost input per table VII	$36,700,00
Cost of money applicable to facilities capital identified with overhead pools per subtotal in column 5, table XV	661,60
Total cost input including cost of money	37,361,60

VARIATION II—TOTAL COST INPUT ALLOCATION BASE INCLUDES COST OF MONEY—Continued

(b) Alternative method:

Total cost input per table VII	36,700,000
Cost of money applicable to facilities capital identified with overhead pools per subtotal in column 5, table XVI	385,800
Total cost input including cost of money	37,085,900

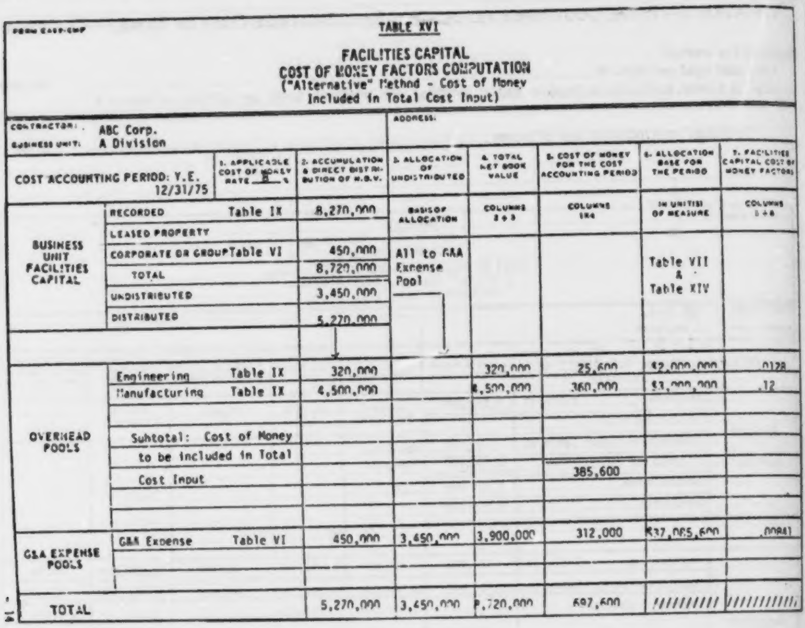
FORM CASB-CMF

TABLE XV

FACILITIES CAPITAL
COST OF MONEY FACTORS COMPUTATION
("Regular" Method - Cost of Money
Included in Total Cost Input)

CONTRACTOR: ABC Corp.
BUSINESS UNIT: A Division
ADDRESS:

COST ACCOUNTING PERIOD: Y.E. 12/31/75		1. APPLICABLE COST OF MONEY RATE 8 %	2. ACCUMULATION & DIRECT DISTRIBUTION OF N.B.V.	3. ALLOCATION OF UNDISTRIBUTED	4. TOTAL NET BOOK VALUE	5. COST OF MONEY FOR THE COST ACCOUNTING PERIOD	6. ALLOCATION BASE FOR THE PERIOD	7. FACILITIES CAPITAL COST OF MONEY FACTORS
BUSINESS UNIT FACILITIES CAPITAL	RECORDED	Table IX	8,270,000	BASIS OF ALLOCATION	COLUMNS 2 + 3	COLUMNS 1 × 4	IN UNIT(S) OF MEASURE	COLUMNS 5 ÷ 6
	LEASED PROPERTY							
	CORPORATE OR GROUP	Table VI	450,000	Worksheet Table X				
	TOTAL		8,720,000					
	UNDISTRIBUTED		3,450,000					
	DISTRIBUTED		5,270,000				Table VII & Table XIV	
OVERHEAD POOLS	Engineering	Table IX	320,000	756,000	1,076,000	86,080	$2,000,000	.04304
	Manufacturing	Table IX	4,500,000	2,250,000	6,750,000	540,000	$3,000,000	.18
	Technical Computer			444,000	444,000	35,520	2,200 hr	15.57895
	Subtotal: Cost of Money to be included in Total Cost Input					661,600		
G&A EXPENSE POOLS	G&A Expense	Table VI	450,000		450,000	36,000	$37,361,600	.00096
TOTAL			5,270,000	3,450,000	8,720,000	697,600	//////////	//////////



FORM CASB-CMF

TABLE XVI

FACILITIES CAPITAL
COST OF MONEY FACTORS COMPUTATION
("Alternative" Method - Cost of Money
Included in Total Cost Input)

CONTRACTOR: ABC Corp.
BUSINESS UNIT: A Division
ADDRESS:

COST ACCOUNTING PERIOD: Y.E. 12/31/75		1. APPLICABLE COST OF MONEY RATE 8 %	2. ACCUMULATION & DIRECT DISTRIBUTION OF N.B.V.	3. ALLOCATION OF UNDISTRIBUTED	4. TOTAL NET BOOK VALUE	5. COST OF MONEY FOR THE COST ACCOUNTING PERIOD	6. ALLOCATION BASE FOR THE PERIOD	7. FACILITIES CAPITAL COST OF MONEY FACTORS
				BASIS OF ALLOCATION	COLUMNS 2+3	COLUMNS 1×4	IN UNIT(S) OF MEASURE	COLUMNS 5÷6
BUSINESS UNIT FACILITIES CAPITAL	RECORDED	Table IX	8,270,000					
	LEASED PROPERTY							
	CORPORATE OR GROUP	Table VI	450,000	All to G&A Expense Pool			Table VII & Table XIV	
	TOTAL		8,720,000					
	UNDISTRIBUTED		3,450,000					
	DISTRIBUTED		5,270,000					
OVERHEAD POOLS	Engineering	Table IX	320,000		320,000	25,600	$2,000,000	.0128
	Manufacturing	Table IX	4,500,000		4,500,000	360,000	$3,000,000	.12
	Subtotal: Cost of Money to be included in Total Cost Input					385,600		
G&A EXPENSE POOLS	G&A Expense	Table VI	450,000	3,450,000	3,900,000	312,000	$37,065,600	.00841
TOTAL			5,270,000	3,450,000	8,720,000	697,600	//////////	//////////

TABLE XVII—SUMMARY OF COST OF MONEY COMPUTATION ON FACILITIES CAPITAL (cost of money included in total cost input—regular method)

Allocation base	Allocated to contract, table VIII	Computation using regular facilities, capital cost of money factor, table XV	Amount
Engineering labor	$330,000	0.04304	$14,203
Manufacturing labor	$1,210,000	.18	217,800
Technical computer time	[1]280	15.57895	4,362
Cost of money related to overheads			236,365
Cost of money above to be included in cost input	$236,365		
Cost input, table VIII	$5,369,000		
Cost input including cost of money	$5,605,365	.00096	5,381
Total cost of money on facilities capital			241,74

[1] Hours.

ABLE XVIII—SUMMARY OF COST OF MONEY COMPUTATION ON FACILITIES CAPITAL (cost of money included in total cost input—alternative method)

Allocation base	Allocated to contract, table VIII	Computation using alternative facilities, capital cost of money factor, table XVI	Amount
ngineering labor	$330,000	0.0128	$4,224
anufacturing labor	1,210,000	.12	145,200
ost of money related to overheads			149,424
ost of money above to be included in cost input	$149,424		
ost input, table VIII	5,369,000		
ost input including cost of money	$5,518,424	.00841	$46,410
Total cost of money on facilities capital			195,834

52 FR 35622, as amended at 52 FR 36675, ept. 30, 1987]

0.415 Accounting for the cost of deferred compensation.

0.415-10 [Reserved]

0.415-20 Purpose.

(a) The purpose of this Standard is o provide criteria for the measurement of the cost of deferred compenation and the assignment of such cost o cost accounting periods. The appliation of these criteria should increase he probability that the cost of deerred compensation is allocated to ost objectives in a uniform and conistent manner.

(b) This Standard is applicable to he cost of all deferred compensation xcept for compensated personal abence and pension plan costs which are overed in other Cost Accounting tandards.

0.415-30 [Reserved]

0.415-40 Fundamental requirement.

(a) The cost of deferred compensaion shall be assigned to the cost acounting period in which the contracr incurs an obligation to compensate e employee. In the event no obligaon is incurred prior to payment, the st of deferred compensation shall be e amount paid and shall be assigned the cost accounting period in which e payment is made.

b) The measurement of the amount the cost of deferred compensation shall be the present value of the future benefits to be paid by the contractor.

(c) The cost of each award of deferred compensation shall be considered separately for purposes of measurement and assignment of such costs to cost accounting periods. However, if the cost of deferred compensation for the employees covered by a deferred compensation plan can be measured with reasonable accuracy on a group basis, separate computations for each employee are not required.

30.415-50 Techniques for application.

(a) The contractor shall be deemed to have incurred an obligation for the cost of deferred compensation when all of the following conditions have been met. However, for awards which require that the employee perform future service in order to receive the benefits, the obligation is deemed to have been incurred as the future service is performed for that part of the award attributable to such future service:

(1) There is a requirement to make the future payment(s) which the contractor cannot unilaterally avoid.

(2) The deferred compensation award is to be satisfied by a future payment of money, other assets, or shares of stock of the contractor.

(3) The amount of the future payment can be measured with reasonable accuracy.

(4) The recipient of the award is known.

(5) If the terms of the award require that certain events must occur before an employee is entitled to receive the benefits, there is a reasonable probability that such events will occur.

(6) For stock options, there must be a reasonable probability that the options ultimately will be exercised.

(b) If any of the conditions in 30.415-50(a) is not met, the cost of deferred compensation shall be assignable only to the cost accounting period or periods in which the compensation is paid to the employee.

(c) If the cost of deferred compensation can be estimated with reasonable accuracy on a group basis, including consideration of probable forfeitures, such estimate may be used as the basis for measuring and assigning the present value of future benefits.

(d) The following provisions are applicable for plans that meet the conditions of 30.415-50(a) and the compensation is to be paid in money.

(1) If the deferred compensation award provides that the amount to be paid shall include the principal of the award plus interest at a rate fixed at the date of award, such interest shall be included in the computation of the amount of the future benefit. If no interest is included in the award, the amount of the future benefit is the amount of the award.

(2) If the deferred compensation award provides for payment of principal plus interest at a rate not fixed at the time of award but based on a specified index which is determinable in each applicable cost accounting period, e.g., a published corporate bond rate, such interest shall be included in the computation of the amount of future benefit. The interest rate to be used shall be the rate in effect at the close of the period in which the cost of deferred compensation is assignable. Since that interest rate is likely to vary from the actual rates in future periods, adjustments shall be made in any such future period in which the variation in rates materially affects the cost of deferred compensation.

(3) If the deferred compensation award provides for payment of principal plus interest at a rate not based on a specified index or not determinable in each applicable year, the

(i) Cost of deferred compensation for the principal of the award shall be measured by the present value of the future benefits of the principal and shall be assigned to the cost accounting period in which the employer incurs an obligation to compensate the employee;

(ii) Interest on such awards shall be assigned to the cost accounting period(s) in which the payment of the deferred compensation is made.

(4) If the terms of the award require that the employee perform future service in order to receive benefits, the cost of the deferred compensation shall be appropriately assigned to the periods of current and future service based on the facts and circumstances of the award. The cost of deferred compensation for each cost accounting period shall be the present value of the future benefits of the deferred compensation calculated as of the end of each such period to which such cost is assigned.

(5) In computing the present value of the future benefits, the discount rate shall be equal to the interest rate as determined by the Secretary of the Treasury pursuant to Pub. L. 92-41, 85 Stat. 97, at the time the cost is assignable.

(6) If the award is made under a plan which requires irrevocable funding for payment to the employee in a future cost accounting period together with all interest earned thereon, the amount assignable to the period of award shall be the amount irrevocably funded.

(7) In computing the assignable cost for a cost accounting period, any forfeitures which reduce the employer's obligation for payment of deferred compensation shall be a reduction of contract costs in the period in which the forfeiture occurred. The amount of the reduction for a forfeiture shall be the amount of the award that was assigned to a prior period, plus interest compounded annually, using the same Treasury rate that was used as the discount rate at the time the cost was assigned. For irrevocably funded plans, pursuant to 30.415-50(d)(6), the amount of the reduction for a forfeit-

ure shall be the amount initially funded plus or minus a pro-rata share of the gains and losses of the fund.

(8) If the cost of deferred compensation for group plans measured in accordance with 30.415-50(c) is determined to be greater than the amounts nitially assigned because the forfeit-ure was overestimated, the additional ost shall be assignable to the cost ac-counting period in which such cost is scertainable.

(e) The following provisions are ap-plicable for plans that meet the condi-ions of 30.415-50(a) and the compen-ation is received by the employee in ther than money. The measurements et forth herein constitute the present alue of future benefits for awards nade in other than money and, there-ore, shall be deemed to be a reasona-le measure of the amount of the uture payment:

(1) If the award is made in the stock f the contractor, the cost of deferred ompensation for such awards shall be ased on the market value of the stock n the measurement date; i.e., the first ate the number of shares awarded is nown. Market value is the current or revailing price of the security as indi-ated by market quotations. If such alues are unavailable or not appropri-te (thin market, volatile price move-ents, etc.) an acceptable alternative the fair value of the stock.

(2) If an award is made in the form options to employees to purchase ock of the contractor, the cost of de-rred compensation of such award all be the amount by which the rket value of the stock exceeds the tion price multiplied by the number shares awarded on the measure-nt date; i.e., the first date on which h the option price and the number shares is known. If the option price the measurement date is equal to greater than the market value of stock, no cost shall be deemed to e been incurred for contract cost-purposes.

) If the terms of an award of stock tock option require that the em-ee perform future service in order ceive the stock or to exercise the on, the cost of the deferred com-ation shall be appropriately as-d to the periods of current and future service based on the facts and circumstances of the award. The cost to be assigned shall be the value of the stock or stock option at the measurement date as prescribed in 30.415-50(e)(1) or (e)(2).

(4) If an award is made in the form of an asset other than cash, the cost of deferred compensation for such award shall be based on the market value of the asset at the time the award is made. If a market value is not available, the fair value of the asset shall be used.

(5) If the terms of an award, made in the form of an asset other than cash, require that the employee perform future service in order to receive the asset, the cost of the deferred compensation shall be appropriately assigned to the periods of current and future service based on the facts and circumstances of the award. The cost to be assigned shall be the value of the asset at the time of award as prescribed in 30.415-50(e)(4).

(6) In computing the assignable cost for a cost accounting period, any forfeitures which reduce the employer's obligation for payment of deferred compensation shall be a reduction of contract costs in the period in which the forfeiture occurred. The amount of the reduction shall be equal to the amount of the award that was assigned to a prior period, plus interest compounded annually, using the Treasury rate (see 30.415-50(d)(5)) that was in effect at the time the cost was assigned. If the recipient of the award of stock options voluntarily fails to exercise such options, such failure shall not constitute a forfeiture under provisions of this Standard.

(7) Stock option awards or any other form of stock purchase plans containing all of the following characteristics shall be considered noncompensatory and not covered by this Standard:

(i) Substantially all full-time employees meeting limited employment qualifications may participate.

(ii) Stock is offered equally to eligible employees or based on a uniform percentage of salary or wages.

(iii) An option or a purchase right must be exercisable within a reasonable period.

(iv) The discount from the market price of the stock is no greater than would be reasonable in an offer of stock to stockholders or others.

30.415-60 Illustrations.

(a) Contractor A has a deferred compensation plan in which all cash awards are increased each year by an interest factor equivalent to the long-term borrowing rate of the contractor prevailing during each such year. The interest factor based on a variable long-term borrowing rate meets the criteria of 30.415-50(d)(2). Consequently, the cost of deferred compensation for Contractor A shall be measured by the present value of the future benefits and shall be assigned to the cost accounting period in which the contractor initially incurs an obligation to compensate the employee. If the long-term borrowing rate for Contractor A was nine percent at the close of the period to which the cost of deferred compensation was assignable, then that rate should be used to calculate the future benefit. Any adjustment in the cost of deferred compensation which results from a material change in the nine percent rate in future applicable periods shall be made in each such future period or periods (see 30.415-50(d)(2)).

(b) Contractor B made a deferred compensation award of $10,000 to an employee on December 31, 1976, for services performed in 1976 to be paid in equal annual payments of $2,000 starting at December 31, 1981. The terms of the award do not provide for an interest factor to be included in the payment; consequently, according to provisions of 30.415-50(d)(1), interest may not be included in the computation of the future benefit. The assignable cost for 1976 is computed as follows, assuming that the interest rate determined by the Secretary of the Treasury (pursuant to Pub. L. 92-41, 85 Stat. 97) at the time of award is eight percent and the conditions set forth in 30.415-50(a) are met.

Year	Amount of future payment × Discount rate 8-pct present value factor = Present value
1981	$2,000 × 0.6805 = $1,361
1982	2,000 × .6301 = 1,260
1983	2,000 × .5834 = 1,167
1984	2,000 × .5402 = 1,080
1985	2,000 × .5002 = 1,000
Assignable cost for 1976	5,868

(c) Contractor C awarded stock options for 1,000 shares of the contractor to key employees on December 31, 1976, under a deferred compensation plan requiring 2 years of additional service before the awards can be exercised. The facts and circumstances of the awards indicate that the deferred compensation applies only to the periods of future service. The market price of the stock was $26 per share, the option price was $22, and the interest rate established by the Secretary of the Treasury in effect at the time of award was 8 percent.

(1) In accordance with 30.415-50(e)(2), the cost of the stock options is the amount by which the current value of the stock exceeds the option price multiplied by the number of shares awarded on the measurement date. Thus, the total cost of the stock options is 1,000 shares multiplied by the difference of the option price and the market price ($26 − 22) or $4,000.

(2) Under provisions of 30.415-50(e)(3), the cost for stock options is assigned to each future cost accounting period in which employee service is required and is computed as follows:

	Assignable Cost[1]
Year of required service:	
1977	$2,000
1978	2,000
Total amount of award	4,000

[1] Note that this illustration assumes that the facts and circumstances of the award indicate that the award relates equally to each period of future service. Thus, the assignable cost was allocated on a pro-rata basis.

(d) (1) Contractor D has a deferred compensation plan that specifies that an employee receiving a cash award must remain with the company for 3 calendar years after the award in order to qualify and receive the award and the facts and circumstances indicate that the deferred compensation applies only to the periods of future service. In accordance with 30.415-50(d)(4), the cost of deferred compensation is assignable to the periods of future service. Thus, the amount of cost of deferred compensation to be assigned by Contractor D for each of the 3 years shall be the present value of the future benefits of the deferred compensation award calculated as of the end of each such period to which such cost is assigned.

(2) Under this plan, Contractor D made an award to an employee of $3,000 to be paid at the end of the third year. The assignable cost for each of the 3 years is computed as follows:

Year [1]	Amount of future payment	×	Present value factor [2] using prevailing Treasury rate [3]	=	Assignable cost for each year
1	$1,000	×	0.8573 (8 pct for 2 yr)	=	$857.30
2	1,000	×	0.9302 (7.5 pct for 1 yr)	=	930.20
3	1,000	×	1.000 (8 pct for 0 yr)	=	1,000.00

[1] Note that in accordance with the facts and circumstances of the award no deferred compensation is assignable to the period in which the award is made and that the award relates equally to each period of future service.

[2] Note that since the costs are measured at the end of each year of required service, the present value factors are based on the number of years from the year of assignment to the date of payment.

[3] Note that the prevailing Treasury rate changed from year 1 to year 2.

(e) (1) Contractor E has a deferred compensation plan that specifies that an employee receiving a cash award must remain with the company for two calendar years after the award in order to qualify and receive the award. Contractor E made an award of $6,000 at the end of 1976 to an employee to be paid at the end of 1978. However, the employee voluntarily terminated his employment before the end of 1977. The facts and circumstances of the award indicate that $2,000 of the award represents compensation for services rendered in the period of award (1976). The remaining portion of the award represents compensation for services to be rendered in future periods. The assignable cost for 1976, which was the only period to which costs were assigned before termination, was the present value of $2,000, the amount of the award attributable to the services of that period. Thus, the cost assigned for 1976 was:

Amount of future payment×Discount rate present value factor for 2 yr at 8 pct=Assignable cost

$2,000×0.8573=$1,714.60

(2) According to provisions of 30.415-50(d)(7), the amount of the forfeiture shall be the amount of the cost that was assigned to a prior period, plus interest compounded annually, from the year the cost was assigned to the year of forfeiture, using the same Treasury rate (see 30.415-50(d)(5)) that was used as the discount rate at the time the cost was assigned. The Treasury rate in effect at the date of award was eight percent.

(3) The amount of the forfeiture is computed as follows:

Assignable cost×Discount rate future value factor for 1 yr at 8 pct=Forfeiture

$1,714.60×1.08=$1,851.77

30.415-61 Interpretation. [Reserved]

30.415-62 Exemption. [Reserved]

30.415-63 Effective date. [Reserved]

30.416 Accounting for insurance costs.

30.416-10 [Reserved]

30.416-20 Purpose.

The purpose of this standard is to provide criteria for the measurement of insurance costs, the assignment of such costs to cost accounting periods, and their allocation to cost objectives. The application of these criteria should increase the probability that insurance costs are allocated to cost objectives in a uniform and consistent manner.

30.416-30 [Reserved]

30.416-40 Fundamental requirement.

(a) The amount of insurance cost to be assigned to a cost accounting period is the projected average loss for that period plus insurance administration expenses in that period.

(b) The allocation of insurance costs to cost objectives shall be based on the beneficial or causal relationship between the insurance costs and the benefiting or causing cost objectives.

30.416-50 Techniques for application.

(a) *Measurement of projected average loss.*

(1) For exposure to risk of loss which is covered by the purchase of insurance or by payments to a trusteed fund, the premium or payment, adjusted in accordance with the following criteria, shall represent the projected average loss:

(i) The premium cost applicable to a given policy term shall be assigned pro rata among the cost accounting periods covered by the policy term, except as provided in subdivisions (a)(1)(ii) through (vi) of this subsection. A refund, dividend or additional assessment shall become an adjustment to the pro rata premium costs for the earliest cost accounting period in which the refund or dividend is actually or constructively received or in which the additional assessment is payable.

(ii) Where insurance is purchased specifically for, and directly allocated to, a single final cost objective, the premium need not be prorated among cost accounting periods.

(iii) Any part of a premium or payment to an insurer or trustee, or any part of a dividend or premium refund retained by an insurer or trustee which would be includable as a deposit in published financial statements prepared in accordance with generally accepted accounting principles shall be accounted for as a deposit for the purpose of determining insurance costs.

(iv) Any part of a premium or payment to an insurer or to a trustee, or any part of a dividend or premium refund retained by an insurer, for inclusion in a reserve or fund established and maintained on behalf of the insured or the policyholder or trustor, shall be accounted for as a deposit unless the following conditions are met:

(A) The objectives of the reserve or fund are clearly stated in writing.

(B) Measurement of the amount required for the reserve or fund is actuarially determined and is consistent with the objectives of the reserve or fund.

(C) Payments and additions to the reserve or fund are made in a systematic and consistent manner.

(D) If payments to accomplish the stated objectives of the reserve or fund are made from a source other than the reserve or fund, the payments into the reserve or fund are reduced accordingly.

(v) If an objective of an insurance program is to prefund insurance coverage on retired persons, then, in addition to the requirements imposed by subdivision (a)(1)(iv) of this subsection:

(A) Payments must be made to an insurer or trustee to establish and maintain a fund or reserve for that purpose;

(B) The policyholder or trustor must have no right of recapture of the reserve or fund so long as any active or retired participant in the program remains alive unless the interests of such remaining participants are satisfied through adequate reinsurance or otherwise; and

(C) The amount added to the reserve or fund in any cost accounting period must not be greater than an amount which would be required to apportion the cost of the insurance coverage fairly over the working lives of the active employees in the plan. If a contractor establishes a terminal-funded plan for retired persons or converts from a pay-as-you-go plan to a terminal-funded plan, the actuarial present value of benefits applicable to employees already retired shall be amortized over a period of 15 years.

(vi) The contractor may adopt and consistently follow a practice of determining insurance costs based on the estimated premium and assessments net of estimated refunds and dividends. If this practice is adopted, then any difference between an estimated and actual refund, dividend, or assessment shall become an adjustment to the pro rata net premium costs for the earliest cost accounting period in which the refund or dividend is actually or constructively received or in which the additional assessment is payable.

(2) For exposure to risk of loss which is not covered by the purchase of insurance or by payments to a trusteed fund, the contractor shall follow a program of self-insurance accounting according to the following criteria:

(i) Except as provided in subdivisions (a)(2) (ii) and (iii) of this subsection actual losses shall not become a part of insurance costs. Instead, the contractor shall make a self-insurance charge for each period for each type of self-insured risk which shall represent the projected average loss for that period. If insurance could be purchased against the self-insured risk, the cost of such insurance may be used as an estimate of the projected average loss; if this method is used, the self-insurance charge plus insurance administration expenses may be equal to, but shall not exceed, the cost of comparable purchased insurance plus the associated insurance administration expenses. However, the contractor's actual loss experience shall be evaluated regularly, and self-insurance charges for subsequent periods shall reflect such experience in the same manner as would purchased insurance. If insurance could not be purchased against the self-insured risk, the amount of the self-insurance charge for each period shall be based on the contractor's experience, relevant industry experience, and anticipated conditions in accordance with accepted actuarial principles.

(ii) Where it is probable that the actual amount of losses which will occur in a cost accounting period will not differ significantly from the projected average loss for that period, the actual amount of losses in that period may be considered to represent the projected average loss for that period in lieu of a self-insurance charge.

(iii) Under self-insurance programs for retired persons, only actual losses shall be considered to represent the projected average loss unless a reserve or fund is established in accordance with 30.416-50(a)(1)(v).

(iv) The self-insurance charge shall be determined in a manner which will give appropriate recognition to any indemnification agreement which exists between the contracting parties.

(3) In measuring actual losses under subparagraph (a)(2) of this subsection:

(i) The amount of a loss shall be measured by (A) the actual cash value of property destroyed, (B) amounts paid or accrued to repair damage, (C) amounts paid or accrued to estates and beneficiaries, and (D) amounts paid or accrued to compensate claimants, including subrogation. Where the amount of a loss which is represented by a liability to a third party is uncertain, the estimate of the loss shall be the amount which would be includable as an accrued liability in financial statements prepared in accordance with generally accepted accounting principles.

(ii) If a loss has been incurred and the amount of the liability to a claimant is fixed or reasonably certain, but actual payment of the liability will not take place for more than 1 year after the loss is incurred, the amount of the loss to be recognized currently shall be the present value of the future payments, determined by using a discount rate equal to the interest rate as determined by the Secretary of the Treasury pursuant to Pub. L. 92-41, 85 Stat. 97, in effect at the time the loss is recognized. Alternatively, where settlement will consist of a series of payments over an indefinite time period, as in workmen's compensation, the contractor may follow a consistent policy of recognizing only the actual amounts paid in the period of payment.

(4) The contractor may elect to recognize immaterial amounts of self-insured losses or insurance administration expenses as part of other expense categories rather than as "insurance costs."

(b) *Allocation of insurance costs:* (1) Where actual losses are recognized as an estimate of the projected average loss, in accordance with 30.416-50(a)(2), or where actual loss experience is determined for the purpose of developing self-insurance charges by segment, a loss which is incurred in a given segment shall be identified with that segment. However, if the contractor's home office is, in effect, a reinsurer of its segments against catastrophic losses, a portion of such catastrophic losses shall be allocated to, or identified with, the home office.

(2) Insurance costs shall be allocated on the basis of the factors used to determine the premium, assessment, refund, dividend, or self-insurance charge, except that insurance costs incurred by a segment or allocated to a segment from a home office may be combined with costs of other indirect cost pools if the resultant allocation to each final cost objective is substantially the same as it would have been if separately allocated under this provision.

(3) Insurance administration expenses which are material in relation to total insurance costs shall be allocated on the same basis as the related premium costs or self-insurance charge.

(c) *Records.* The contractor shall maintain such records as may be necessary to substantiate the amounts of premiums, refunds, dividends, losses, and self-insurance charges, paid or accrued, and the measurement and allocation of insurance costs. Memorandum records may be used to reflect any material differences between insurance costs as determined in accordance with this standard and as includable in financial statements prepared in accordance with generally accepted accounting principles.

[52 FR 35613, Sept. 22, 1987, as amended at 53 FR 27466, July 20, 1988]

30.416-60 Illustrations.

(a) Contractor A pays a companywide property and casualty insurance premium for the policy term July 1, 1980, to July 1, 1983, and includes the entire amount as cost in its cost accounting period which ended December 31, 1980. This is a violation of 30.416-50(a)(1)(i) in that only one-sixth of the policy term fell within the cost accounting period which ended December 31, 1980, and therefore only one-sixth of the premium should have been included in cost in that cost accounting period.

(b) Contractor B has a retrospectively rated worker's compensation insurance program. The policy term corresponds with the contractor's cost accounting period. Premium refunds are normally received and applied in the following cost accounting period. The contractor's practice is to include the entire gross premium in insurance cost in the cost accounting period in which it is paid and to credit the refund against insurance cost in the cost accounting period in which it is received. This practice conforms with 30.416-50(a)(1)(i). The contractor could also, under the provisions of 30.416-50(a)(1)(vi), have followed a consistent practice of estimating such refunds in advance and including the estimated net premium in insurance cost.

(c) Contractor C establishes a self-insured program of life insurance for active and retired persons. The contractor pays death benefits directly to the beneficiaries of deceased employees and includes such payments in insurance costs at the time of payment. This practice complies with 30.416-50(a)(2)(iii) which requires that only the actual losses be recognized unless a trusteed reserve or fund is established in accordance with 30.416-50(a)(1)(v).

(d) Instead of paying death benefits directly, contractor D purchases annual group term life insurance on active and retired persons and charges the premiums to insurance costs (with proper recognition for refunds and dividends). Contractor D's retired persons wish to be protected against possible discontinuance of the program. Contractor D, therefore, establishes a trusteed fund. As each employee retires, contractor D deposits in the fund an amount which is equal to the premium on a paid-up policy for that employee, and he advises the trustee that the fund is to be used to continue to pay premiums on retired persons in the event the program is discontinued. The contractor also continues to purchase group term insurance on both active employees and retired persons and charges both the premiums and the deposits to insurance costs. This practice does not comply with 30.416-50(a)(1)(iv)(D) which requires that if payments to accomplish the stated objectives of the reserve or funds are made from a source other than the reserve or fund, the payments into the fund shall be reduced accordingly.

NOTE: In this instance the contractor could comply with the standard by paying from the fund that portion of the group term premium which represented the retired persons or by reducing the deposits to the fund by an equivalent amount in accordance with 30.416-50(a)(1)(iv)(D). This practice would also comply with the requirement of 30.416-50(a)(1)(v)(C) that the amount added to the fund not be greater than an amount which would be required to fairly allocate the cost over the working lives of the active employees in the plan.

(e) Contractor E wishes to provide assurance of his life insurance program continuance to both active and retired employees. He establishes a trusteed fund in accordance with 30.416-50(a)(1) (iv) and (v) and thereafter pays into the fund each year for each active employee an actuarially determined amount which will accumulate to the equivalent of the premium on a paid-up life insurance policy at retirement. He charges the annual payments to insurance costs. Benefits are paid directly from the fund (or the fund is used to pay the annual premiums on group term life insurance for all employees). This practice also complies with the requirement of 30.416-50(a)(1)(v)(C) that the amount added to the fund not be greater than an amount which would be required to fairly allocate the cost over the working lives of the active employees in the plan.

(f) Contractor F has a fire insurance policy which provides that the first $50,000 of any fire loss will be borne by the contractor. Because the risk of loss is dispersed among many physical units of property and the average potential loss per unit is relatively low, the actual losses in any period may be expected not to differ significantly from the projected average loss. Therefore, the contractor intends to let the actual losses represent the projected average loss for this exposure to risk. Property with an actual cash value of $80,000 is destroyed in a fire. The contractor charges the $50,000 of the loss not covered by the policy to insurance costs for contract costing purposes. The practice complies with the requirement of 30.416-50(a)(2). However, had the contractor's plan been to make a self-insurance charge for such losses, then any difference between the self-insurance charge and actual losses in that cost accounting period would not have been allocable as an insurance cost.

(g) Contractor G is preparing to enter into a Government contract to produce explosive devices. The contractor is unable to purchase adequate insurance protection and must act as a self-insurer. There is a significant possibility of a major loss, against which the Government will not undertake to idemnify the contractor. The contractor, therefore, intends to make a self-insurance charge for this exposure to risk. The contractor may, in accordance with 30.416-50(a)(2)(i), use data obtained from other contractors or any other reasonable method of estimating the projected average loss in order to determine the self-insurance charge.

(h) Contractor H purchases liability insurance for all of its motor vehicles in a single, company-wide policy which contains a $50,000 deductible provision. However, the company's management policy provides that when a loss is incurred in a segment, only the first $5,000 of the loss will be charged to the segment; the balance of the loss will be absorbed at the home-office level and reallocated among all segments. Because the risk of loss is dispersed among many physical units and the maximum potential loss per occurrence is limited, the actual losses in any cost accounting period may be expected not to differ significantly from the projected average loss. Therefore, the contractor intends to let the actual losses represent the projected average loss for this exposure to risk. An analysis of the loss experience shows that many past losses exceeded $5,000. Contractor H's practice of allocating the loss in excess of $5,000 to the home office is a violation of 30.416-50(b)(1)(ii). The limit of $5,000 cannot realistically be considered a measure of a "catastrophic" loss when losses frequently exceed this amount, and the use of a limit this low would obscure segment loss experience.

30.416-61 Interpretation. [Reserved]

30.416-62 Exemption. [Reserved]

30.416-63 Effective date.

The effective date of the modification deleting the reference to state discount rates at 30.416-50(a)(3)(ii), is September 19, 1988. The modification shall be followed by each contractor on or after the start of its next cost accounting period beginning after the receipt of a contract to which the modification is applicable.

[53 FR 27466, July 20, 1988]

30.417 Cost of money as an element of the cost of capital assets under construction.

30.417-10 [Reserved]

30.417-20 Purpose.

The purpose of this Cost Accounting Standard is to establish criteria for the measurement of the cost of money attributable to capital assets under construction, fabrication or development as an element of the cost of those assets. Consistent application of these criteria will improve cost measurement by providing for recognition of cost of contractor investment in assets under construction, and will provide greater uniformity in accounting for asset acquisition costs.

30.417-30 [Reserved]

30.417-40 Fundamental requirement.

The cost of money applicable to the investment in tangible and intangible capital assets being constructed, fabricated, or developed for a contractor's own use shall be included in the capitalized acquisition cost of such assets.

30.417-50 Techniques for application.

(a) The cost of money for an asset shall be calculated as follows:

(1) The cost of money rate used shall be based on interest rates determined by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(2) A representative investment amount shall be determined each cost accounting period for each capital asset being constructed, fabricated, or developed giving appropriate consideration to the rate at which costs of construction are incurred.

(3) Other methods for calculating the cost of money to be capitalized, such as the method used for financial accounting and reporting, may be used, provided the resulting amount does not differ materially from the amount calculated by use of subparagraphs (a) (1) and (2), of this subsection.

(b) If substantially all the activities necessary to get the asset ready for its intended use are discontinued, cost of money shall not be capitalized for the period of discontinuance. However, if such discontinuance arises out of causes beyond the control and without the fault or negligence of the contractor, cessation of cost of money capitalization is not required.

30.417-60 Illustrations.

(a) A contractor decided to build a major addition to his plant using both his own labor and outside subcontractors. It took 13 months to complete the building. The first 10 months of the construction period were in one cost accounting period. At the end of the cost accounting period the total charges, including cost of money computed in accordance with 30.414, accumulated in the construction-in-progress account for this project amounted to $750,000. However, most of these construction costs were incurred towards the end of the cost accounting period. In developing a method for determining a representative investment amount, appropriate consideration must be given to the rate at which costs have been incurred in accordance with 30.417-50(a)(2). Therefore, the contractor averaged the 10 month-end balances and determined that the average investment in the project was $245,000. Two cost of money rates were in effect during the 10-month period; their time-weighted average was determined to be 8.6 percent. Application of the 8.6 percent rate for ten-twelfths of a year to the representative balance of $245,000 resulted in the determination that $17,448 should be added to the construction-in-progress account in recognition of the cost of money related to this project in its first cost accounting period. The project was completed with the addition of $750,000 of additional costs during the first 3 months of the subsequent cost accounting period. The contractor considered the 3 month-end balances (which included the $17,558 capitalized cost of money described in the preceding paragraph) and determined that the representative balance was $1,234,000. The cost of money rate in effect during this 3-month period was 7.75 percent. Applying the rate of 7.75 percent for one-fourth of a year to the balance of $1,234,000 resulted in a determination that $23,909 should be added to the construction-in-progress account in recognition of the cost of money while under construction in the second cost accounting period. The capitalized project was put into service at the recognized cost of acquisition of $1,541,467 which consists of the "regular" costs of $1,500,000 plus $17,558 and $23,909 cost of money. This practice is in accordance with 30.417-50(a) and other applicable provisions of the Standard.

NOTE: An alternative technique would be to make separate calculations, using an appropriate investment amount and cost of money rate, for each month. The sum of the monthly cost of money amounts could be entered in the construction-in-progress account once each cost accounting period.

(b) A contractor built a major addition with identical basic data to those described in 30.417-60(a) except that the costs were incurred at a fairly uniform rate throughout the period. Because of the pattern of cost incurrence, the contractor used beginning and ending balances of the cost accounting period to find the representative amounts. For the first cost accounting period the representative investment amount was the average of the beginning and ending balances (zero and $750,000), or $375,000. Application of the average interest rate of 8.6 percent for ten-twelfths of a year resulted in the determination that $26,875 should be added to the construction-in-progress account in recognition of the cost of money related to this project in its first cost accounting period. During the subsequent three months the contractor used the representative balance of $1,151,875, derived by averaging the beginning balance of $776,875 ($750,000 "regular" cost plus the $26,875 imputed cost from the prior period) and the balance at the end, $1,526,875. Applying the 7.75% cost of money rate to this balance for a three-month period resulted in a determination that $22,317 should be added to the construction-in-progress account in recognition of the cost of money while under construction in the second cost accounting period. The capitalized project was put into service at the recognized cost of acquisition of $1,549,192 which consists of the "regular" costs of $1,500,000 plus $26,875 and $22,317 imputed cost of money. This practice is in accordance with 30.417-50(a) and other applicable provisions of the Standard.

NOTE: If this contractor, acting in accordance with established Standards for financial accounting, allocated a portion of its paid interest expense to this construction project and the resultant acquisition cost for financial reporting purposes was not materially different from $1,549,192, the contractor could, in accordance with 30.417-50(a)(iii), use the same acquisition cost for contract costing purposes.

30.417-61 Interpretation. [Reserved]

30.417-62 Exemption. [Reserved]

30.417-63 Effective date. [Reserved]

30.418 Allocation of direct and indirect costs.

30.418-10 [Reserved]

30.418-20 Purpose.

The purpose of this Cost Accounting Standard is (a) to provide for consistent determination of direct and indirect costs, (b) to provide criteria for the accumulation of indirect costs, including service center and overhead costs, in indirect cost pools, and (c) to provide guidance relating to the selection of allocation measures based on the beneficial or causal relationship between an indirect cost pool and cost objectives. Consistent application of these criteria and guidance will improve classification of costs as direct and indirect and the allocation of indirect costs.

30.418-30 [Reserved]

30.418-40 Fundamental requirements.

(a) A business unit shall have a written statement of accounting policies and practices for classifying costs as direct or indirect which shall be consistently applied.

(b) Indirect costs shall be accumulated in indirect cost pools which are homogeneous.

(c) Pooled costs shall be allocated to cost objectives in reasonable proportion to the beneficial or causal relationship of the pooled costs to cost objectives as follows:

(1) If a material amount of the costs included in a cost pool are costs of management or supervision of activities involving direct labor or direct material costs, resource consumption cannot be specifically identified with cost objectives. In that circumstance, a base shall be used which is representative of the activity being managed or supervised.

(2) If the cost pool does not contain a material amount of the costs of management or supervision of activities involving direct labor or direct material costs, resource consumption can be specifically identified with cost objectives. The pooled cost shall be allocated based on the specific identifiability of resource consumption with cost objectives by means of one of the following allocation bases:

(i) A resource consumption measure, (ii) an output measure, or (iii) a surrogate that is representative of resources consumed. The base shall be selected in accordance with the criteria set out in 30.418-50(e).

(d) To the extent that any cost allocations are required by the provisions of other Cost Accounting Standards, such allocations are not subject to the provisions of this Standard.

(e) This Standard does not cover accounting for the costs of special facilities where such costs are accounted for in separate indirect cost pools.

30.418-50 Techniques for application.

(a) *Determination of direct cost and indirect cost.* (1) The business unit's written policy classifying costs as direct or indirect shall be in conformity with the requirements of this Standard.

(2) In accounting for direct costs a business unit shall use actual costs, except that—

(i) Standard costs for material and labor may be used as provided in 30.407; or

(ii) An average cost or pre-established rate for labor may be used provided that (A) the functions performed are not materially disparate and employees involved are interchangeable with respect to the functions performed, or (B) the functions performed are materially disparate but the employees involved either all work in a single production unit yielding homogeneous outputs, or perform their respective functions as an integral team.

Whenever average cost or pre-established rates for labor are used, the variances, if material, shall be disposed of at least annually by allocation to cost objectives in proportion to the costs previously allocated to these cost objectives.

(3) Labor or material costs identified specifically with one of the particular cost objectives listed in subparagraph (d)(3) of this subsection shall be accounted for as direct labor or direct material costs.

(b) *Homogeneous indirect cost pools.* (1) An indirect cost pool is homogeneous if each significant activity whose costs are included therein has the same or a similar beneficial or causal relationship to cost objectives as the other activities whose costs are included in the cost pool. It is also homogeneous if the allocation of the costs of the activities included in the cost pool result in an allocation to cost objectives which is not materially different from the allocation that would result if the costs of the activities were allocated separately.

(2) An indirect cost pool is not homogeneous if the costs of all significant activities in the cost pool do not have the same or a similar beneficial or causal relationship to cost objectives and, if the costs were allocated separately, the resulting allocation

would be materially different. The determination of materiality shall be made using the criteria provided in Subpart 30.3.

(3) A homogeneous indirect cost pool shall include all indirect costs identified with the activity to which the pool relates.

(c) *Change in Allocation Base.* No change in an existing indirect cost pool allocation base is required if the allocation resulting from the existing base does not differ materially from the allocation that results from the use of the base determined to be most appropriate in accordance with the criteria set forth in paragraphs (d) and (e) of this subsection. The determination of materiality shall be made using the criteria provided in Subpart 30.3.

(d) *Allocation measures for an indirect cost pool which includes a material amount of the costs of management or supervision of activities involving direct labor or direct material costs.* (1) The costs of the management or supervision of activities involving direct labor or direct material costs do not have a direct and definitive relationship to the benefiting cost objectives and cannot be allocated on measures of a specific beneficial or causal relationship. In that circumstance, the base selected to measure the allocation of the pooled costs to cost objectives shall be a base representative of the activity being managed or supervised.

(2) The base used to represent the activity being managed or supervised shall be determined by the application of the criteria below. All significant elements of the selected base shall be included.

(i) A direct labor hour base or direct labor cost base shall be used, whichever in the aggregate is more likely to vary in proportion to the costs included in the cost pool being allocated, except that

(ii) A machine-hour base is appropriate if the costs in the cost pool are comprised predominantly of facility-related costs, such as depreciation, maintenance, and utilities, or

(iii) A units-of-production base is appropriate if there is common production of comparable units, or

(iv) A material cost base is appropriate if the activity being managed or supervised is a material-related activity.

(3) Indirect cost pools which include material amounts of the costs of management or supervision of activities involving direct labor or direct material costs shall be allocated to—

(i) Final cost objectives;

(ii) Goods produced for stock or product inventory;

(iii) Independent research and development and bid and proposal projects;

(iv) Cost centers used to accumulate costs identified with a process cost system (i.e., process cost centers);

(v) Goods or services produced or acquired for other segments of the contractor and for other cost objectives of a business unit; and

(vi) Self-construction, fabrication, betterment, improvement, or installation of tangible capital assets.

(e) *Allocation measures for indirect cost pools that do not include material amounts of the costs of management or supervision of activities involving direct labor or direct material costs.* Homogeneous indirect cost pools of this type have a direct and definitive relationship between the activities in the pool and benefiting cost objectives. The pooled costs shall be allocated using an appropriate measure of resource consumption. This determination shall be made in accordance with the following criteria taking into consideration the individual circumstances:

(1) The best representation of the beneficial or causal relationship between an indirect cost pool and the benefiting cost objectives is a measure of resource consumption of the activities of the indirect cost pool.

(2) (i) If consumption measures are unavailable or impractical to ascertain, the next best representation of the beneficial or causal relationship for allocation is a measure of the output of the activities of the indirect cost pool. Thus, the output is substituted for a direct measure of the consumption of resources.

(ii) The use of the basic unit of output will not reflect the proportional consumption of resources in circumstances in which the level of resource consumption varies among the units of output produced. Where a material difference will result, either the output measure shall be modified or more than one output measure shall be used to reflect the resources consumed to perform the activity.

(3) If neither resources consumed nor output of the activities can be measured practically, a surrogate that varies in proportion to the services received shall be used to measure the resources consumed. Generally, such surrogates measure the activity of the cost objectives receiving the service.

(4) Allocation of indirect cost pools which benefit one another may be accomplished by use of (i) the cross-allocation (reciprocal) method, (ii) the sequential method, or (iii) another method the results of which approximate those achieved by either of the methods in subdivisions (e)(4)(i) or (e)(4)(ii) of this subsection.

(5) Where the activities represented by an indirect cost pool provide services to two or more cost objectives simultaneously, the cost of such services shall be prorated between or among the cost objectives in reasonable proportion to the beneficial or causal relationship between the services and the cost objectives.

(f) *Special allocation.* Where a particular cost objective in relation to other cost objectives receives significantly more or less benefit from an indirect cost pool than would be reflected by the allocation of such costs using a base determined pursuant to paragraphs (d) and (e) of this subsection, the Government and contractor may agree to a special allocation from that indirect cost pool to the particular cost objective commensurate with the benefits received. The amount of a special allocation to any such cost objective made pursuant to such an agreement shall be excluded from the indirect cost pool and the particular cost objective's allocation base data shall be excluded from the base used to allocate the pool.

(g) *Use of pre-established rates for indirect costs.* (1) Pre-established rates, based on either forecasted actual or standard cost, may be used in allocating an indirect cost pool.

(2) Pre-established rates shall reflect the costs and activities anticipated for the cost accounting period except as

provided in subparagra
subsection. Such pre-es
shall be reviewed at
and revised as necessar
anticipated conditions.

(3) The contracting
agree on pre-establishe
are not based on costs
anticipated for a co
period. The contractor
consistently apply writt
the establishment of the

(4) Under subparagra
(3) of this subsection w
of a cost accounting per
al, these variances shall
by allocating them to
in proportion to the c
allocated to these cost
use of the pre-establishe

(5) If pre-established
vised during a cost acc
and if the variances a
the time of the revisi
cant, the costs allocate
shall be adjusted to
which would have been
the revised pre-establish

30.418-60 Illustrations.

(a) Business Unit A h
sifications of engineers
spent in working direct
duction of the goods or
for by contracts and o
objectives. In keeping w
policy, detailed time re
of the hours worked
neers, showing the job,
bers representing vario
tives. On the basis of
time records, Unit A
labor costs of these eng
labor costs of final c
This practice is in acco
requirements of 30.418-

(b) Business Unit B h
department, employees
form various functions
work-in-process of mul
objectives. These e
grouped by labor skills
changeable within the
The average wage rate
is multiplied by the ho
each cost objective by
that group. The contr
these costs as direct

each final cost objective. This cost accounting treatment is in accordance with the provisions of 30.418-50(a)(2)(ii)(B).

(c) Business Unit C accumulates the costs relating to building ownership, maintenance, and utility into one indirect cost pool designated "Occupancy Costs" for allocation to cost objectives. Each of these activities has the same or a similar beneficial or causal relationship to the cost objectives occupying a space. Unit C's practice is in conformance with the provisions of 30.418-50(b)(1).

(d) Business Unit D includes the indirect costs of machining and assembling activities in a single manufacturing overhead pool. The machining activity does not have the same or similar beneficial or causal relationship to cost objectives as the assembling activity. Also, the allocation of the cost of the machining activity to cost objectives would be significantly different if allocated separately from the costs of the assembling activity. Unit D's single manufacturing overhead pool is not homogeneous in accordance with the provisions of 30.418-50(b), and separate pools must be established in accordance with 30.418-40(b).

(e) In accordance with 30.418-50(b)(3), Business Unit E includes all the cost of occupancy in an indirect cost pool. In selecting an allocation measure for this indirect cost pool, the contractor establishes that it is impractical to ascertain a measurement of the consumption of resources in relation to the use of facilities by individual cost objectives. An output base, the number of square feet of space provided to users, can be measured practically; however, the cost to provide facilities is significantly different for various types of facilities such as warehouse, factory, and office and each type of facility requires a different level of resource consumption to provide the same number of square feet of usable space. Allocation on a basic unit measure of square feet of, space occupied will not adequately reflect the proportional consumption of resources. Unit E establishes a weighted square foot measure for allocating occupancy costs, which reflects the different levels of resource consumption required to provide the different types of facilities. This practice is in conformance with provisions of 30.418-50(e)(2)(ii).

(f) Business Unit F has an indirect cost pool containing a significant amount of material-related costs. The contractor allocates these costs between his machining overhead cost pool and his assembly overhead cost pool. The business unit finds it impractical to use an allocation measure based on either consumption or output. The business unit selects a dollars of material-issued base which varies in proportion to the services rendered. The dollars of material-issued base is a surrogate base which conforms to the provisions of 30.418-50(e)(3).

(g) Business Unit G has a machining activity for which it develops a separate overhead rate, using direct labor cost as the allocation base. The machining activity occasionally does significant amounts of work for other activities of the business unit. The labor used in doing the work for other activities is of the same nature as that used for contract work. However, the machining labor for other activities is not included in the base used to allocate the overhead costs of the machining activity. This practice is not in conformance with 30.418-50(d)(2). Unit G must include the cost of labor doing work for the other activities in the allocation base for the machining activity indirect cost pool.

(h) Business Unit H accounts for the costs of company aircraft in a separate homogeneous indirect cost pool and allocates the cost to benefiting cost objectives using flight hours. Unit H prorates the cost of a single flight between benefiting cost objectives whenever simultaneous services have been rendered. Manager of Contract 2 learns of the trip and goes along with Manager of Contract 1. Unit H prorates the cost of the trip between Contract 1 and Contract 2. This practice is in conformance with the provision of 30.418-50(e)(5).

(i) During a cost accounting period, Business Unit I allocates the cost of its flight services indirect cost pool to other indirect cost pools and final cost objectives using a pre-established rate.

The pre-established rate is based on an estimate of the actual costs and activity for the cost accounting period. For the cost accounting period, Unit I establishes a rate of $200 per hour for use of the flight services activity. In March, the contractor's operating environment changes significantly; the contractor now expects a significant increase in the cost of this activity during the remainder of the year. Unit I estimates the rate for the entire cost accounting period to be $240 an hour. Pursuant to the provisions of 30.418-50(g)(4), the Business Unit may revise its rate to the expected $240 an hour. If the accumulated variances are significant, the business unit must also adjust the costs previously allocated to reflect the revised rates.

30.418-61 Interpretation. [Reserved]

30.418-62 Exemptions.

This standard shall not apply to contractors who are subject to the provisions of OMB Circular A-87 (Cost Principles for State and Local Governments.)

[52 FR 35622, as amended at 52 FR 36675, Sept. 30, 1987. Redesignated at 53 FR 27466, July 20, 1988]

30.418-63 Effective date. [Reserved]

30.420 Accounting for independent research and development costs and bid and proposal costs.

30.420-10 [Reserved]

30.420-20 Purpose.

The purpose of this Cost Accounting Standard is to provide criteria for the accumulation of independent research and development costs and bid and proposal costs, and for the allocation of such costs to cost objectives based on the beneficial or causal relationship between such costs and cost objectives. Consistent application of these criteria will improve cost allocation.

30.420-30 [Reserved]

30.420-40 Fundamental requirement.

(a) The basic unit for the identification and accumulation of Independent Research and Development (IR&D) and Bid and Proposal (B&P) costs shall be the individual IR&D or B&P project.

(b) IR&D and B&P project costs shall consist of all allocable costs, except business unit general and administrative expenses.

(c) IR&D and B&P cost pools consist of all IR&D and B&P project costs and other allocable costs, except business unit general and administrative expenses.

(d) The IR&D and B&P cost pools of a home office shall be allocated to segments on the basis of the beneficial or causal relationship between the IR&D and B&P costs and the segments reporting to that home office.

(e) The IR&D and B&P cost pools of a business unit shall be allocated to the final cost objectives of that business unit on the basis of the beneficial or causal relationship between the IR&D and B&P costs and the final cost objectives.

(f) (1) B&P costs incurred in a cost accounting period shall not be assigned to any other cost accounting period.

(2) IR&D costs incurred in a cost accounting period shall not be assigned to any other cost accounting period, except as may be permitted pursuant to provisions of existing laws, regulations, and other controlling factors.

30.420-50 Techniques for application.

(a) IR&D and B&P project costs shall include (1) costs, which if incurred in like circumstances for a final cost objective, would be treated as direct costs of that final cost objective, and (2) the overhead costs of productive activities and other indirect costs related to the project based on the contractor's cost accounting practice or applicable Cost Accounting Standards for allocation of indirect costs.

(b) IR&D and B&P cost pools for a segment consist of the project costs plus allocable home office IR&D and B&P costs.

(c) When the costs of individual IR&D or B&P efforts are not material in amount, these costs may be accumulated in one or more project(s) within each of these two types of effort.

(d) The costs of any work performed by one segment for another segment shall not be treated as IR&D costs or B&P costs of the performing segment unless the work is a part of an IR&D or B&P project of the performing segment. If such work is part of a performing segment's IR&D or B&P project, the project will be transferred to the home office to be allocated in accordance with paragraph (e) of this subsection.

(e) The costs of IR&D and B&P projects accumulated at a home office shall be allocated to its segments as follows:

(1) Projects which can be identified with a specific segment(s) shall have their costs allocated to such segment(s).

(2) The costs of all other IR&D and B&P projects shall be allocated among all segments by means of the same base used by the company to allocate its residual expenses in accordance with 30.403; provided, however, where a particular segment receives significantly more or less benefit from the IR&D or B&P costs than would be reflected by the allocation of such costs to the segment by that base, the Government and the contractor may agree to a special allocation of the IR&D or B&P costs to such segment commensurate with the benefits received. The amount of a special allocation to any segment made pursuant to such an agreement shall be excluded from the IR&D and B&P cost pools to be allocated to other segments and the base data of any such segment shall be excluded from the base used to allocate these pools.

(f) The costs of IR&D and B&P projects accumulated at a business unit shall be allocated to cost objectives as follows:

(1) Where costs of any IR&D or B&P project benefit more than one segment of the organization, the amounts to be allocated to each segment shall be determined in accordance with paragraph (e) of this subsection.

(2) IR&D and B&P cost pools which are not allocated under subparagraph (f)(1) of this subsection, shall be allocated to all final cost objectives of the business unit by means of the same base used by the business unit to allocate its general and administrative expenses in accordance with 30.410-50; provided, however, where a particular final cost objective receives significantly more or less benefit from IR&D or B&P costs than would be reflected by the allocation of such costs the Government and the contractor may agree to a special allocation of the IR&D or B&P costs to such final cost objective commensurate with the benefits received. The amount of special allocation to any such final cost objective made pursuant to such an agreement shall be excluded from the IR&D and B&P cost pools to be allocated to other final cost objectives and the particular final cost objective's base data shall be excluded from the base used to allocate these pools.

(g) Notwithstanding the provisions of paragraphs (d), (e) or (f) of this subsection, the costs of IR&D and B&P projects allocable to a home office pursuant to 30.420-50(d) may be allocated directly to the receiving segments, provided that such allocation not be substantially different from the allocation that would be made if they were first passed through home office accounts.

30.420-60 Illustrations.

(a) Business Unit A's engineering department in accordance with its established accounting practice, charges administrative effort including typing to its overhead cost pool. In submitting a proposal, the engineering department assigns several typists to the proposal project on a full time basis and charges the typists' time directly to the proposal project, rather than to its overhead pool. Because the engineering department under its established accounting practice does not charge the cost of typing directly to final cost objectives, the direct charge does not meet with the requirements of 30.420-50(a).

(b) Company B has five segments. The company undertakes an IR&D project which is part of the IR&D plans of segments X, Y, and Z, and will be of general benefit to all five segments. The company designates Segment Z as the project leader in performing the project. In accumulating the costs, each segment allocates overhead to its part of the project but does not allocate segment G&A. The IR&D costs are then allocated to the home office by each segment. The costs are combined with other IR&D costs that benefit the company as a whole. The costs are allocated to all five segements by means of the same base by which the company allocates its residual home office expense costs to all segments. This practice meets the requirements of 30.420-40(b), 30.420-50(e)(2), and 30.420-50(f)(1).

(c) Business Unit C normally accounts for its B&P effort by individual project. It accumulates directly allocated costs and departmental overhead costs by project. The business unit also submits large numbers of bids and proposals whose individual costs of preparation are not material in amount. The business unit collects the cost of these efforts under a single project. Since the cost of preparing each individual bid and proposal is not material, the practice of accumulating these costs in a single project meets the requirements of 30.420-50(c).

(d) Segment D requests that Segment Y provide support for a Segment D IR&D project. The work being performed by Y is similar in nature to Y's normal product and is not part of its annual IR&D plan. Segment Y allocates to the project all costs it allocates to other final cost objectives, including G&A expense. Segment Y then directly transfers the cost of the project to Segment D in accordance with its normal intersegment transfer procedure. This accounting treatment meets the requirements of 30.420-50(d) and 30.410.

(e) Contractor E has six operating segments and a research segment. The research segment performs work under (1) research and development contracts, (2) projects which are not part of its own IR&D plan but are specifically in support of other segments' IR&D projects, and (3) IR&D projects for the benefit of the company as a whole.

(i) The research segment directly allocates the cost of the projects in support of another segment's IR&D projects, including an allocation of its general and administrative expenses, to the receiving segment. This practice meets the requirements of 30.420-50(d).

(ii) The costs of the IR&D projects which benefit the company as a whole exclude any allocation of the research segment's general and administrative expenses and are transferred to the home office. The home office allocates these costs on the same base it uses to allocate its residual expenses to all seven segments. This practice meets the requirements of 30.420-50(e)(2) and (f)(1).

(f) Company F accumulates at the home office the costs of IR&D and B&P projects which generally benefit all segments of the company except Segment X. The company and the contracting officer agree that the nature of the business activity of Segment X is such that the home office IR&D and B&P effort is neither caused by nor provides any benefit to that segment. For the purpose of allocating its home office residual expenses, the company uses a base as provided in 30.403. For the purpose of allocating the home office IR&D and B&P costs, the company removes the data of Segment X from the base used for the allocation of its residual expenses. This practice meets the requirements of 30.420-50(e)(2).

(g) Company G has 10 segments. Segment X performs IR&D projects, the results of which benefit it and two other segments but none of the other seven segments. The cost of those projects performed by Segment X are transferred to the home office and allocated to the three segments on the basis of the benefits received by the three segments. This practice meets the requirements of 30.420-50(e)(1) and 30.420-50(f)(1).

30.420-61 Interpretation. [Reserved]

30.420-62 Exemptions.

This Standard shall not apply to contractors who are subject to the provisions of OMB Circular A-87 (Cost Principles for State and Local Government).

[52 FR 35622, as amended at 52 FR 36675, Sept. 30, 1987. Redesignated at 53 FR 27466, July 20, 1988]

30.420-63 Effective date. [Reserved]

Subpart 30.5—[Reserved]

Subpart 30.6—CAS Administration

30.601 Responsibility.

(a) The cognizant ACO shall perform CAS administration for all contracts in a business unit notwithstanding retention of other administration functions by the contracting officer.

(b) Within 30 days of the award of any new contract or subcontract subject to CAS, the contracting officer, contractor, or subcontractor making the award shall request the cognizant ACO to perform administration for CAS matters (see subpart 42.2).

30.602 Changes to disclosed or established cost accounting practices.

Adjustments to contracts for CAS noncompliance, new standards, or voluntary changes are required only if the amounts involved are material. The ACO has the right to forego action to adjust contracts if the amount involved is not considered material; however, in the case of noncompliance issues, the ACO shall inform the contractor that (a) the Government reserves the right to make appropriate contract adjustments if, in the future, the ACO determines that the cost impact has become material and (b) the contractor is not excused from the obligation to comply with the applicable Standard or rules and regulations involved. In determining materiality, the ACO shall use the criteria in 30.305.

30.602-1 Equitable adjustment for new or modified standards.

(a) The clause at 52.230-1, Cost Accounting Standards Notices and Certification (National Defense), requires offerors to state whether or not the award of the contemplated contract would require a change to established cost accounting practices affecting existing contracts and subcontracts. The contracting officer shall ensure that the contractor's response to the notice is made known to the cognizant ACO.

(b) Contracts and subcontracts containing the clause at 52.230-3, Cost Accounting Standards, may require equitable adjustments to comply with new or modified CAS. Such adjustments are limited to contracts and subcontracts awarded before the effective date of each new or modified standard. A new or modified standard becomes applicable prospectively to these contracts and subcontracts when a new national defense contract or subcontract containing the clause at 52.230-3, Cost Accounting Standards, is awarded on or after the effective date of the new standard.

(c) Contracting officers shall encourage contractors to submit to the cognizant ACO any change in accounting practice in anticipation of complying with a new or modified standard as soon as practical after the new or modified standard has been incorporated into the FAR.

(d) Upon receipt of information from the contractor indicating that an accounting change is required to comply with a new or modified standard, the cognizant ACO shall review the proposed change concurrently for adequacy and compliance. If the review indicates that the change is both adequate and in compliance (see 30.202-7), the contractor shall be notified and requested to submit a cost impact proposal in sufficient detail to determine the impact on each CAS-covered contract and subcontract. The proposal shall identify each additional standard and all contracts and subcontracts containing the CAS clause and having an award date before the effective date of that standard. The proposal shall be in sufficient detail to permit evaluation, determination, and negotiation of the cost impact upon each affected contract and subcontract containing the clause at 52.230-3, Cost Accounting Standards, and shall be in the form and manner specified by the cognizant contracting officer.

(e) The cognizant ACO shall promptly analyze the proposal with the assistance of the auditor, determine the impact, and negotiate the contract price adjustments on behalf of all Government agencies. The ACO shall invite contracting officers to participate in negotiations of adjustments when the price of any of their contracts may be increased or decreased by $10,000 or more. At the conclusion of negotiations, the ACO shall—

(1) Execute supplemental agreements to contracts of the ACO's own agency (and, if additional funds are required, request them from the appropriate contracting officer);

(2) Prepare a negotiation memorandum and send copies to cognizant auditors and contracting officers of other agencies having prime contracts affected by the negotiation (those agencies shall execute supplemental agreements in the amounts negotiated); and

(3) Furnish copies of the memorandum indicating the effect on costs to the ACO of the next higher tier subcontractor or prime contractor, as appropriate, if a subcontract is to be adjusted. This memorandum shall be the basis for negotiation between the subcontractor and the next higher tier subcontractor or prime contractor and for execution of a supplemental agreement to the subcontract.

(f) If the contractor does not submit a proposal in the form and time specified (see paragraph (b) of the clause at 52.230-4, Administration of Cost Accounting Standards, or if the parties fail to agree concerning the cost impact, the cognizant ACO, with the assistance of the auditor, shall estimate the cost impact on contracts and subcontracts containing the clause at 52.230-3, Cost Accounting Standards. The ACO shall request the contractor to agree to the cost or price adjustment. The ACO may withhold an amount not to exceed 10 percent of each subsequent payment request related to the contractor's CAS-covered prime contracts, which contain the appropriate withholding provisions, until the proposal has been furnished by the contractor. The contractor shall also be advised that in the event no agreement on the cost or price adjustment is reached within 20 days, action may be taken in accordance with the clause at 52.233-1, Disputes. If the ACO issues a unilateral determination under the Disputes clause, the ACO shall consider appropriate action to protect the Government's interests under subpart 32.6.

30.602-2 Noncompliance with CAS requirements.

(a) Within 15 days of the receipt of a report of alleged noncompliance from the auditor, the cognizant ACO shall make an initial finding of compliance or noncompliance and advise the auditor.

(b) If an initial finding of noncompliance is made, the ACO shall immediately notify the contractor in writing of the exact nature of the noncompliance and allow 30 days within which to agree or to submit reasons why the existing practices are considered to be in compliance.

(c) If the contractor agrees with the initial finding of noncompliance—

(1) The contractor shall be required to correct the noncompliance and submit a complete description of any accounting change and the general dollar magnitude of the change of all CAS-covered contracts and subcontracts;

(2) The cognizant ACO shall review the accounting change for adequacy and compliance concurrently (if the change is both adequate and in compliance, the ACO shall notify the contractor and request a cost impact proposal);

(3) The cost impact proposal must identify all contracts and subcontracts containing the clause at 52.230-3, Cost Accounting Standards, or the clause at 52.230-5, Disclosure and Consistency of Cost Accounting Practices, and shall be in sufficient detail to permit evaluation and negotiation of the cost impact of each separate CAS-covered contract and subcontract from the date of failure to comply until the noncompliance is corrected; and

(4) The ACO shall then follow the procedures in 30.602-1(e).

(d) If the contractor disagrees with the initial noncompliance finding, the cognizant ACO shall review the reasons why the contractor considers the existing practices to be in compliance and make a determination of compliance or noncompliance.

(1) If the ACO makes a determination of compliance, the ACO shall

notify the contractor and send a copy to the auditor.

(2) If the ACO makes a determination of noncompliance, or if the contractor fails to furnish the cost impact proposal, the ACO, with the assistance of the auditor, shall determine the cost impact of the noncompliance on contracts and subcontracts containing CAS clauses. The ACO may withhold an amount not to exceed 10 percent of each subsequent payment request related to the contractor's CAS-covered prime contracts, which contain the appropriate provisions, until the proposal has been furnished by the contractor.

(3) If the ACO determines that the noncompliance results in material increased costs to the Government, the ACO shall notify the contractor and request agreement as to the cost or price adjustment, together with any applicable interest. The contractor shall also be advised that in the event no agreement on the cost or price adjustment is reached within 20 days, action may be taken in accordance with the clause at 52.233-1, Disputes. If the ACO issues a unilateral determination under the Disputes clause, the ACO shall consider appropriate action to protect the Government's interests under subpart 32.6.

(4) If the ACO estimate indicates there is no material increase in costs as a result of the noncompliance and the contractor refuses to take corrective action, the ACO shall notify the contractor in writing that the contractor is in noncompliance, that corrective action should be taken, and that if such noncompliance subsequently results in materially increased costs to the Government, the provisions of the clause at 52.230-3, Cost Accounting Standards, and/or the clause at 52.230-5, Disclosure and Consistency of Cost Accounting Practices, will be enforced.

30.602-3 Voluntary changes.

(a) The contract price may be adjusted for voluntary changes to a contractor's Disclosure Statement or cost accounting practices. The contractor must first notify the cognizant ACO by submission, not less than 60 days (or such other date as may be mutually agreed to) before proposed implementation, of a description of the accounting change and the general dollar magnitude of the change (including the sum of all increases and the sum of all decreases) for all CAS-covered contracts and subcontracts.

(b) The cognizant ACO shall review the accounting change concurrently for adequacy and compliance (see 30.202-7). If the change meets both tests, the ACO shall so notify the contractor and request that the contractor submit a cost impact proposal identifying all contracts and subcontracts containing the clause at 52.230-3, Cost Accounting Standards, and the clause at 52.230-2, Disclosure and Consistency of Cost Accounting Practices. The cost impact proposal shall be in sufficient detail to allow evaluation and negotiation of the cost impact upon each affected CAS-covered contract and subcontract.

(c) With the assistance of the auditor, the ACO shall promptly analyze the cost impact proposal to determine whether or not the proposed change will result in increased costs being paid by the Government. The ACO shall consider all of the contractor's affected CAS-covered contracts and subcontracts, but any cost changes to higher-tier subcontracts or contracts of other contractors over and above the cost of the subcontract adjustment shall not be considered. Increased costs resulting from a voluntary change may be allowed only if the ACO determines that the change is desirable and not detrimental to the Government. The ACO shall then follow the procedures in 30.602-1(e).

(d) If the contractor fails to submit a cost impact proposal in the form and time specified or if the parties fail to agree concerning the cost impact, the cognizant ACO, with the assistance of the auditor, shall estimate the cost impact on contracts and subcontracts containing a CAS clause and shall then request the contractor to agree to the cost or price adjustment. The ACO may withhold an amount not to exceed 10 percent of each subsequent payment request related to the contractor's CAS-covered prime contracts, which contain the appropriate withholding provisions, until the proposal has been furnished by the contractor. The contractor shall also be advised that, in the event no agreement on the cost or price adjustment is reached within 20 days, action may be taken in accordance with the clause at 52.233-1, Disputes. If the ACO issues a unilateral determination under the Disputes clause, the ACO shall consider appropriate action to protect the Government's interests under subpart 32.6.

30.603 Subcontract administration.

When a negotiated CAS price adjustment or a determination of noncompliance is required at the subcontract level, the ACO cognizant of the subcontractor shall make the determination and advise the ACO cognizant of the prime contractor or next higher tier subcontractor of his decision. ACO's cognizant of higher tier subcontractors or prime contractors shall not reverse the determination of the ACO cognizant of the subcontractor.

APPENDIX A TO PART 30—PREAMBLES TO THE COST ACCOUNTING STANDARDS

PART I—PREAMBLES TO THE COST ACCOUNTING STANDARDS PUBLISHED BY THE COST ACCOUNTING STANDARDS BOARD

NOTE: Preambles to the Cost Accounting Standards published by the Cost Accounting Standards Board appear in Title 4 of the Code of Federal Regulations and are republished in the looseleaf edition of the FAR.

PART II—PREAMBLES TO THE RELATED RULES AND REGULATIONS PUBLISHED BY THE COST ACCOUNTING STANDARDS BOARD

NOTE: Preambles to the Related Rules and Regulations published by the Cost Accounting Standards Board appear in Title 4 of the Code of Federal Regulations and are republished in the looseleaf edition of the FAR.

PART III—PREAMBLES PUBLISHED UNDER THE FAR SYSTEM

Preamble A to 30.404, Capitalization of Tangible Assets

This final rule, in Federal Acquisition Circular (FAC) 84-38, revises 30.404-40(b)(1), 30.404-60(a)(1), and 30.404-60(a)(1)(i).

Summary

Section 30.404 requires that contractors have written policies for capitalization which must include a minimum acquisition cost criterion of $1000. The Standard is being amended to raise the threshold to $1500. The purpose of the change is to permit contractors to adopt practices appropriated in today's economy. *Effective date.* The effective date of this modification is September 19, 1988.

Supplementary Information:

Background

The CAS Board established the minimum acquisition cost criterion for capitalization at $500 when it originally promulgated CAS 404 in 1973. The Board's initial $500 limitation encompassed the practices of 97 percent of the companies whose Disclosure Statements were filed with the Board. In the promulgation comments to the Standard, the Board recommended that the special limits in the standard ". . . may need to be reviewed in the future . . . (and will be revised) promptly if developments warrant a change."

On March 3, 1980, the Board *did* revise the limitation upward to $1000 as it recognized that circumstances had changed significantly since the promulgation of Standard 404. The Board found that the performance of several official indices showed increases from 60 to 80 percent and a survey of companies not influenced by the limitation of Standard 404 showed a significant number using $1000 as the minimum criterion for capitalization.

The impact of inflation has continued over the 7 years since 1980, although at a lower level. Indices from the Commerce Department for the implicit price deflators on nonresidential structures and machinery and equipment showed increases from 30 to 35 percent over the period 1979 through 1985. When applied to the current $1000 criterion, this yields values from $1300 to $1350. In addition, economic projections showed inflation levels rising slightly from 1986 through 1989. Consequently, this change increases the minimum acquisition cost criterion for capitalization of tangible capital assets to $1500 to cover both actual and projected price increases.

The amendment which is now being promulgated is derived directly from the proposed rule which was published in the FEDERAL REGISTER on July 9, 1986 (51 FR 24971), with an invitation for interested parties to submit comments.

Four letters of comment were received on the July 9, 1986, proposal. Only one letter directly addressed the appropriateness of the proposed revisions to 30.404. That comment stated that inflation should not be the motivating factor in determining significant costs for capitalization, but rather materiality of the cost should be the factor in determining significance.

The CAS Board's comments in the CAS 404 preamble and its action to increase the capitalization threshold based upon inflation, discussed above, indicate that the Board considered the materiality and significance of asset acquisition cost to be directly related to the level of prices in the economy. The Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council agree with the CAS Board's outlook on this matter and expect the increase in capitalization threshold provided in this modification to 30.404 will be beneficial to Government contract costing by not requiring capitalization of assets that are of insignificant value.

Preamble A to 30.416, Accounting for Insurance Costs

This final rule, in Federal Acquisition Circular (FAC) 84-38, revises 30.416-50(a)(3)(ii).

Summary

FAR 30.416-50(a)(3)(ii) revisions delete the requirement to use state rates in discounting certain self-insured losses to present value.

Effective date: The effective date of this modification is September 19, 1988.

This modification shall be followed by each contractor on or after the start of its next cost accounting period, beginning after receipt of a contract to which this modification is applicable.

Supplementary Information

Background

Section 30.416 provides that the amount of insurance cost to be assigned to a cost accounting period is the projected average loss (PAL) for that period plus insurance administration expense in that period. The PAL is either the insurance premium, where the risk of loss is covered by the purchase of insurance, or a self-insurance charge, where the exposure to risk is not covered by the purchase of insurance. Where it is probable that the actual amount of losses will not differ significantly from the PAL, the actual amount of losses may be considered to represent the PAL for the period as the self-insurance charge.

In self-insurance, when the actual amount of losses is being used to represent the PAL, contractors are to discount those losses to present value, where payments to the claimant will not take place for over a year after the loss occurs. If a state provides a discount rate for computing lump-sum settlements, 30.416 requires that the state rate be used for computing present value. Otherwise, the Pub. L. 92-41 Treasury rate is to be used. The differing rates specified by the states, and the lack of specified rates in some states, result in inconsistent treatment of self-insurance charges on defense contracts.

The purpose of requiring a present value computation for contract cost accounting purposes is to recognize the time value of money for funds advanced to and used by the contractor for extended periods before being disbursed. The Pub. L. 92-41 Treasury rate is generally specified for this purpose. The majority of state laws covering worker's compensation insurance specify a discount rate in the range of 3-6 percent. The use of a low rate results in a larger settlement than would use of a current money market rate. The purpose of low state rates is to discourage lump-sum settlements. This purpose is unrelated to that of fair valuation for contract cost accounting purposes. The use of state rates may produce inaccurate measures of present values and will most certainly create inconsistencies in the pricing of contracts due to the lack of consistent determinations of present values. Consequently, the proposed rule, published in the FEDERAL REGISTER on July 8, 1986 (51 FR 24788), deleted the reference to state discount rates at 30.416-50(a)(3)(ii) and required use of the Pub. L. 92-41 Treasury rate in all cases.

Four comments were received in response to the proposed rule. None of the comments directly challenged the appropriateness of the proposed revision. Therefore, no changes were made to the proposed rule as a result of the public comments.

[53 FR 27466, July 20, 1988]

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42301, Sept. 19, 1983, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes for part 31 appear at 52 FR 35669, Sept. 22, 1987.

31.000 Scope of part.

This part contains cost principles and procedures for (a) the pricing of contracts, subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed (see 15.805-3) and (b) the determination, negotiation, or allowance of costs when required by a contract clause.

31.001 Definitions.

Accrued benefit cost method means an actuarial cost method under which units of benefit are assigned to each cost accounting period and are valued as they accrue; i.e., based on the services performed by each employee in the period involved. The measure of normal cost under this method for each cost accounting period is the present value of the units of benefit deemed to be credited to employees for service in that period. The measure of the actuarial liability at a plan's inception date is the present value of the units of benefit credited to employees for service prior to that date. (This method is also known as the unit credit cost method.)

Accumulating costs means collecting cost data in an organized manner, such as through a system of accounts.

Actual cash value means the cost of replacing damaged property with other property of like kind and quality in the physical condition of the property immediately before the damage.

Actual costs, as used in this part (other than subpart 31.6), means amounts determined on the basis of costs incurred, as distinguished from forecasted costs. Actual costs include standard costs properly adjusted for applicable variances.

Actuarial assumption means a prediction of future conditions affecting pension costs; e.g., mortality rate, employee turnover, compensation levels, pension fund earnings, and changes in values of pension funds assets.

Actuarial cost method means a technique which uses actuarial assumptions to measure the present value of future pension benefits and pension fund administrative expenses, and which assigns the cost of such benefits and expenses to cost accounting periods.

Actuarial gain and loss means the effect on pension cost resulting from differences between actuarial assumptions and actual experience.

Actuarial liability means pension cost attributable, under the actuarial cost method in use, to years before the date of a particular actuarial valuation. As of such date, the actuarial liability represents the excess of the present value of the future benefits and administrative expenses over the present value of future contributions for the normal cost for all plan participants and beneficiaries. The excess of the actuarial liability over the value of the assets of a pension plan is the unfunded actuarial liability.

Actuarial valuation means the determination, as of a specified date, of the normal cost, actuarial liability, value of the assets of a pension fund, and other relevant values for the pension plan.

Allocate means to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool.

Automatic data processing equipment (ADPE), as used in this part means:

(a) Digital and analog computer components and systems, irrespective of type of use, size, capacity, or price;

(b) All peripheral, auxiliary, and accessorial equipment used in support of digital and/or analog computers, either cable connected, or *self standing,* and whether selected or acquired with the computers or separately;

(c) Punched card machines (PCM) and systems used in conjunction with or independently of digital or analog computers; and

(d) Digital and analog terminal and conversion equipment that is acquired solely or primarily for use with a system which employs a computer or punched card machines.

Business unit means any segment of an organization, or an entire business organization which is not divided into segments.

Compensated personal absence means any absence from work for reasons such as illness, vacation, holidays, jury duty, military training, or personal activities for which an employer pays compensation directly to an employee in accordance with a plan or custom of the employer.

Cost input means the cost, except general and administrative (G&A) expenses, which for contract costing purposes is allocable to the production of goods and services during a cost accounting period.

Cost objective, as used in this part (other than subpart 31.6), means a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.

Cost of capital committed to facilities means an imputed cost determined by applying a cost of money rate to facilities capital.

Deferred compensation means an award made by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of the receipt of compensation by the employee. This definition shall not include the amount of year end accruals for salaries, wages, or bonuses that are to be paid within a reasonable period of time after the end of a cost accounting period.

Defined-benefit pension plan means a pension plan in which the benefits to be paid, or the basis for determining such benefits, are established in advance and the contributions are intended to provide the stated benefits.

Defined-contribution pension plan means a pension plan in which the contributions to be made are established in advance and the benefits are determined thereby.

Directly associated cost means any cost which is generated solely as a result of the incurrence of another cost, and which would not have been incurred had the other cost not been incurred.

Estimating costs means the process of forecasting a future result in terms of cost, based upon information available at the time.

Expressly unallowable cost means a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable.

Facilities capital means the net book value of tangible capital assets and of those intangible capital assets that are subject to amortization.

Final cost objective, as used in this part (other than subparts 31.3 and 31.6), means a cost objective that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

Fiscal year, as used in this part, means the accounting period for which annual financial statements are regularly prepared, generally a period of 12 months, 52 weeks, or 53 weeks.

Funded pension cost, as used in this part, means the portion of pension costs for a current or prior cost accounting period that has been paid to a funding agency.

General and administrative (G&A) expense means any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business unit as a whole. G&A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

Home office means an office responsible for directing or managing two or more, but not necessarily all, segments of an organization. It typically establishes policy for, and provides guidance to, the segments in their operations. It usually performs management, supervisory, or administrative functions, and may also perform service functions in support of the operations of the various segments. An organization which has intermediate levels, such as groups, may have several home offices which report to a common home office. An intermediate organization may be both a segment and a home office.

Immediate-gain actuarial cost method means any of the several actuarial cost methods under which actuarial gains and losses are included as part of the unfunded actuarial liability of the pension plan, rather than as part of the normal cost of the plan.

Independent research and development (IR&D) cost means the cost of effort which is neither sponsored by a grant, nor required in performing a contract, and which falls within any of the following four areas: (a) basic research, (b) applied research, (c) development, and (d) systems and other concept formulation studies.

Indirect cost pools, as used in this part (other than subparts 31.3 and 31.6), means groupings of incurred costs identified with two or more cost objectives but not identified specifically with any final cost objective.

Insurance administration expenses means the contractor's costs of administering an insurance program; e.g., the costs of operating an insurance or risk-management department, processing claims, actuarial fees, and service fees paid to insurance companies, trustees, or technical consultants.

Intangible capital asset means an asset that has no physical substance, has more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the benefits it yields.

Labor cost at standard means a preestablished measure of the labor element of cost, computed by multiplying labor-rate standard by labor-time standard.

Labor-rate standard means a preestablished measure, expressed in monetary terms, of the price of labor.

Labor-time standard means a preestablished measure, expressed in temporal terms, of the quantity of labor.

Material cost at standard means a preestablished measure of the materil elements of cost, computed by muliplying material-price standard by material-quantity standard.

Material-price standard means a preestablished measure, expressed in monetary terms, of the price of mateial.

Material-quantity standard means a reestablished measure, expressed in hysical terms, of the quantity of maerial.

Moving average cost means an invenory costing method under which an verage unit cost is computed after ach acquisition by adding the cost of he newly acquired units to the cost of he units of inventory on hand and diiding this figure by the new total umber of units.

Normal cost means the annual cost attributable, under the actuarial cost method in use, to years subsequent to a particular valuation date.

Original complement of low cost equipment means a group of items acquired for the initial outfitting of a tangible capital asset or an operational unit, or a new addition to either. The items in the group individually cost less than the minimum amount established by the contractor for capitalization for the classes of assets acquired but in the aggregate they represent a material investment. The group, as a complement, is expected to be held for continued service beyond the current period. Initial outfitting of the unit is completed when the unit is ready and available for normal operations.

Pay-as-you-go cost method means a method of recognizing pension cost only when benefits are paid to retired employees or their beneficiaries.

Pension plan means a deferred compensation plan established and maintained by one or more employers to provide systematically for the payment of benefits to plan participants after their retirements; *provided,* that the benefits are paid for life or are payable for life at the option of the employees. Additional benefits such as permanent and total disability and death payments, and survivorship payments to beneficiaries of deceased employees may be an integral part of a pension plan.

Pension plan participant means any employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit from a pension plan which covers employees of such employer or members of such organization who have satisfied the plan's participation requirements, or whose beneficiaries are receiving or may be eligible to receive any such benefit. A participant whose employment status with the employer has not been terminated is an active participant of the employer's pension plan.

Pricing means the process of establishing a reasonable amount or amounts to be paid for supplies or services.

Profit center, as used in this part (other than subparts 31.3 and 31.6), means the smallest organizationally independent segment of a company charged by management with profit and loss responsibilities.

Projected average loss means the estimated long-term average loss per period for periods of comparable exposure to risk of loss.

Projected benefit cost method means any of the several actuarial cost methods which distribute the estimated total cost of all the employees' prospective benefits over a period of years, usually their working careers.

Proposal means any offer or other submission used as a basis for pricing a contract, contract modification, or termination settlement or for securing payments thereunder.

Residual value means the proceeds, less removal and disposal costs, if any, realized upon disposition of a tangible capital asset. It usually is measured by the net proceeds from the sale or other disposition of the asset, or its fair value if the asset is traded in on another asset. The estimated residual value is a current forecast of the residual value.

Segment means one of two or more divisons, product departments, plants, or other subdivisions of an organization reporting directly to a home office, usually identified with responsibility for profit and/or producing a product or service. The term includes Government-owned contractor-operated (GOCO) facilities, and joint ventures and subsidiaries (domestic and foreign) in which the organization has a majority ownership. The term also includes those joint ventures and subsidiaries (domestic and foreign) in which the organization has less than a majority of ownership, but over which it exercises control.

Self-insurance means the assumption or retention of the risk of loss by the contractor, whether voluntarily or involuntarily. Self-insurance includes the deductible portion of purchased insurance.

Self-insurance charge means a cost which represents the projected average loss under a self-insurance plan.

Service life means the period of usefulness of a tangible capital asset (or
group of assets) to its current own
The period may be expressed in uni
of time or output. The estimated ser
ice life of a tangible capital asset (
group of assets) is a current foreca
of its service life and is the period ov
which depreciation cost is to be a
signed.

Spread-gain actuarial cost metho
means any of the several project
benefit actuarial cost methods und
which actuarial gains and losses are i
cluded as part of the current an
future normal costs of the pensio
plan.

Standard cost means any cost com
puted with the use of preestablishe
measures.

Tangible capital asset means a
asset that has physical substanc
more than minimal value, and is ex
pected to be held by an enterprise fo
continued use or possession beyon
the current accounting period for th
services it yields.

Termination gain or loss means a
actuarial gain or loss resulting fro
the difference between the assume
and actual rates at which pension pla
participants separate from employ
ment for reasons other than retire
ment, disability, or death.

Unallowable cost means any co
which, under the provisions of an
pertinent law, regulation, or contrac
cannot be included in prices, cost-rei
bursements, or settlements under
Government contract to which it is a
locable.

Unfunded pension plan as used i
this part, means a defined benefit pe
sion plan for which no funding agen
is established for the accumulation
contributions.

Variance means the difference b
tween a preestablished measure an
an actual measure.

Weighted average cost means an i
ventory costing method under whic
an average unit cost is computed per
odically by dividing the sum of th
cost of beginning inventory plus th
cost of acquisitions by the tot
number of units included in these tw
categories.

[48 FR 42301, Sept. 17, 1983, as amended
54 FR 13024, Mar. 29, 1989]

Subpart 31.1—Applicability

31.100 Scope of subpart.

This subpart describes the applicability of the cost principles and procedures in succeeding subparts of this part to various types of contracts and subcontracts. It also describes the need for advance agreements.

31.101 Objectives.

In recognition of differing organizational characteristics, the cost principles and procedures in the succeeding subparts are grouped basically by organizational type; e.g., commercial concerns and educational institutions. The overall objective is to provide that, to the extent practicable, all organizations of similar types doing similar work will follow the same cost principles and procedures. To achieve this uniformity, individual deviations concerning cost principles require advance approval of the agency head or designee in the case of civilian agencies and the National Aeronautics and Space Administration, and by the DAR Council in the case of the Department of Defense. Agency supplements and class deviations require advance approval by either the DAR Council or Civilian Agency Acquisition Council, as appropriate.

31.102 Fixed-price contracts.

The applicable subparts of part 31 shall be used in the pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts whenever (a) cost analysis is performed, or (b) a fixed-price contract clause requires the determination or negotiation of costs. However, application of cost principles to fixed-price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price. The final price accepted by the parties reflects agreement only on the total price. Further, notwithstanding the mandatory use of cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered.

31.103 Contracts with commercial organizations.

This category includes all contracts and contract modifications for supplies, services, or experimental, developmental, or research work negotiated with organizations other than educational institutions (see 31.104), construction and architect-engineer contracts (see 31.105), State and local governments (see 31.107) and nonprofit organizations (see 31.108) on the basis of cost.

(a) The cost principles and procedures in subpart 31.2 and agency supplements shall be used in pricing negotiated supply, service, experimental, developmental, and research contracts and contract modifications with commercial organizations whenever cost analysis is performed as required by 15.805-3.

(b) In addition, the contracting officer shall incorporate the cost principles and procedures in subpart 31.2 and agency supplements by reference in contracts with commercial organizations as the basis for—

(1) Determining reimbursable costs under (i) cost-reimbursement contracts and cost-reimbursement subcontracts under these contracts performed by commercial organizations and (ii) the cost-reimbursement portion of time-and-materials contracts except when material is priced on a basis other than at cost (see 16.601(b)(3));

(2) Negotiating indirect cost rates (see subpart 42.7);

(3) Proposing, negotiating, or determining costs under terminated contracts (see 49.103 and 49.113);

(4) Price revision of fixed-price incentive contracts (see 16.204 and 16.403);

(5) Price redetermination of price redetermination contracts (see 16.205 and 16.206); and

(6) Pricing changes and other contract modifications.

31.104 Contracts with educational institutions.

This category includes all contracts and contract modifications for research and development, training, and other work performed by educational institutions.

(a) The contracting officer shall incorporate the cost principles and procedures in subpart 31.3 by reference in cost-reimbursement contracts with educational institutions as the basis for—

(1) Determining reimbursable costs under the contracts and cost-reimbursement subcontracts thereunder performed by educational institutions;

(2) Negotiating indirect cost rates; and

(3) Settling costs of cost-reimbursement terminated contracts (see subpart 49.3 and 49.109-7).

(b) The cost principles in this subpart are to be used as a guide in evaluating costs in connection with negotiating fixed-price contracts and termination settlements.

31.105 Construction and architect-engineer contracts.

(a) This category includes all contracts and contract modifications negotiated on the basis of cost with organizations other than educational institutions (see 31.104), State and local governments (see 31.107), and nonprofit organizations except those exempted under OMB Circular A-122 (see 31-108) for construction management or construction, alteration or repair of buildings, bridges, roads, or other kinds of real property. It also includes architect-engineer contracts related to construction projects. It does not include contracts for vessels, aircraft, or other kinds of personal property.

(b) Except as otherwise provided in (d) below, the cost principles and procedures in subpart 31.2 shall be used in the pricing of contracts and contract modifications in this category if cost analysis is performed as required by 15.805-3.

(c) In addition, the contracting officer shall incorporate the cost principles and procedures in subpart 31.2 (as modified by (d) below) by reference in contracts in this category as the basis for—

(1) Determining reimbursable costs under cost-reimbursement contracts, including cost-reimbursement subcontracts thereunder;

(2) Negotiating indirect cost rates;
(3) Proposing, negotiating, or dete
mining costs under terminated co
tracts;
(4) Price revision of fixed-price i
centive contracts; and
(5) Pricing changes and other co
tract modifications.
(d) Except as otherwise provided
this paragraph (d), the allowability
costs for construction and architec
engineer contracts shall be determine
in accordance with subpart 31.2.
(1) Because of widely varying facto
such as the nature, size, duration, an
location of the construction projec
advance agreements as set forth
31.109, for such items as home offic
overhead, partners' compensation, em
ployment of consultants, and equi
ment usage costs, are particularly im
portant in construction and architec
engineer contracts. When appropria
they serve to express the parties' u
derstanding and avoid possible subs
quent disputes or disallowances.
(2) *Construction equipment*, as use
in this section, means equipment (i
cluding marine equipment) in soun
workable condition, either owned
controlled by the contractor or th
subcontractor at any tier, or obtaine
from a commercial rental source, an
furnished for use under Governme
contracts.
(i) Allowable ownership and opera
ing costs shall be determined as fo
lows:
(A) Actual cost data shall be use
when such data can be determined f
both ownership and operating cos
for each piece of equipment, or grou
of similar serial or series equipme
from the contractor's accounti
records. When such costs cannot be
determined, the contracting agen
may specify the use of a particul
schedule of predetermined rates
any part thereof to determine own
ship and operating costs of constru
tion equipment (see subdivisio
(d)(2)(i)(B) and (C) of this sectio
However, costs otherwise unallowab
under this part shall not become
lowable through the use of any sche
ule (see 31.109(c)). For example, sche
ules need to be adjusted for Gove
ment contract costing purposes if th
are based on replacement cost, inclu

unallowable interest costs, or use improper cost of money rates or computations. Contracting officers should review the computations and factors included within the specified schedule and ensure that unallowable or unacceptably computed factors are not allowed in cost submissions.

(B) Predetermined schedules of construction equipment use rates (e.g., the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers, industry sponsored construction equipment cost guides, or commercially published schedules of construction equipment use cost) provide average ownership and operating rates for construction equipment. The allowance for ownership costs should include the cost of depreciation and may include facilities capital cost of money. The allowance for operating costs may include costs for such items as fuel, filters, oil, and grease; servicing, repairs, and maintenance; and tire wear and repair. Costs of labor, mobilization, demobilization, overhead, and profit are generally not reflected in schedules, and separate consideration may be necessary.

(C) When a schedule of predetermined use rates for construction equipment is used to determine direct costs, all costs of equipment that are included in the cost allowances provided by the schedule shall be identified and eliminated from the contractor's other direct and indirect costs charged to the contract. If the contractor's accounting system provides for site or home office overhead allocations, all costs which are included in the equipment allowances may need to be included in any cost input base before computing the contractor's overhead rate. In periods of suspension of work pursuant to a contract clause, the allowance for equipment ownership shall not exceed an amount for standby cost as determined by the schedule or contract provision.

(ii) Reasonable costs of renting construction equipment are allowable (but see paragraph (C) below).

(A) Costs, such as maintenance and minor or running repairs incident to operating such rented equipment, that are not included in the rental rate are allowable.

(B) Costs incident to major repair and overhaul of rental equipment are unallowable.

(C) The allowability of charges for construction equipment rented from any division, subsidiary, or organization under common control, will be determined in accordance with 31.205-36(b)(3).

(3) Costs incurred at the job site incident to performing the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility costs, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.

(4) Rental and any other costs, less any applicable credits incurred in acquiring the temporary use of land, structures, and facilities are allowable. Costs, less any applicable credits, incurred in constructing or fabricating structures and facilities of a temporary nature are allowable.

[48 FR 42301, Sept. 19, 1983, as amended at 50 FR 23607, June 4, 1985; 52 FR 19804, May 27, 1987]

031.106 Facilities contracts.

31.106-1 Applicable cost principles.

The cost principles and procedures applicable to the evaluation and determination of costs under facilities contracts (as defined in 45.301), and subcontracts thereunder, will be governed by the type of entity to which a facilities contract is awarded. Except as otherwise provided in 31.106-2 below, subpart 31.2 applies to facilities contracts awarded to commercial organizations; subpart 31.3 applies to facilities contracts awarded to educational institutions; and 31.105 applies to facilities contracts awarded to construction contractors. Whichever cost principles are appropriate will be used in the pricing of facilities contracts and contract modifications if cost analysis is performed as required by 15.805-3. In addition, the contracting officer shall incorporate the cost principles and procedures appropriate in the circumstances (e.g., subpart 31.2; subpart 31.3; or 31.105) by reference in facilities contracts as the basis for—

(a) Determining reimbursable costs under facilities contracts, including cost-reimbursement subcontracts thereunder;

(b) Negotiating indirect cost rates; and

(c) Determining costs of terminated contracts when the contractor elects to *voucher out* costs (see subpart 49.3), and for settlement by determination (see 49.109-7).

31.106-2 Exceptions to general rules on allowability and allocability.

(a) A contractor's established accounting system and procedures are normally directed to the equitable allocation of costs to the types of products which the contractor produces or services rendered in the course of normal operating activities. The acquisition of, or work on, facilities for the Government normally does not involve the manufacturing processes, plant departmental operations, cost patterns of work, administrative and managerial control, or clerical effort usual to production of the contractor's normal products or services.

(b) Advance agreements (see 31.109) should be made between the contractor and the contracting officer as to indirect cost items to be applied to the facilities acquisition. A contractor's normal accounting practice for allocating indirect costs to the acquisition of contractor facilities may range from charging all these costs to this acquisition to not charging any. When necessary to produce an equitable result, the contractor's usual method of allocating indirect cost shall be varied, and appropriate adjustment shall be made to the pools of indirect cost and the bases of their distribution.

(c) The purchase of completed facilities (or services in connection with the facilities) from outside sources does not involve the contractor's direct labor or indirect plant maintenance personnel. Accordingly, indirect manufacturing and plant overhead costs, which are primarily incurred or generated by reason of direct labor or maintenance labor operations, are not allocable to the acquisition of such facilities.

(d) Contracts providing for the installation of new facilities or the rehabilitation of existing facilities may involve the use of the contractor's plant maintenance labor, as distinguished from direct labor engaged in the production of the company's normal products. In such instances, only those types of indirect manufacturing and plant operating costs that are related to or incurred by reason of the expenditures of the classes of labor used for the performance of the facilities work may be allocated to the facilities contract. Thus, a facilities contract which involves the use of plant maintenance labor only would not be subject to an allocation of such cost items as direct productive labor supervision, depreciation, and maintenance expense applicable to productive machinery and equipment, or raw material and finished goods storage costs.

(e) Where a facilities contract calls for the construction, production, or rehabilitation of equipment or other items that are involved in the regular course of the contractor's business by the use of the contractor's direct labor and manufacturing processes, the indirect costs normally allocated to all that work may be allocated to the facilities contract.

31.106-3 Contractor's commercial products.

If facilities constituting the contractor's usual commercial products (or only minor modifications thereof) are acquired by the Government under the contract, the Government shall not pay any amount in excess of the contractor's most favored customer price or the price of other suppliers for like quantities of the same or substantially the same items, whichever is lower.

31.107 Contracts with State, local, and federally recognized Indian tribal governments.

(a) Subpart 31.6 provides principles and standards for determining costs applicable to contracts with State, local, and federally recognized Indian tribal governments. They provide the basis for a uniform approach to the problem of determining costs and to promote efficiency and better relationships between State, local, and federally recognized Indian tribal governments, and Federal Government entities. They apply to all programs that involve contracts with State, local, and federally recognized Indian tribal governments, except contracts with—

(1) Publicly financed educational institutions subject to subpart 31.3; or

(2) Publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Government agencies.

(b) The Office of Management and Budget will approve any other exceptions in particular cases when adequate justification is presented.

[48 FR 42301, Sept. 19, 1983, as amended at 52 FR 30076, Aug. 12, 1987]

31.108 Contracts with nonprofit organizations.

Subpart 31.7 provides principles and standards for determining costs applicable to contracts with nonprofit organizations other than educational institutions, State and local governments, and those nonprofit organizations exempted under OMB Circular No. A-122.

31.109 Advance agreements.

(a) The extent of allowability of the costs covered in this part applies broadly to many accounting systems in varying contract situations. Thus, the reasonableness and allocability of certain costs may be difficult to determine, particularly for firms or their divisions that may not be under effective competitive restraints. To avoid ossible subsequent disallowance or ispute based on unreasonableness or onallocability, contracting officers nd contractors should seek advance greement on the treatment of special r unusual costs. However, an advance greement is not an absolute require- ent and the absence of an advance greement on any cost will not, in elf, affect the reasonableness or al- cability of that cost.

(b) Advance agreements may be ne- tiated either before or during a con- act but should be negotiated before incurrence of the costs involved. The agreements must be in writing, executed by both contracting parties, and incorporated into applicable current and future contracts. An advance agreement shall contain a statement of its applicability and duration.

(c) The contracting officer is not authorized by this 31.109 to agree to a treatment of costs inconsistent with this part. For example, an advance agreement may not provide that, notwithstanding 31.205-20, interest is allowable.

(d) Advance agreements may be negotiated with a particular contractor for a single contract, a group of contracts, or all the contracts of a contracting office, an agency, or several agencies.

(e) The cognizant administrative contracting officer (ACO), or other contracting officer established in part 42, shall negotiate advance agreements except that an advance agreement affecting only one contract, or class of contracts from a single contracting office, shall be negotiated by a contracting officer in the contracting office, or an ACO when delegated by the contracting officer. When the negotiation authority is delegated, the ACO shall coordinate the proposed agreement with the contracting officer before executing the advance agreement.

(f) Before negotiating an advance agreement, the Government negotiator shall—

(1) Determine if other contracting offices inside the agency or in other agencies have a significant unliquidated dollar balance in contracts with the same contractor;

(2) Inform any such office or agency of the matters under consideration for negotiation; and

(3) As appropriate, invite the office or agency and the cognizant audit agency to participate in prenegotiation discussions and/or in the subsequent negotiations.

(g) Upon completion of the negotiation, the sponsor shall prepare and distribute to other interested agencies and offices, including the audit agency, copies of the executed agreement and a memorandum providing the information specified in 15.808, Price negotiation memorandum, as applicable.

(h) Examples of costs for which advance agreements may be particularly important are—

(1) Compensation for personal services, including but not limited to allowances for off-site pay, incentive pay, location allowances, hardship pay, cost of living differential, and termination of defined benefit pension plans;

(2) Use charges for fully depreciated assets;

(3) Deferred maintenance costs;

(4) Precontract costs;

(5) Independent research and development and bid and proposal costs;

(6) Royalties and other costs for use of patents;

(7) Selling and distribution costs;

(8) Travel and relocation costs, as related to special or mass personnel movements, as related to travel via contractor-owned, -leased, or -chartered aircraft, or as related to maximum per diem rates;

(9) Costs of idle facilities and idle capacity;

(10) Costs of automatic data processing equipment;

(11) Severance pay to employees on support service contracts;

(12) Plant reconversion;

(13) Professional services (e.g., legal, accounting, and engineering);

(14) General and administrative costs (e.g., corporate, division, or branch allocations) attributable to the general management, supervision, and conduct of the contractor's business as a whole. These costs are particularly significant in construction, job-site, architect-engineer, facilities, and Government-owned contractor operated (GOCO) plant contracts (see 31.203(f));

(15) Costs of construction plant and equipment (see 31.105(d)).

(16) Costs of public relations and advertising; and

(17) Training and education costs (see 31.205-44(h)).

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 12298, Apr. 9, 1986; 51 FR 27489, July 31, 1986; 52 FR 9038, Mar. 20, 1987; 52 FR 27806, July 24, 1987; 54 FR 34755, Aug. 21, 1989]

Subpart 31.2—Contracts With Commercial Organizations

31.201 General.

31.201-1 Composition of total cost.

The total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits, plus any allocable cost of money pursuant to 31.205-10. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used, including standard costs properly adjusted for applicable variances. See 31.201-2(b) and (c) for Cost Accounting Standards (CAS) requirements.

31.201-2 Determining allowability.

(a) The factors to be considered in determining whether a cost is allowable include the following:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the CAS Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

(b) Certain cost principles in this subpart incorporate the measurement, assignment, and allocability rules of selected CAS and limit the allowability of costs to the amounts determined using the criteria in those selected standards. Only those CAS or portions of standards specifically made applicable by the cost principles in this subpart are mandatory unless the contract is CAS-covered (see part 30). Business units that are not otherwise subject to these standards under a CAS clause are subject to the selected standards only for the purpose of determining allowability of costs on Government contracts. Including the selected standards in the cost principles does not subject the business unit to any other CAS rules and regulations. The applicability of the CAS rules and regulations is determined by the CAS clause, if any, in the contract and the requirements of the standards themselves.

(c) When contractor accounting practices are inconsistent with this subpart 31.2, costs resulting from such inconsistent practices shall not be allowed in excess of the amount that would have resulted from using practices consistent with this subpart.

31.201-3 Determining reasonableness.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

(b) What is reasonable depends upon a variety of considerations and circumstances, including—

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

[52 FR 19804, May 27, 1987]

31.201-4 Determining allocability.

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

31.201-5 Credits.

The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund. See 31.205-6(j)(4) for rules related to refund or credit to the Government upon termination of an overfunded defined benefit pension plan.

[48 FR 42301, Sept. 19, 1983, as amended at 54 FR 34755, Aug. 21, 1989]

31.201-6 Accounting for unallowable costs.

(a) Costs that are expressly unallowable or mutually agreed to be unallowable, including mutually agreed to be unallowable directly associated costs, shall be identified and excluded from any billing, claim, or proposal applicable to a Government contract. A directly associated cost is any cost which is generated solely as a result of incurring another cost, and which would not have been incurred had the other cost not been incurred. When an unallowable cost is incurred, its directly associated costs are also unallowable.

(b) Costs which specifically become designated as unallowable or as unallowable directly associated costs of unallowable costs as a result of a written decision furnished by a contracting officer shall be identified if included in or used in computing any billing, claim, or proposal applicable to a Government contract. This identification requirement applies also to any costs incurred for the same purpose under like circumstances as the costs specifically identified as unallowable under either this paragraph or paragraph (a) above.

(c) The detail and depth of records required as backup support for proposals, billings, or claims shall be that which is adequate to establish and maintain visibility of identified unallowable costs, including directly associated costs. Unallowable costs involved in determining rates used for standard costs, or for indirect cost proposals or billing, need be identified only at the time rates are proposed, established, revised, or adjusted. These requirements may be satisfied by any form of cost identification which is adequate for purposes of contract cost determination and verification.

(d) If a directly associated cost is included in a cost pool which is allocated over a base that includes the unallowable cost with which it is associated, the directly associated cost shall remain in the cost pool. Since the unallowable costs will attract their allocable share of costs from the cost pool, no further action is required to assure disallowance of the directly associated costs. In all other cases, the directly associated costs, if material in amount, must be purged from the cost pool as unallowable costs.

(e)(1) In determining the materiality of a directly associated cost, consideration should be given to the significance of (i) the actual dollar amount, (ii) the cumulative effect of all directly associated costs in a cost pool, or (iii) the ultimate effect on the cost of Government contracts.

(2) Salary expenses of employees who participate in activities that generate unallowable costs shall be treated as directly associated costs to the extent of the time spent on the proscribed activity, provided the costs are material in accordance with subparagraph (e)(1) above (except when such salary expenses are, themselves, unallowable). The time spent in proscribed activities should be compared to total time spent on company activities to determine if the costs are material. Time spent by employees outside the normal working hours should not be considered except when it is evident that an employee engages so frequently in company activities during periods outside normal working hours as to indicate that such activities are a part of the employee's regular duties.

(3) When a selected item of cost under 31.205 provides that directly associated costs be unallowable, it is intended that such directly associated costs be unallowable only if determined to be material in amount in accordance with the criteria provided in paragraphs (e)(1) and (e)(2) above, except in those situations where allowance of any of the directly associated costs involved would be considered to be contrary to public policy.

31.201-7 Construction and architect-engineer contracts.

Specific principles and procedures for evaluating and determining costs in connection with contracts and subcontracts for construction, and architect-engineer contracts related to construction projects, are in 31.105. The applicability of these principles and procedures is set forth in 31.000 and 31.100.

31.202 Direct costs.

(a) A direct cost is any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

(b) For reasons of practicality, any direct cost of minor dollar amount may be treated as an indirect cost if the accounting treatment—

(1) Is consistently applied to all final cost objectives; and

(2) Produces substantially the same results as treating the cost as a direct cost.

31.203 Indirect costs.

(a) An indirect cost is any cost not directly identified with a single, final cost objective, but identified with two or more final cost objectives or an intermediate cost objective. It is not subject to treatment as a direct cost. After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated to the several cost objectives. An indirect cost shall not be allocated to a final cost objective if other costs incurred for the same purpose in like circumstances have been included as a direct cost of that or any other final cost objective.

(b) Indirect costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring such costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives. Commonly, manufacturing overhead, selling expenses, and general and administrative (G&A) expenses are separately grouped. Similarly, the particular case may require subdivision of these groupings, e.g., building occupancy costs might be separable from those of personnel administration within the manufacturing overhead group. This necessitates selecting a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the several cost objectives. When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(c) Once an appropriate base for distributing indirect costs has been accepted, it shall not be fragmented by removing individual elements. All items properly includable in an indirect cost base should bear a pro rata share of indirect costs irrespective of their acceptance as Government contract costs. For example, when a cost input base is used for the distribution of G&A costs, all items that would properly be part of the cost input base, whether allowable or unallowable, shall be included in the base and bear their pro rata share of G&A costs.

(d) The contractor's method of allocating indirect costs shall be in accordance with standards promulgated by the CAS Board, if applicable to the contract; otherwise, the method shall be in accordance with generally accepted accounting principles which are consistently applied. The method may require examination when—

(1) Substantial differences occur between the cost patterns of work under the contract and the contractor's other work;

(2) Significant changes occur in the nature of the business, the extent of subcontracting, fixed-asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or

(3) Indirect cost groupings developed for a contractor's primary location are applied to offsite locations. Separate cost groupings for costs allocable to offsite locations may be necessary to permit equitable distribution of costs on the basis of the benefits accruing to the several cost objectives.

(e) A base period for allocating indirect costs is the cost accounting period during which such costs are incurred and accumulated for distribution to work performed in that period. The criteria and guidance in 30.406 for selecting the cost accounting periods to be used in allocating indirect costs are incorporated herein for application to contracts subject to full CAS coverage. For contracts subject to modified CAS coverage and for non-CAS-covered contracts, the base period for allocating indirect costs will normally be the contractor's fiscal year. But a shorter period may be appropriate (1) for contracts in which performance involves only a minor portion of the fiscal year, or (2) when it is general practice in the industry to use a shorter period. When a contract is performed over an extended period, as many base periods shall be used as are required to represent the period of contract performance.

(f) Special care should be exercised in applying the principles of paragraphs (b), (c), and (d) above when

Government-owned contractor-operated (GOCO) plants are involved. The distribution of corporate, division, or branch office G&A expenses to such plants operating with little or no dependence on corporate administrative activities may require more precise cost groupings, detailed accounts screening, and carefully developed distribution bases.

31.204 Application of principles and procedures.

(a) Costs shall be allowed to the extent they are reasonable, allocable, and determined to be allowable under 31.201, 31.202, 31.203, and 31.205. These criteria apply to all of the selected items that follow, even if particular guidance is provided for certain items for emphasis or clarity.

(b) Costs incurred as reimbursements or payments to a subcontractor under a cost-reimbursement, fixed-price incentive, or price redeterminable type subcontract of any tier above the first firm-fixed-price subcontract or fixed-price subcontract with economic price adjustment provisions are allowable to the extent that allowance is consistent with the appropriate subpart of this part 31 applicable to the subcontract involved. Costs incurred as payments under firm-fixed-price subcontracts or fixed-price subcontracts with economic price adjustment provisions or modifications thereto, when cost analysis was performed under 15.805-3, shall be allowable only to the extent that the price was negotiated in accordance with 31.102.

(c) Section 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items. When more than one subsection in 31.205 is relevant to a contractor cost, the cost shall be apportioned among the applicable subsections, and the determination of allowability of each portion shall be based on the guidance contained in the applicable subsection. When a cost, to which more than one subsection in 31.205 is relevant, cannot be apportioned, the determination of allowability shall be based on the guidance contained in the subsection that most specifically deals with, or best captures the essential nature of, the cost at issue.

[48 FR 42301, Sept. 19, 1983, as amended at 53 FR 17858, May 18, 1988]

31.205 Selected costs.

31.205-1 Public relations and advertising costs.

(a) *Public relations* means all functions and activities dedicated to—

(1) Maintaining, protecting, and enhancing the image of a concern or its products; or

(2) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. The term public relations includes activities associated with areas such as advertising, customer relations, etc.

(b) *Advertising* means the use of media to promote the sale of products or services and to accomplish the activities referred to in paragraph (d) of this subsection, regardless of the medium employed, when the advertiser has control over the form and content of what will appear, the media in which it will appear, and when it will appear. Advertising media include but are not limited to conventions, exhibits, free goods, samples, magazines, newspapers, trade papers, direct mail, dealer cards, window displays, outdoor advertising, radio, and television.

(c) Public relations and advertising costs include the costs of media time and space, purchased services performed by outside organizations, as well as the applicable portion of salaries, travel, and fringe benefits of employees engaged in the functions and activities identified in paragraphs (a) and (b) of this subsection.

(d) The only advertising costs that are allowable are those specifically required by contract, or that arise from requirements of Government contracts and that are exclusively for—

(1) Recruiting personnel required for performing contractual obligations, when considered in conjunction with all other recruitment costs (but see 31.205-34);

(2) Acquiring scarce items for contract performance; or

(3) Disposing of scrap or surplus materials acquired for contract performance.

Costs of this nature, if incurred for more than one Government contract or both Government work and other work of the contractor, are allowable to the extent that the principles in 31.201-3, 31.201-4, and 31.203 are observed.

(e) Allowable public relations costs include the following:

(1) Costs specifically required by contract.

(2) Costs of—

(i) Responding to inquiries on company policies and activities;

(ii) Communicating with the public, press, stockholders, creditors, and customers; and

(iii) Conducting general liaison with news media and Government public relations officers, to the extent that such activities are limited to communication and liaison necessary to keep the public informed on matters of public concern such as notice of contract awards, plant closings or openings, employee layoffs or rehires, financial information, etc.

(3) Costs of participation in community service activities (e.g., blood bank drives, charity drives, savings bond drives, disaster assistance, etc.).

(4) Costs of plant tours and open houses (but see subparagraph (f)(5) of this subsection).

(5) Costs of keel laying, ship launching, commissioning, and roll-out ceremonies, to the extent specifically provided for by contract.

(f) Unallowable public relations and advertising costs include the following:

(1) All advertising costs other than those specified in paragraph (d) of this subsection.

(2) Costs of air shows and other special events, such as conventions and trade shows, including—

(i) Costs of displays, demonstrations, and exhibits;

(ii) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and

(iii) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings.

(3) Costs of sponsoring meetings, symposia, seminars, and other special events when the principal purpose of the event is other than dissemination of technical information or stimulation of production.

(4) Costs of ceremonies such as corporate celebrations and new product announcements.

(5) Costs of promotional material, motion pictures, videotapes, brochures, handouts, magazines, and other media that are designed to call favorable attention to the contractor and its activities (but see 31.205-13(a), Employee morale, health, welfare, food service, and dormitory costs and credits; 31.205-21, Labor relations costs; 31.205-43(c), Trade, business, technical, and professional activity costs; and 31.205-44, Training and education costs).

(6) Costs of souvenirs, models, imprinted clothing, buttons, and other mementos provided to customers or the public.

(7) Costs of memberships in civic and community organizations.

(8) All public relations costs, other than those specified in paragraph (e) of this subsection, whose primary purpose is to promote the sale of products or services by stimulating interest in a product or product line (except for those costs made allowable under 31.205-38(c)), or by disseminating messages calling favorable attention to the contractor for purposes of enhancing the company image to sell the company's products or services. Nothing in this paragraph (f)(8) modifies the express unallowability of costs listed in paragraph (f)(2) through (f)(7). The purpose of this paragraph is to provide criteria for determining whether costs not specifically identified should be unallowable.

(g) Notwithstanding the provisions of paragraph (d) and subparagraph (f)(2) of this section, reasonable costs incurred to promote American aerospace exports at domestic and international exhibits, such as air shows, trade shows, and conventions, are allowable. Such reasonable costs include transportation of the aircraft, aerospace parts and equipment, and other associated support cost. However, such allowable costs shall not include the cost of entertainment, hospitality suites or chalets, advertising media other than exhibits, and other costs not necessary to establish, operate or maintain an exhibit, display, or demonstration. This paragraph applies so long as section 8062 of Pub. L. 100-202, or a similar provision in a subsequent act, is in effect.

[51 FR 12298, Apr. 9, 1986, as amended at 53 FR 12130, Apr. 12, 1988; 53 FR 13274, Apr. 22, 1988; 54 FR 34755, Aug. 21, 1989]

31.205-2 Automatic data processing equipment leasing costs.

(a) This subsection applies to all contractor-leased automatic data processing equipment (ADPE), as defined in 31.001 (except as components of an end item to be delivered to the Government), acquired under operating leases, as defined in Statement of Financial Accounting Standard No. 13 (FAS-13), Accounting for Leases, issued by the Financial Accounting Standards Board. Compliance with 31.205-11(m) requires that ADPE acquired by means of capital leases, as defined in FAS-13, shall be treated as purchased assets; i.e., be capitalized and the capitalized value of such assets be distributed over their useful lives as depreciation charges or over the leased life as amortization charges as appropriate. Allowability of costs related to contractor-owned ADPE is governed by other requirements of this subpart.

(b)(1) If the contractor leases ADPE but cannot demonstrate, on the basis of facts existent at the time of the decision to lease or continue leasing and documented in accordance with paragraph (d) below, that leasing will result in less cost to the Government over the anticipated useful life (see paragraph (c) below), then rental costs are allowable only up to the amount that would be allowed had the contractor purchased the ADPE.

(2) The costs of leasing ADPE are allowable only to the extent that the contractor can annually demonstrate in accordance with paragraph (d) below (whether or not the term of lease is renewed or otherwise extended) that these costs meet the following criteria:

(i) The costs are reasonable and necessary for the conduct of the contractor's business in light of factors such as the contractor's requirements for ADPE, costs of comparable facilities, the various types of leases available, and the terms of the rental agreement.

(ii) The costs do not give rise to a material equity in the facilities (such as an option to renew or purchase at a bargain rental or price other than that normally given to industry at large) but represent charges only for the current use of the equipment, including incidental service costs such as maintenance, insurance, and applicable taxes.

(iii) The contracting officer's approval was obtained for the leasing arrangement (see paragraph (d)(3) below) when the total cost of leasing—

(A) The ADPE is to be allocated to one or more Government contracts which require negotiating or determining costs, or

(B) ADPE in a single plant, division, or cost center exceeds $500,000 a year and 50 percent or more of the total leasing cost is to be allocated to one or more Government contracts which require negotiating or determining costs.

(3) Rental costs under a sale and leaseback arrangement are allowable only up to the amount that would have been allowed had the contractor retained title to the ADPE.

(4) Allowable rental costs of ADPE leased from any division, subsidiary, or organization under a common control are limited to the cost of ownership (excluding interest or other costs unallowable under this subpart 31.2 and including the cost of money (see 31.205-10)). When there is an established practice of leasing the same or similar equipment to unaffiliated lessees, rental costs shall be allowed in accordance with paragraphs (b)(1) and (2) above, except that the purchase price and costs of ownership shall be determined under 31.205-26(e).

(c)(1) An estimate of the anticipated useful life of the ADPE may represent the application life (utility in a given function), technological life (utility before becoming obsolete in whole or in part), or physical life (utility before wearing out) depending upon the facts and circumstances and the particular facilities involved. Each case must be evaluated individually. In estimating anticipated useful life, the contractor may use the application life if it can be demonstrated that the ADPE has utility only in a given function and the duration of the function can be determined. Technological life may be used if the contractor can demonstrate that existing ADPE must be replaced because of—

(i) Specific program objectives or contract requirements that cannot be accomplished with the existing ADPE;

(ii) Cost reductions that will produce identifiable savings in production or overhead costs;

(iii) Increase in workload volume that cannot be accomplished efficiently by modifying or augmenting existing ADPE; or

(iv) Consistent pattern of capacity operation (2 ½-3 shifts) on existing ADPE.

(2) Technological advances will not justify replacing existing ADPE before the end of its physical life if it will be able to satisfy future requirements or demands.

(3) In estimating the least cost to the Government for useful life, the cumulative costs that would be allowed if the contractor owned the ADPE should be compared with cumulative costs that would be allowed under any of the various types of leasing arrangements available. For the purpose of this comparison, the costs of ADPE exclude interest or other unallowable costs pursuant to this subpart 31.2; they include but are not limited to the costs of operation, maintenance, insurance, depreciation, facilities capital cost of money, rental, and the cost of machine services, as applicable.

(d) (1) Except as provided in paragraph (3) below, the contractor's justification, under paragraph (b) above, of the leasing decisions shall consist of the following supporting data, prepared before acquisition:

(i) Analysis of use of existing ADPE.

(ii) Application of the criteria in paragraph (b) above.

(iii) Specific objectives or requirements, generally in the form of a data system study and specification.

(iv) Solicitation of proposals, based on the data system specification, from qualified sources.

(v) Proposals received in response to the solicitation and reasons for selecting the equipment chosen and for the decision to lease.

(2) Except as provided in paragraph (3) below, the contractor's annual justification, under paragraph (b)(2) above, of the decision to retain or change existing ADPE capability and the need to continue leasing shall consist of current data as specified in subdivisions (d)(1)(i) through (iii) above.

(3) If the contractor's prospective ADPE lease cost meets the threshold in 31.205-2(b)(2)(iii) above, the contractor shall furnish data supporting the initial decision to lease (see paragraph (b)(1) above). If the total cost of leasing ADPE in a single plant, division, or cost center exceeds $500,000 per year and 50 percent or more of the total leasing cost is allocated to Government contracts which require negotiating or determining costs, the contractor shall furnish data supporting the annual justification for retaining or changing existing ADPE capability and the need to continue leasing shall also be furnished (see paragraph (b)(2) above).

31.205-3 Bad debts.

Bad debts, including actual or estimated losses arising from uncollectible accounts receivable due from customers and other claims, and any directly associated costs such as collection costs, and legal costs are unallowable.

31.205-4 Bonding costs.

(a) Bonding costs arise when the Government requires assurance against financial loss to itself or others by reason of the act or default of the contractor. They arise also in instances where the contractor requires similar assurance. Included are such bonds as bid, performance, payment, advance payment, infringement, and fidelity bonds.

(b) Costs of bonding required pursuant to the terms of the contract are allowable.

(c) Costs of bonding required by the contractor in the general conduct of its business are allowable to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

31.205-5 Civil defense costs.

(a) Civil defense costs are those incurred in planning for, and protecting life and property against, the possible effects of enemy attack. Costs of civil defense measures (including costs in excess of normal plant protection costs, first-aid training and supplies, fire fighting training and equipment, posting of additional exit notices and directions, and other approved civil defense measures) undertaken on the contractor's premises pursuant to suggestions or requirements of civil defense authorities are allowable when allocated to all work of the contractor.

(b) Costs of capital assets acquired for civil defense purposes are allowable through depreciation (see 31.205-11).

(c) Contributions to local civil defense funds and projects are unallowable.

31.205-6 Compensation for personal services.

(a) *General.* Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided for severance pay costs in paragraph (g) below and for pension costs in paragraph (j) below). It includes, but is not limited to, salaries; wages; directors' and executive committee members' fees; bonuses (including stock bonuses); incentive awards; employee stock options, stock appreciation rights, and stock ownership plans; employee insurance; fringe benefits; contributions to pension, annuity, and management employee incentive compensation plans; and allowances for off-site pay, incentive pay, location allowances, hardship pay, severance pay, and cost of living differential. Compensation for personal services is allowable subject to the following general criteria and additional requirements contained in other parts of this cost principle:

(1) Compensation for personal services must be for work performed by the employee in the current year and must not represent a retroactive adjustment of prior years' salaries or wages (but see 31.205-6(g), (h), (j), (k), and (m) below).

(2) The compensation in total must be reasonable for the work performed; however, specific restrictions on individual compensation elements must be observed where they are prescribed.

(3) The compensation must be based upon and conform to the terms and conditions of the contractor's established compensation plan or practice followed so consistently as to imply, in effect, an agreement to make the payment.

(4) No presumption of allowability will exist where the contractor introduces major revisions of existing compensation plans or new plans and the contractor—

(i) Has not notified the cognizant ACO of the changes either before their implementation or within a reasonable period after their implementation, and

(ii) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the allowability of the changes.

(5) Costs that are unallowable under other paragraphs of this subpart 31.2 shall not be allowable under this subsection 31.205-6 solely on the basis that they constitute compensation for personal services. (See 31.205-34(c)).

(b) *Reasonableness.* (1) The compensation for personal services paid or accrued to each employee must be reasonable for the work performed. Compensation will be considered reasonable if each of the allowable elements making up the employee's compensation package is reasonable. In determining the reasonableness of individual elements for particular employees or classes of employees, consideration should be given to all potentially relevant facts. Facts which may be relevant include general conformity with the compensation practices of other firms of the same size, the compensation practices of other firms in the

ndustry, the compensation prac-
f other firms in the same geo-
c area, the compensation prac-
f firms engaged in predominant-
Government work, and the cost
mparable services obtainable
utside sources. While all of the
actors, as well as any other rel-
nes, should be considered, their
significance will vary accord-
circumstances. For example, in
se of secretarial salaries, con-
with the compensation paid
er firms in the same geographic
ould likely be a more significant
n than conformity with the
sation paid by other firms in
ne industry wherever located.
inistering this principle, it is
zed that not every compensa-
e need be subjected in detail to
ove or other tests. The tests
applied only when a general
reveals amounts or types of
sation that appear unreason-
unjustified. Based on an initial
of the facts, contracting offi-
their representatives may chal-
he reasonableness of any indi-
lement or the sum of the indi-
lements of compensation paid
ed to particular employees or
of employees. In such cases,
no presumption of reasonable-
, upon challenge, the contrac-
t demonstrate the reasonable-
he compensation item in ques-
doing so, the contractor may
e, and the contracting officer
sider, not only any circum-
urrounding the compensation
llenged, but also the magni-
other compensation elements
ay be lower than would be
d reasonable in themselves.
mple, a contractor, if chal-
the amount of base salaries
agement, could counter by
lower than normal end-of-
agement bonuses. However,
actor's right to introduce off-
ompensation elements into
tion is subject to the follow-
tions:
ts will be considered only be-
allowable elements of an
s (or a class of employees')
tion package. For example,
management salaries cannot
be offset against lower than normal secretarial salaries.

(ii) Offsets will be considered only between the allowable portion of the following compensation elements of employees or classes of employees:

(A) Wages and salaries.

(B) Incentive bonuses.

(C) Deferred compensation.

(D) Pension and savings plan benefits.

(E) Health insurance benefits.

(F) Life insurance benefits.

(G) Compensated personal absence benefits.

However, any of the above elements or portions thereof, whose amount is not measurable, shall not be introduced or considered as an offset item.

(iii) In considering offsets, the magnitude of the compensation elements in question must be taken into account. An executive bonus that is excessive by $100,000 is not fully offset by a base salary that is low by only $25,000. In determining the magnitude of compensation elements, the timing of receipt by the employee must be considered. For example, a bonus of $100,000 in the current period will be considered as of greater value than a deferred compensation arrangement to make the same payment in some future period.

(2) Compensation costs under certain conditions give rise to the need for special consideration. Among such conditions are the following:

(i) Compensation to (A) owners of closely held corporations, partners, sole proprietors, or members of their immediate families, or (B) persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise. Determination should be made that salaries are reasonable for the personal services rendered rather than being a distribution of profits. Compensation in lieu of salary for services rendered by partners and sole proprietors will be allowed to the extent that it is reasonable and does not constitute a distribution of profits. For closely held corporations, compensation costs covered by this subdivision shall not be recognized in amounts exceeding those costs that are deductible as compensation under the Internal Revenue Code and regulations under it.

(ii) Any change in a contractor's compensation policy that results in a substantial increase in the contractor's level of compensation, particularly when it was concurrent with an increase in the ratio of Government contracts to other business, or any change in the treatment of allowability of specific types of compensation due to changes in Government policy. Contracting officers or their representatives should normally challenge increased costs where major revisions of existng compensation plans or new plans are introduced by the contractor, and the contractor—

(A) Has not notified the cognizant ACO of the changes either before their implementation or within a reasonable period after their implementation; and

(B) Has not provided the Government, either before implementation or within a reasonable period after it, an opportunity to review the reasonableness of the changes.

(iii) The contractor's business is such that its compensation levels are not subject to the restraints that normally occur in the conduct of competitive business.

(iv) The contractor incurs costs for compensation in excess of the amounts which are deductible under the Internal Revenue Code and regulations issued under it.

(c) *Labor-management agreements.* Nothwithstanding any other requirements of this subsection 31.205-6, costs of compensation are not allowable to the extent that they result from provisions of labor-management agreements that, as applied to work in performing Government contracts, are determined to be unreasonable because they are either unwarranted by the character and circumstances of the work or discriminatory against the Government. The application of the provisions of a labor-management agreement designed to apply to a given set of circumstances and conditions of employment (e.g., work involving extremely hazardous activities or work not requiring recurrent use of overtime) is unwarranted when applied to a Government contract involving significantly different circumstances and conditions of employment (e.g., work involving less hazardous activities or work continually requiring use of overtime). It is discriminatory against the Government if it results in employee compensation (in whatever form or name) in excess of that being paid for similar non-Government work under comparable circumstances. Disallowance of costs will not be made under this paragraph (c) unless—

(1) The contractor has been permitted an opportunity to justify the costs; and

(2) Due consideration has been given to whether unusual conditions pertain to Government contract work, imposing burdens, hardships, or hazards on the contractor's employees, for which compensation that might otherwise appear unreasonable is required to attract and hold necessary personnel.

(d) *Salaries and wages.* Salaries and wages for current services include gross compensation paid to employees in the form of cash, stock (see paragraph (f)(2) below regarding valuation), products, or services, and are allowable.

(e) *Domestic and foreign differential pay.* (1) When personal services are performed in a foreign country, compensation may also include a differential that may properly consider all expenses associated with foreign employment such as housing, cost of living adjustments, transportation, bonuses, additional Federal, State, local or foreign income taxes resulting from foreign assignment, and other related expenses.

(2) Although the additional taxes in paragraph (1) above may be considered in establishing foreign overseas differential, any increased compensation calculated directly on the basis of an employee's specific increase in income taxes is unallowable. Differential allowances for additional Federal, State, or local income taxes resulting from domestic assignments are unallowable.

(f) *Bonuses and incentive compensation.* (1) Incentive compensation for management employees, cash bonuses, suggestion awards, safety awards, and incentive compensation based on production, cost reduction, or efficient performance are allowable provided the awards are paid or accrued under an agreement entered into in good faith between the contractor and the employees before the services are rendered or pursuant to an established plan or policy followed by the contractor so consistently as to imply, in effect, an agreement to make such payment and the basis for the award is supported.

(2) When the costs of bonuses and ncentive compensation are paid in the tock of the contractor or of an affiliate, the following additional restrictions apply:

(i) Valuation placed on the stock shall be the fair market value on the measurement date (i.e., the first date the number of shares awarded is known) determined upon the most objective basis available; and

(ii) Accruals for the cost of stock before issuing the stock to the employees shall be subject to adjustment according to the possibilities that the employees will not receive the stock and that their interest in the accruals will be forfeited.

(3) When the bonus and incentive compensation payments are deferred, the costs are subject to the requirements of paragraph (f)(1) above and of paragraph (k) below.

(g) *Severance pay.* (1) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages by contractors o workers whose employment is being nvoluntarily terminated. Payments or early retirement incentive plans re covered in paragraph (j)(6) below.

(2) Severance pay to be allowable ust meet the general allowability criteria in subdivision (g)(2)(i) below, nd, depending upon whether the severance is normal or abnormal, criteria subdivision (g)(2)(ii) for normal sev- ance pay or subdivision (g)(2)(iii) for normal severance pay also apply.

(i) Severance pay is allowable only to e extent that, in each case, it is re- ired by (A) law; (B) employer-em- yee agreement; (C) established licy that constitutes, in effect, an plied agreement on the contractor's rt; or (D) circumstances of the par- ular employment (but see 37.110(f) arding services performed outside the United States). Payments made in the event of employment with a replacement contractor where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, or continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor are not severance pay and are unallowable.

(ii) Actual normal turnover severance payments shall be allocated to all work performed in the contractor's plant, or where the contractor provides for accrual of pay for normal severances, that method will be acceptable if the amount of the accrual is reasonable in light of payments actually made for normal severances over a representative past period and if amounts accrued are allocated to all work performed in the contractor's plant.

(iii) Abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus, accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis.

(h) *Backpay.* (1) *Backpay resulting from violations of Federal labor laws or the Civil Rights Act of 1964.* Backpay may result from a negotiated settlement, order, or court decree that resolves a violation of Federal labor laws or the Civil Rights Act of 1964. Such backpay falls into two categories: one requiring the contractor to pay employees additional compensation for work performed for which they were underpaid, and the other resulting from other violations, such as when the employee was improperly discharged, discriminated against, or other circumstances for which the backpay was not additional compensation for work performed. Backpay resulting from underpaid work is compensation for the work performed and is allowable. All other backpay resulting from violation of Federal labor laws or the Civil Rights Act of 1964 is unallowable.

(2) *Other backpay.* Backpay may also result from payments to union employees (union and non-union) for the difference in their past and current wage rates for working without a contract or labor agreement during labor management negotiations. Such backpay is allowable. Backpay to nonunion employees based upon results of union agreement negotiations is allowable only if (i) a formal agreement or understanding exists between management and the employees concerning these payments, or (ii) an established policy or practice exists and is followed by the contractor so consistently as to imply, in effect, an agreement to make such payment.

(i) *Stock options, stock appreciation rights, phantom stock plans, and junior stock conversions.*

(1) The cost of stock options awarded to employees to purchase stock of the contractor or of an affiliate will be treated as deferred compensation and must comply with the requirements of paragraph (k) of this subsection. The allowable cost of stock options is limited to the difference between the option price and the market price on the first date on which the option price and the number of shares are known. Accordingly, when the stock option price is equal to or greater than the market price on that date, then no costs are allowable for contract costing purposes.

(2) Stock appreciation rights are rights granted to employees by contractors to receive the increase in value, or appreciation, of company stock even though the employee neither purchases the stock nor receives title to it. Stock appreciation rights will be treated as deferred compensation and must comply with the requirements of paragraph (k) of this subsection. The allowable cost of stock appreciation rights is limited to the difference between the stock-appreciation-right base price from which appreciation will be measured and the market price on the first date on which both the number of shares and the stock-appreciation-right base price are known. Accordingly, when the stock-appreciation-right base price is equal to or greater than the market price on that date, then no costs are allowable for contract costing purposes.

(3) In phantom-stock-type plans, contractors assign or attribute contingent shares of stock to employees as if the employees own the stock, even though the employees neither purchase the stock nor receive title to it. Under these plans, an employee's account may be increased by the equivalent of dividends paid and any appreciation in the market price of the stock over the price of the stock on the first date on which the number of shares awarded is known. Such increases in employee accounts for dividend equivalents and market price appreciation are unallowable.

(4) Junior stock is a class of equity stock that (i) is sold to employees at a price below that of the contractor's common stock, (ii) carries reduced dividend and voting rights, and (iii) is convertible to common stock upon the attainment of specified corporate goals. Costs associated with the conversion of junior stock into common stock are not allowable, whether or not they are accounted for as compensation costs.

(j) *Pension costs.* (1) A pension plan is a deferred compensation plan that is established and maintained by one or more employers to provide systematically for paying benefits to plan participants after their retirement, provided that the benefits are paid for life or are payable for life at the option of the employee. Additional benefits such as permanent and total disability and death payments and survivorship payments to beneficiaries of deceased employees may be treated as pension costs, provided the benefits are an integral part of the pension plan and meet all the criteria pertaining to pension costs.

(2) Pension plans are normally segregated into two types of plans: defined benefit or defined contribution pension plans. The cost of all defined benefit pension plans shall be measured, allocated, and accounted for in compliance with the provisions of 30.412, Composition and Measurement of Pension Costs, and 30. 413, Adjustment and Allocation of Pension Cost. The costs of all defined contribution pension plans shall be measured, allo-

cated, and accounted for in accordance with the provisions of 30.412. Pension costs are allowable subject to the referenced standards and the cost limitations and exclusions set forth in subdivision (j)(2)(i) and in subparagraphs (j) (3), through (8) of this subsection.

(i) Except for unfunded pension plans as defined in 31.001, to be allowable in the current year, pension costs must be funded by the time set for filing the Federal income tax return or any extension thereof. Pension costs assigned to the current year, but not funded by the tax return time, shall not be allowable in any subsequent year.

(ii) Pension payments must be reasonable in amount and be paid pursuant to (A) an agreement entered into in good faith between the contractor and employees before the work or services are performed and (B) the terms and conditions of the established plan. The cost of changes in pension plans which are discriminatory to the Government or are not intended to be applied consistently for all employees under similar circumstances in the future are not allowable.

(iii) Except as provided for early retirement benefits in subparagraph (j) (7) of this subsection, one-time-only pension supplements not available to all participants of the basic plan are not allowable as pension costs unless the supplemental benefits represent a separate pension plan and the benefits are payable for life at the option of the employee.

(iv) Increases in payments to previously retired plan participants covering cost-of-living adjustments are allowable if paid in accordance with a policy or practice consistently followed.

(3) *Defined benefit pension plans.* This paragraph covers pension plans in which the benefits to be paid or the basis for determining such benefits are established in advance and the contributions are intended to provide the stated benefits. The cost limitations and exclusions pertaining to defined benefit plans are as follows:

(i) Normal costs of pension plans not funded in the year incurred, and all other components of pension costs (see 30.412-40(a)(1)) assignable to the current accounting period but not funded during it, shall not be allowable in subsequent years (except that a payment made to a fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year). However, any part of a pension cost that is computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) (see 30.412-50(c)(3)), will be allowable in those future accounting periods in which the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding occurred in the year the costs would have been assigned except for the waiver.

(A) Except for unfunded pension plans as defined in 31.001, normal costs of pension plans not funded in the year incurred, and all other components of pension costs (see 30.412-40(a)(1)) assignable to the current accounting period but not funded during it, shall not be allowable in subsequent years (except that a payment made to a fund by the time set for filing the Federal income tax return or any extension thereof is considered to have been made during such taxable year). However, any part of a pension cost that is computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of the Employee's Retirement Income Security Act of 1974 (ERISA) (see 30.412-50(c)(3)), will be allowable in those future accounting periods in which the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding occurred in the year the costs would have been assigned except for the waiver.

(B) Allowable costs for unfunded pension plans, as defined in 31.001, are limited to the amount computed in accordance with 30.412 and 30.413.

(ii) Any amount paid or funded before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in those years. The interest earned on such premature funding, based on the valuation rate of return, may be excluded from future years' computations of pension costs in accordance with 30.412-50(a)(7).

(iii) Increased pension costs caused by delay in funding beyond 30 days after each quarter of the year to which they are assignable are unallowable. If a composite rate is used for allocating pension costs between the segments of a company and if, because of differences in the timing of the funding by the segments, an inequity exists, allowable pension costs for each segment will be limited to that particular segment's calculation of pension costs as provided for in 30.413-50(c)(5). Determination of unallowable costs shall be made in accordance with the actuarial method used in calculating pension costs.

(iv) Allowability of the cost of indemnifying the Pension Benefit Guaranty Corporation (PBGC) under ERISA Section 4062 or 4064 arising from terminating an employee deferred compensation plan will be considered on a case-by-case basis; provided that if insurance was required by the PBGC under ERISA Section 4023, it was so obtained and the indemnification payment is not recoverable under the insurance. Consideration under the foregoing circumstances will be primarily for the purpose of appraising the extent to which the indemnification payment is allocable to Government work. If a beneficial or other equitable relationship exists, the Government will participate, despite the requirements of 31.205-19(a)(3) and (b), in the indemnification payment to the extent of its fair share.

(4) *Termination of defined benefit pension plans.* When excess or surplus assets revert to the contractor as a result of termination of a defined benefit pension plan, or such assets are constructively received by it for any reason, the contractor shall make a refund or give a credit to the Government for its equitable share. The Government's equitable share shall reflect the Government's participation in pension costs through those contracts for which certified (see 15.804) cost or pricing data were submitted or which are subject to subpart 31.2.

(5) *Defined contribution pension plans.* This paragraph covers those pension plans in which the contributions to be made are established in advance and the level of benefits is determined by the contributions made. It also covers profit sharing, savings plans, and other such plans provided the plans fall within the definition of a pension plan in paragraph (j)(1) above.

(i) The pension cost assignable to a cost accounting period is the net contribution required to be made for that period after taking into account dividends and other credits, where applicable. However, any portion of pension cost computed for a cost accounting period that is deferred pursuant to a waiver granted under the provisions of ERISA (see 30.412-50(c)(3)) will be allowable in those future accounting periods when the funding does occur. The allowability of these deferred contributions will be limited to the amounts that would have been allowed had the funding been made in the year the costs would have been assigned except for the waiver.

(ii) Any amount paid or funded to the trust before the time it becomes assignable and allowable shall be applied to future years, in order of time, as if actually paid and deductible in such years.

(iii) The provisions of subdivision (j)(3)(iv) above concerning payments to PBGC apply to defined contribution plans.

(6) [Reserved]

(7) *Early retirement incentive plans.* An early retirement incentive plan is a plan under which employees receive a bonus or incentive, over and above the requirement of the basic pension plan, to retire early. These plans normally are not applicable to all participants of the basic plan and do not represent life income settlements, and as such would not qualify as pension costs. However, for contract costing purposes, early retirement incentive payments are allowable subject to the pension cost criteria contained in subdivisions (j)(3)(i) through (iv) provided—

(i) The costs are accounted for and allocated in accordance with the contractor's system of accounting for pension costs.

(ii) The payments are made in accordance with the terms and conditions of the contractor's plan;

(iii) The plan is applied only to active employees. The cost of extending the plan to employees who retired or were terminated before the adoption of the plan is unallowable; and

(iv) The total of the incentive payments to any employee may not exceed the amount of the employee's annual salary for the previous fiscal year before the employee's retirement.

(8) *Employee stock ownership plans (ESOP)* (i) An ESOP is an individual stock bonus plan designed specifically to invest in the stock of the employer corporation. The contractor's contributions to an Employee Stock Ownership Trust (ESOT) may be in the form of cash, stock, or property. Costs of ESOP's are allowable subject to the following conditions:

(A) Contributions by the contractor in any one year may not exceed 15 percent (25 percent when a money purchase plan is included) of salaries and wages of employees participating in the plan in any particular year.

(B) The contribution rate (ratio of contribution to salaries and wages of participating employees) may not exceed the last approved contribution rate except when approved by the contracting officer based upon justification provided by the contractor. When no contribution was made in the previous year for an existing ESOP, or when a new ESOP is first established, and the contractor proposes to make a contribution in the current year, the contribution rate shall be subject to the contracting officer's approval.

(C) When a plan or agreement exists wherein the liability for the contribution can be compelled for a specific year, the expense associated with that liability is assignable only to that period. Any portion of the contribution not funded by the time set for filing of the Federal income tax return for that year or any extension thereof shall not be allowable in subsequent years.

(D) When a plan or agreement exists wherein the liability for the contribution cannot be compelled, the amount contributed for any year is assignable to that year provided the amount is funded by the time set for filing of the Federal income tax return for that year.

(E) When the contribution is in the form of stock, the value of the stock contribution shall be limited to the fair market value of the stock on the date that title is effectively transferred to the trust. Cash contributions shall be allowable only when the contractor furnishes evidence satisfactory to the contracting officer demonstrating that stock purchases by the ESOT are or will be at a fair market price; e.g., makes arrangements with the trust permitting the contracting officer to examine purchases of stock by the trust to determine that prices paid are at fair market value. When excessive prices are paid, the amount of the excess will be credited to the same indirect cost pools that were charged for the ESOP contributions in the year in which the stock purchase occurs. However, when the trust purchases the stock with borrowed funds which will be repaid over a period of years by cash contributions from the contractor to the trust, the excess price over fair market value shall be credited to the indirect cost pools pro rata over the period of years during which the contractor contributes the cash used by the trust to repay the loan. When the fair market value of unissued stock or stock of a closely held corporation is not readily determinable, the valuation will be made on a case-by-case basis taking into consideration the guidelines for valuation used by the IRS.

(ii) Amounts contributed to an ESOP arising from either (A) an additional investment tax credit (see 1975 Tax Reduction Act—TRASOP's); or (B) a payroll-based tax credit (see Economic Recovery Tax Act of 1981) are unallowable.

(iii) The requirements of subdivision (j)(3)(ii) above are applicable to Employee Stock Ownership Plans.

(k) *Deferred compensation.* (1) Deferred compensation is an award given by an employer to compensate an employee in a future cost accounting period or periods for services rendered in one or more cost accounting periods before the date of receipt of compensation by the employee. Deferred compensation does not include the amount of year-end accruals for salaries, wages, or bonuses that are paid within a reasonable period of time after the end of a cost accounting period. Subject to 31.205-6(a), deferred awards are allowable when they are based on current or future services. Awards made in periods subsequent to the period when the work being remunerated was performed are not allowable.

(2) The costs of deferred awards shall be measured, allocated, and accounted for in compliance with the provisions of 30.415, Accounting for the Cost of Deferred Compensation.

(3) Deferred compensation payments to employees under awards made before the effective date of 30.415 are allowable to the extent they would have been allowable under prior acquisition regulations.

(l) *Compensation incidental to business acquisitions.* The following costs are unallowable:

(1) Payments to employees under agreements in which they receive special compensation, in excess of the contractor's normal severance pay practice, if their employment terminates following a change in the management control over, or ownership of, the contractor or a substantial portion of its assets.

(2) Payments to employees under plans introduced in connection with a change (whether actual or prospective) in the management control over, or ownership of, the contractor or a substantial portion of its assets in which those employees receive special compensation, which is contingent upon the employee remaining with the contractor for a specified period of time.

(m) *Fringe benefits.* (1) Fringe benefits are allowances and services provided by the contractor to its employees as compensation in addition to regular wages and salaries. Fringe benefits include, but are not limited to, the cost of vacations, sick leave, holidays, military leave, employee insurance, and supplemental unemployment benefit plans. Except as provided elsewhere in subpart 31.2, the costs of fringe benefit are allowable to the extent that they are reasonable and are required by law, employer-employee agreement, or an established policy of the contractor.

(2) That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is unallowable regardless of whether the cost is reported as taxable income to the employees (see 31.205-46(f)).

(n) *Employee rebate and purchase discount plans.* Rebates and purchase discounts, in whatever form, granted to employees on products or services produced by the contractor or affiliates are unallowable.

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 12299, Apr. 9, 1986; 51 FR 31426, Sept. 3, 1986; 52 FR 19804, May 27, 1987; 53 FR 10830, Apr. 1, 1988; 53 FR 34228, Sept. 2, 1988; 54 FR 13024, Mar. 29, 1989; 54 FR 34755, Aug. 21, 1989; 54 FR 18507, May 1, 1989; 54 FR 51401, Dec. 15, 1989]

31.205-7 Contingencies.

(a) *Contingency,* as used in this subpart, means a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time.

(b) Costs for contingencies are generally unallowable for historical costing purposes because such costing deals with costs incurred and recorded on the contractor's books. However, in some cases, as for example, terminations, a contingency factor may be recognized when it is applicable to a past period to give recognition to minor unsettled factors in the interest of expediting settlement.

(c) In connection with estimates of future costs, contingencies fall into two categories:

(1) Those that may arise from presently known and existing conditions, the effects of which are foreseeable within reasonable limits of accuracy, e.g., anticipated costs of rejects and defective work. Contingencies of this category are to be included in the estimates of future costs so as to provide the best estimate of performance cost.

(2) Those that may arise from presently known or unknown conditions, the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government; e.g., results of pending litigation. Contingencies of this category are to be excluded from cost estimates under the several items of cost, but should be disclosed separately (including the basis upon which the contingency is computed) to facilitate the negotiation of appropriate contractual coverage. (See, for example, 31.205-6(g), 31.205-19, and 31.205-24.)

31.205-8 Contributions or donations.

Contributions or donations, including cash, property and services, regardless of recipient, are unallowable, except as provided in 31.205-1(e)(3).

[51 FR 12300, Apr. 9, 1986]

31.205-9 [Reserved]

31.205-10 Cost of money.

(a) *Facilities capital cost of money*—(1) *General.* (i) Facilities capital cost of money (cost of capital committed to facilities) is an imputed cost determined by applying a cost-of-money rate to facilities capital employed in contract performance. A cost-of-money rate is uniformly imputed to all contractors (see subdivision (ii) below). Capital employed is determined without regard to whether its source is equity or borrowed capital. The resulting cost of money is not a form of interest on borrowings (see 31.205-20).

(ii) 30.414, Cost of Money as an Element of the Cost of Facilities Capital, establishes criteria for measuring and allocating, as an element of contract cost, the cost of capital committed to facilities. Cost-of-money factors are developed on Form CASB-CMF, broken down by overhead pool at the business unit, using (A) business-unit facilities capital data, (B) overhead allocation base data, and (C) the cost-of-money rate, which is based on interest rates specified by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2).

(2) *Allowability.* Whether or not the contract is otherwise subject to CAS, facilities capital cost of money is allowable if—

(i) The contractor's capital investment is measured, allocated to contracts, and costed in accordance with 30.414;

(ii) The contractor maintains adequate records to demonstrate compliance with this standard;

(iii) The estimated facilities capital cost of money is specifically identified or proposed in cost proposals relating to the contract under which this cost is to be claimed; and

(iv) The requirements of 31.205-52, which limit the allowability of facilities capital cost of money, are observed.

(3) *Accounting.* The facilities capital cost of money need not be entered on the contractor's books of account. However, the contractor shall (i) make a memorandum entry of the cost and (ii) maintain, in a manner that permits audit and verification, all relevant schedules, cost data, and other data necessary to support the entry fully.

(4) *Payment.* Facilities capital cost of money that is (i) allowable under paragraph (2) above, and (ii) calculated, allocated, and documented in accordance with this cost principle shall be an *incurred cost* for reimbursement purposes under applicable cost-reimbursement contracts and for progress payment purposes under fixed-price contracts.

(5) The cost of money resulting from including asset valuations resulting from business combinations in the facilities capital employed base is unallowable (see 31.205-52).

(b) *Cost of money as an element of the cost of capital assets under construction*—(1) *General.* (i) Cost of money as an element of the cost of capital assets under construction is an imputed cost determined by applying a cost-of-money rate to the investment in tangible and intangible capital assets while they are being constructed, fabricated, or developed for a contractor's own use. Capital employed is determined without regard to whether its source is equity or borrowed capital. The resulting cost of money is not a form of interest on borrowing (see 31.205-20).

(ii) 30.417, Cost of Money as an Element of the Cost of Capital Assets Under Construction, establishes criteria for measuring and allocating, as an element of contract cost, the cost of capital committed to capital assets under construction, fabrication, or development.

(2) *Allowability.* (i) Whether or not the contract is otherwise subject to CAS, and except as specified in subdivision (ii) below, the cost of money for capital assets under construction, fabrication, or development is allowable if—

(A) The cost of money is calculated, allocated to contracts, and costed in accordance with 30.417;

(B) The contractor maintains adequate records to demonstrate compliance with this standard;

(C) The cost of money for tangible capital assets is included in the capitalized cost that provides the basis for allowable depreciation costs, or, in the case of intangible capital assets, the cost of money is included in the cost of those assets for which amortization costs are allowable; and

(D) The requirements of 31.205-52, which limit the allowability of cost of money for capital assets under construction, fabrication, or development, are observed.

(ii) Actual interest cost in lieu of the calculated imputed cost of money for capital assets under construction, fabrication, or development is unallowable.

(3) *Accounting.* The cost of money for capital assets under construction need not be entered on the contractor's books of account. However, the contractor shall (i) make a memorandum entry of the cost and (ii) maintain, in a manner that permits audit and verification, all relevant schedules, cost data, and other data necessary to support the entry fully.

(4) *Payment.* The cost of money for capital assets under construction that is allowable under paragraph (2) above of this cost principle shall be an *incurred cost* for reimbursement purposes under applicable cost-reimbursement contracts and for progress payment purposes under fixed-price contracts.

[48 FR 42301, Sept. 19, 1983, as amended at 49 FR 26743, June 29, 1984; 52 FR 35669, Sept. 22, 1987; 55 FR 25530, June 21, 1990]

31.205-11 Depreciation.

(a) Depreciation is a charge to c
rent operations which distributes t
cost of a tangible capital asset, less
timated residual value, over the es
mated useful life of the asset in a sy
tematic and logical manner. It do
not involve a process of valuatio
Useful life refers to the prospecti
period of economic usefulness in a pa
ticular contractor's operations as di
tinguished from physical life; it is ev
denced by the actual or estimated r
tirement and replacement practice
the contractor.

(b) Contractors having contract
subject to 30.409, Depreciation of Ta
gible Capital Assets, must adhere t
the requirement of that standard fo
all fully CAS-covered contracts an
may elect to adopt the standard for al
other contracts. All requirements o
30.409 are applicable if the election i
made, and its requirements supersede
any conflicting requirements of thi
cost principle. Once electing to adopt
30.409 for all contracts, contractor
must continue to follow it until notification of final acceptance of all deliverable items on all open negotiated Government contracts. Paragraphs (c) through (e) below apply to contracts to which 30.409 is not applied.

(c) Normal depreciation on a contractor's plant, equipment, and other capital facilities is an allowable contract cost, if the contractor is able to demonstrate that it is reasonable and allocable (but see paragraph (i) below).

(d) Depreciation shall be considered reasonable if the contractor follows policies and procedures that are—

(1) Consistent with those followed in the same cost center for business other than Government;

(2) Reflected in the contractor's books of accounts and financial statements; and

(3) Both used and acceptable for Federal income tax purposes.

(e) When the depreciation reflected on a contractor's books of accounts and financial statements differs from that used and acceptable for Federal income tax purposes, reimbursement shall be based on the asset cost amortized over the estimated useful life of the property using depreciation methods (straight line, sum of the years' digits, etc.) acceptable for income tax purposes. Allowable depreciation shall not exceed the amounts used for book and statement purposes and shall be determined in a manner consistent with the depreciation policies and procedures followed in the same cost center on non-Government business.

(f) Depreciation for reimbursement purposes in the case of tax-exempt organizations shall be determined on the basis described in paragraph (e) immediately above.

(g) Special considerations are required for assets acquired before the effective date of this cost principle if, on that date, the undepreciated balance of these assets resulting from depreciation policies and procedures used previously for Government contracts and subcontracts is different from the undepreciated balance on the books and financial statements. The undepreciated balance for contract cost purposes shall be depreciated over the remaining life using the methods and lives followed for book purposes. The aggregate depreciation of any asset allowable after the effective date of this 31.205-11 shall not exceed the cost basis of the asset less any depreciation allowed or allowable under prior acquisition regulations.

(h) Depreciation should usually be allocated to the contract and other work as an indirect cost. The amount of depreciation allowed in any accounting period may, consistent with the basic objectives in paragraph (a) above, vary with volume of production or use of multishift operations.

(i) In the case of emergency facilities covered by certificates of necessity, a contractor may elect to use normal depreciation without requesting a determination of *true depreciation*, or may elect to use either normal or *true depreciation* after a determination of *true depreciation* has been made by an Emergency Facilities Depreciation Board (EFDB). The method elected must be followed consistently thoughout the life of the emergency facility. When an election is made to use normal depreciation, the criteria in paragraphs (c), (d), (e), and (f) above shall apply for both the emergency period and the post-emergency period. When an election is made to use *true depreciation*, the amount allowable as depreciation—

(1) With respect to the emergency period (five years), shall be computed in accordance with the determination of the EFDB and allocated rateably over the full five year emergency period; *provided* no other allowance is made which would duplicate the factors, such as extraordinary obsolescence, covered by the Board's determination; and

(2) After the end of the emergency period, shall be computed by distributing the remaining undepreciated portion of the cost of the emergency facility over the balance of its useful life provided the remaining undepreciated portion of such cost shall not include any amount of unrecovered *true depreciation*.

(j) No depreciation, rental, or use charge shall be allowed on property acquired at no cost from the Government by the contractor or by any division, subsidiary, or affiliate of the contractor under common control.

(k) The depreciation on any item which meets the criteria for allowance at a *price* under 31.205-26(e) may be based on that price, provided the same policies and procedures are used for costing all business of the using division, subsidiary, or organization under common control.

(l) No depreciation or rental shall be allowed on property fully depreciated by the contractor or by any division, subsidiary, or affiliate of the contractor under common control. However, a reasonable charge for using fully depreciated property may be agreed upon and allowed (but see 31.109(h)(2)). In determining the charge, consideration shall be given to cost, total estimated useful life at the time of negotiations, effect of any increased maintenance charges or decreased efficiency due to age, and the amount of depreciation previously charged to Government contracts or subcontracts.

(m) 30.404, Capitalization of Tangible Assets, applies to assets acquired by a *capital lease* as defined in Statement of Financial Accounting Standard No. 13 (FAS-13), Accounting for

Leases, issued by the Financial Accounting Standards Board (FASB). Compliance with 30.404 and FAS-13 requires that such leased assets (capital leases) be treated as purchased assets; i.e., be capitalized and the capitalized value of such assets be distributed over their useful lives as depreciation charges, or over the leased life as amortization charges as appropriate. Assets whose leases are classified as capital leases under FAS-13 are subject to the requirements of 31.205-11 while assets acquired under leases classified as operating leases are subject to the requirements on rental costs in 31.205-36. The standards of financial accounting and reporting prescribed by FAS-13 are incorporated into this principle and shall govern its application, except as provided in subparagraphs (1), (2), and (3) below.

(1) Rental costs under a sale and leaseback arrangement shall be allowable up to the amount that would have been allowed had the contractor retained title to the property.

(2) Capital leases, as defined in FAS-13, for all real and personal property, between any related parties are subject to the requirements of this subparagraph 31.205-11(m). If it is determined that the terms of the lease have been significantly affected by the fact that the lessee and lessor are related, depreciation charges shall not be allowed in excess of those which would have occurred if the lease contained terms consistent with those found in a lease between unrelated parties.

(3) Assets acquired under leases that the contractor must capitalize under FAS-13 shall not be treated as purchased assets for contract purposes if the leases are covered by 31.205-36(b)(4).

(n) Whether or not the contract is otherwise subject to CAS, the requirements of 31.205-52, which limit the allowability of depreciation, shall be observed.

[48 FR 42301, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

31.205-12 Economic planning costs.

(a) This category includes costs of generalized long-range management planning that is concerned with the future overall development of the contractor's business and that may take into account the eventual possibility of economic dislocations or fundamental alterations in those markets in which the contractor currently does business. Economic planning costs do not include organization or reorganization costs covered by 31.205-27.

(b) Economic planning costs are allowable as indirect costs to be properly allocated.

(c) Research and development and engineering costs designed to lead to new products for sale to the general public are not allowable under this principle.

31.205-13 Employee morale, health, welfare, food service, and dormitory costs and credits.

(a) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraph (b) immediately below, and to the extent that the net amount is reasonable. Some examples are house publications, health clinics, recreation, employee counseling services, and food and dormitory services, which include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities.

(b) Losses from operating food and dormitory services may be included as costs only if the contractor's objective is to operate such services on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to the accomplishment of the above objective are not allowable. A loss may be allowed, however, to the extent that the contractor can demonstrate that unusual circumstances exist (e.g., (1) where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or (2) where charged but unproductive labor costs would be excessive but for the services provided or where cessation or reduction of food or dormitory operations will not otherwise yield net cost savings) such that even with efficient management, operating the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Costs of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(c) When the contractor has an arrangement authorizing an employee association to provide or operate a service, such as vending machines in the contractor's plant, and retain the profits, such profits shall be treated in the same manner as if the contractor were providing the service (but see paragraph (d) immediately below).

(d) Contributions by the contractor to an employee organization, including funds from vending machine receipts or similar sources, may be included as costs incurred under paragraph (a) above only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if directly incurred by the contractor.

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 12300, Apr. 9, 1986]

31.205-14 Entertainment costs.

Costs of amusement, diversion, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable (but see 31.205-1 and 31.205-13). Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable ncome to the employees.

51 FR 12300, Apr. 9, 1986]

1.205-15 Fines, penalties, and mischarging costs.

(a) Costs of fines and penalties reulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

(b) Costs incurred in connection with, or related to, the mischarging of costs on Government contracts are unallowable. Such costs include those incurred to identify, measure, or otherwise determine the magnitude of the improper charging, and costs incurred to remedy or correct the mischarging, such as the costs to rescreen and reconstruct records.

[51 FR 12301, Apr. 9, 1986, as amended at 54 FR 13024, Mar. 29, 1989]

31.205-16 Gains and losses on disposition of depreciable property or other capital assets.

(a) Gains and losses from the sale, retirement, or other disposition (but see 31.205-19) of depreciable property shall be included in the year in which they occur as credits or charges to the cost grouping(s) in which the depreciation or amortization applicable to those assets was included (but see paragraph (d) of this subsection). However, no gain or loss shall be recognized as a result of the transfer of assets in a business combination (see 31.205-52).

(b) Gains and losses on disposition of tangible capital assets, including those acquired under capital leases (see 31.205-11(m), shall be considered as adjustments of depreciation costs previously recognized. The gain or loss for each asset disposed of is the difference between the net amount realized, including insurance proceeds from involuntary conversions, and its undepreciated balance. The gain recognized for contract costing purposes shall be limited to the difference between the acquisition cost (or for assets acquired under a capital lease, the value at which the leased asset is capitalized) of the asset and its undepreciated balance (except see subdivisions (c)(2)(i) or (ii) below).

(c) Special considerations apply to an involuntary conversion which occurs when a contractor's property is destroyed by events over which the owner has no control, such as fire, windstorm, flood, accident, theft, etc., and an insurance award is recovered. The following govern involuntary conversions:

(1) When there is a cash award and the converted asset is not replaced, gain or loss shall be recognized in the period of disposition. The gain recognized for contract costing purposes shall be limited to the difference between the acquisition cost of the asset and its undepreciated balance.

(2) When the converted asset is replaced, the contractor shall either—

(i) Adjust the depreciable basis of the new asset by the amount of the total realized gain or loss; or

(ii) Recognize the gain or loss in the period of disposition, in which case the Government shall participate to the same extent as outlined in subparagraph (c)(1) above.

(d) Gains and losses on the disposition of depreciable property shall not be recognized as a separate charge or credit when—

(1) Gains and losses are processed through the depreciation reserve account and reflected in the depreciation allowable under 31.205-11; or

(2) The property is exchanged as part of the purchase price of a similar item, and the gain or loss is taken into consideration in the depreciation cost basis of the new item.

(e) Gains and losses arising from mass or extraordinary sales, retirements, or other disposition other than through business combinations shall be considered on a case-by-case basis.

(f) Gains and losses of any nature arising from the sale or exchange of capital assets other than depreciable property shall be excluded in computing contract costs.

[48 FR 42301, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

31.205-17 Idle facilities and idle capacity costs.

(a) *Costs of idle facilities or idle capacity,* as used in this subsection, means costs such as maintenance, repair, housing, rent, and other related costs; e.g., property taxes, insurance, and depreciation.

Facilities, as used in this subsection, means plant or any portion thereof (including land integral to the operation), equipment, individually or collectively, or any other tangible capital asset, wherever located, and whether owned or leased by the contractor.

Idle capacity, as used in this subsection, means the unused capacity of partially used facilities. It is the difference between that which a facility could achieve under 100 percent operating time on a one-shift basis, less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays, and the extent to which the facility was actually used to meet demands during the accounting period. A multiple-shift basis may be used in the calculation instead of a one-shift basis if it can be shown that this amount of usage could normally be expected for the type of facility involved.

Idle facilities, as used in this subsection, means completely unused facilities that are excess to the contractor's current needs.

(b) The costs of idle facilities are unallowable unless the facilities—

(1) Are necessary to meet fluctuations in workload; or

(2) Were necessary when acquired and are now idle because of changes in requirements, production economies, reorganization, termination, or other causes which could not have been reasonably foreseen. (Costs of idle facilities are allowable for a reasonable period, ordinarily not to exceed 1 year, depending upon the initiative taken to use, lease, or dispose of the idle facilities (but see 31.205-42)).

(c) Costs of idle capacity are costs of doing business and are a factor in the normal fluctuations of usage or overhead rates from period to period. Such costs are allowable provided the capacity is necessary or was originally reasonable and is not subject to reduction or elimination by subletting, renting, or sale, in accordance with sound business, economics, or security practices. Widespread idle capacity throughout an entire plant or among a group of assets having substantially the same function may be idle facilities.

(d) Any costs to be paid directly by the Government for idle facilities or

le capacity reserved for defense mo-
lization production shall be the sub-
ct of a separate agreement.

.205–18 Independent research and development and bid and proposal costs.

(a) *Definitions.*

Applied research, as used in this sub-
ction, means that effort which (1)
ormally follows basic research, but
ay not be severable from the related
sic research, (2) attempts to deter-
ine and exploit the potential of sci-
tific discoveries or improvements in
chnology, materials, processes,
ethods, devices, or techniques, and
) attempts to advance the state of
e art. Applied research does not in-
ude efforts whose principal aim is
sign, development, or test of specific
ems or services to be considered for
le; these efforts are within the defi-
tion of the term *development,* de-
ed below.

Basic research, as used in this sub-
ction, means that research which is
rected toward increase of knowledge
science. The primary aim of basic
search is a fuller knowledge or un-
rstanding of the subject under
dy, rather than any practical appli-
ion thereof.

id and proposal (B&P) costs, as
ed in this subsection, means the
ts incurred in preparing, submit-
g, and supporting bids and propos-
(whether or not solicited) on po-
tial Government or non-Govern-
nt contracts. The term does not in-
de the costs of effort sponsored by
rant or cooperative agreement or
uired in contract performance.

ompany, as used in this subsection,
ans all divisions, subsidiaries, and
iliates of the contractor under
nmon control.

evelopment, as used in this subsec-
, means the systematic use, under
atever name, of scientific and tech-
al knowledge in the design, develop-
nt, test, or evaluation of a potential
product or service (or of an im-
vement in an existing product or
vice) for the purpose of meeting
cific performance requirements or
ectives. Development includes the
ctions of design engineering, proto-
ng, and engineering testing. Devel-
ent excludes: (1) subcontracted
technical effort which is for the sole purpose of developing an additional source for an existing product, or (2) development effort for manufacturing or production materials, systems, processes, methods, equipment, tools, and techniques not intended for sale.

Independent research and development (IR&D) means a contractor's IR&D cost that is not sponsored by, or required in performance of, a contract or grant and that consists of projects falling within the four following areas: (1) basic research, (2) applied research, (3) development, and (4) systems and other concept formulation studies. IR&D effort shall not include technical effort expended in developing and preparing technical data specifically to support submitting a bid or proposal.

Systems and other concept formulation studies, as used in this subsection, means analyses and study efforts either related to specific IR&D efforts or directed toward identifying desirable new systems, equipments or components, or modifications and improvements to existing systems, equipments, or components.

(b) *Composition and allocation of costs.* The requirements of 30.420, Accounting for Independent Research and Development Costs and Bid and Proposal Costs, are incorporated in their entirety and shall apply as follows—

(1) *Fully-CAS-covered contracts.* Contracts that are fully-CAS-covered shall be subject to all requirements of 30.420.

(2) *Modified-CAS-covered and non-CAS-covered contracts.* Contracts that are not CAS-covered or that contain terms or conditions requiring modified CAS coverage shall be subject to all requirements of 30.420 *except* 4 CFR 420.50(e)(2) and 4 CFR 420.50(f)(2), which are not then applicable. However, non-CAS covered or modified CAS-covered contracts awarded at a time the contractor has CAS-covered contracts requiring compliance with 30.420, shall be subject to all the requirements of 30.420. When the requirements of 4 CFR 420.50(e)(2) and 4 CFR 420.50(f)(2) are not applicable, the following apply:

(i) IR&D and B&P costs shall be allocated to final cost objectives on the same basis of allocation used for the G&A expense grouping of the profit center (see 31.001) in which the costs are incurred. However, when IR&D and B&P costs clearly benefit other profit centers or benefit the entire company, those costs shall be allocated through the G&A of the other profit centers or through the corporate G&A, as appropriate.

(ii) If allocations of IR&D or B&P through the G&A base do not provide equitable cost allocation, the contracting officer may approve use of a different base.

(c) *Allowability.* Except as provided in paragraph (d) below, costs for IR&D and B&P are allowable only in accordance with the following:

(1) *Companies required to negotiate advance agreements.*

(i) Any company that received payments for IR&D and B&P costs in a fiscal year, either as a prime contractor or subcontractor, exceeding $5,400,000 from Government agencies, is required to negotiate with the Government an advance agreement which establishes a ceiling for allowability of IR&D and B&P costs for the following fiscal year. This agreement is binding on all Government agencies, unless prohibited by statute. The requirements of section 203 of Pub. L. 91-441 necessitate that the Department of Defense (DOD) be the lead negotiating agency when the contractor has received more than $5,400,000 in payments for IR&D and B&P from DOD. Computation of IR&D and B&P costs to determine whether the threshold criterion was reached shall include only recoverable IR&D and B&P costs allocated during the company's previous fiscal year to prime contracts and subcontracts for which the submission and certification of cost or pricing data were required. (Also see paragraph (b) above and 15.804.) The computation shall include full burdening pursuant to 30.420.

(ii) When a company meets the criterion in (i) above, required advance agreements may be negotiated at the corporate level and/or with those profit centers that contract directly with the Government and that in the preceding year allocated recoverable IR&D and B&P costs exceeding $675,000, including burdening, to contracts and subcontracts for which the submission and certification of cost or pricing data were required (also see paragraph (b) above and 15.804). When ceilings are negotiated for separate profit centers of the company, the allowability of IR&D and B&P costs for any center that in its previous fiscal year did not reach the $675,000 threshold may be determined in accordance with subparagraph (c)(2) below.

(iii) Ceilings are the maximum dollar amounts of total IR&D and B&P costs that will be allowable for allocation over the appropriate base for that part of the company's operation covered by an advance agreement.

(iv) No IR&D and B&P cost shall be allowable if a company fails to initiate negotiation of a required advance agreement before the end of the fiscal year for which the agreement is required.

(v) When negotiations are held with a company meeting the $5,400,000 criterion or with separate profit centers (when negotiations are held at that level under (ii) above), and if no advance agreement is reached, payment for IR&D and B&P costs shall be reduced below that which the company or profit center would have otherwise received. The amount of such reduced payment shall not exceed 75 percent of the amount which, in the opinion of the contracting officer, the company or profit center would be entitled to receive under an advance agreement. Written notification of the contracting officer's determination of a reduced amount shall be provided the contractor. In the event that an advance agreement is not reached before the end of the contractor's fiscal year for which the agreement is to apply, negotiations shall immediately be terminated, and the contracting officer shall furnish a determination of the reduced amount.

(vi) Contractors may appeal decisions of the contracting officer to reduce payment. The appeal shall be filed with the contracting officer within 30 days of receipt of the contracting officer's determination. (Also see subpart 42.10.)

(2) *Companies not required to negotiate advance agreements.* Ceilings for allowable IR&D and B&P costs for companies not required to negotiate advance agreements in accordance with subparagraph (c)(1) above shall be established by a formula, either on a company-wide basis or by profit centers, computed as follows:

(i) Determine the ratio of IR&D/B&P costs to total sales (or other base acceptable to the contracting officer) for each of the preceding three years and average the two highest of these ratios; this average is the IR&D/B&P historical ratio;

(ii) Compute the average annual IR&D/B&P costs (hereafter called average), using the two highest of the preceding three years;

(iii) IR&D/B&P costs for the center for the current year which are not in excess of the product of the center's actual total sales (or other accepted base) for the current year and the IR&D/B&P historical ratio computed under (i) above (hereafter called product) shall be considered allowable only o the extent the product does not xceed 120 percent of the average. If he product is less than 80 percent of he average, costs up to 80 percent of he average shall be allowable.

(iv) However, at the discretion of the ontracting officer, an advance agree- ent may be negotiated when the con- actor can demonstrate that the for- ula would produce a clearly inequita- le cost recovery.

(d) *Deferred IR&D and B&P costs.*) IR&D costs that were incurred in evious accounting periods are unal- wable, except when a contractor has veloped a specific product at its own k in anticipation of recovering the velopment costs in the sale price of e product provided that—

i) The total amount of IR&D costs plicable to the product can be iden- ed;

i) The proration of such costs to s of the product is reasonable;

ii) The contractor had no Govern- nt business during the time that costs were incurred or did not allo- IR&D costs to Government con- ts except to prorate the cost of developing a specific product to the sales of that product; and

(iv) No costs of current IR&D programs are allocated to Government work except to prorate the costs of developing a specific product to the sales of that product.

(2) When deferred costs are recognized, the contract (except firm-fixed-price and fixed-price with economic price adjustment) will include a specific provision setting forth the amount of deferred IR&D costs that are allocable to the contract. The negotiation memorandum will state the circumstances pertaining to the case and the reason for accepting the deferred costs.

[48 FR 42301, Sept. 19, 1983, as amended at 49 FR 12986, Mar. 30, 1984; 55 FR 25530, June 21, 1990]

31.205–19 Insurance and indemnification.

(a) Insurance by purchase or by self-insuring includes coverage the contractor is required to carry, or to have approved, under the terms of the contract and any other coverage the contractor maintains in connection with the general conduct of its business. Any contractor desiring to establish a program of self-insurance applicable to contracts that are not subject to 30.416, Accounting for Insurance Costs, shall comply with the self-insurance requirements of that standard as well as with part 28 of this Regulation. However, approval of a contractor's insurance program in accordance with part 28 does not constitute a determination as to the allowability of the program's cost. The amount of insurance costs which may be allowed is subject to the cost limitations and exclusions in the following subparagraphs.

(1) Costs of insurance required or approved, and maintained by the contractor pursuant to the contract, are allowable.

(2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable, subject to the following limitations:

(i) Types and extent of coverage shall follow sound business practice, and the rates and premiums must be reasonable.

(ii) Costs allowed for business interruption or other similar insurance must be limited to exclude coverage of profit.

(iii) The cost of property insurance premiums for insurance coverage in excess of the acquisition cost of the insured assets is allowable only when the contractor has a formal written policy assuring that in the event the insured property is involuntarily converted, the new asset shall be valued at the book value of the replaced asset plus or minus adjustments for differences between insurance proceeds and actual replacement cost. If the contractor does not have such a formal written policy, the cost of premiums for insurance coverage in excess of the acquisition cost of the insured asset is unallowable.

(iv) Costs of insurance for the risk of loss of or damage to Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance does not cover loss or damage that results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers or other equivalent representatives.

(v) Contractors operating under a program of self-insurance must obtain approval of the program when required by 28.308(a).

(vi) Costs of insurance on the lives of officers, partners, or proprietors are allowable only to the extent that the insurance represents additional compensation (see 31.205-6).

(3) Actual losses are unallowable unless expressly provided for in the contract, except—

(i) Losses incurred under the nominal deductible provisions of purchased insurance, in keeping with sound business practice, are allowable for contracts not subject to 30.416 and when the contractor did not establish a self-insurance program. Such contracts are not subject to the self-insurance requirements of 30.416. For contracts subject to 30.416, and for those made subject to the self-insurance requirements of that Standard as a result of the contractor's having established a self-insurance program (see paragraph (a) above), actual losses may be used as a basis for charges under a self-insurance program when the actual amount of losses will not differ significantly from the projected average losses for the accounting period (see CFR 416.50(a)(2)(ii)). In those instances where an actual loss has occurred and the present value of the liability is determined under the provisions of 30.416-50(a)(3)(ii), the allowable cost shall be limited to an amount computed using as a discount rate the interest rate determined by the Secretary of the Treasury pursuant to U.S.C. App. 1215(b)(2) in effect at the time the loss is recognized. However, the full amount of a lump-sum settlement to be paid within a year of the date of settlement is allowable.

(ii) Minor losses, such as spoilage, breakage, and disappearance of small hand tools that occur in the ordinary course of doing business and that are not covered by insurance are allowable.

(4) The cost of insurance to protect the contractor against the costs of correcting its own defects in materials or workmanship is unallowable. However, insurance costs to cover fortuitous or casualty losses resulting from defects in materials or workmanship are allowable as a normal business expense.

(5) Premiums for retroactive or backdated insurance written to cover occurred and known losses are unallowable.

(b) If purchased insurance is available, the charge for any self-insurance coverage plus insurance administration expenses shall not exceed the cost of comparable purchased insurance plus associated insurance administration expenses.

(c) Insurance provided by captive insurers (insurers owned by or under the control of the contractor) is considered self-insurance, and charges for it must comply with the self-insurance provisions of 30.416. However, if the captive insurer also sells insurance to the general public in substantial quantities and it can be demonstrated that the charge to the contractor is based on competitive market forces, the insurance will be considered purchased insurance.

(d) The allowability of premiums for insurance purchased from fronting insurance companies (insurance companies not related to the contractor but who reinsure with a captive insurer of the contractor) shall not exceed the amount (plus reasonable fronting company charges for services rendered) which the contractor would have been allowed had it insured directly with the captive insurer.

(e) Self-insurance charges for risks of catastrophic losses are not allowable (see 28.308(e)).

(f) The Government is obligated to indemnify the contractor only to the extent authorized by law, as expressly provided for in the contract, except as provided in paragraph (a)(3) above.

(g) Late premium payment charges related to employee deferred compensation plan insurance incurred pursuant to section 4007 (29 U.S.C. 1307) or section 4023 (29 U.S.C. 1323) of the Employee Retirement Income Security Act of 1974 are unallowable.

[48 FR 42301, Sept. 19, 1983, as amended at 50 FR 23697, June 4, 1985; 51 FR 31426, Sept. 3, 1986]

31.205-20 Interest and other financial costs.

Interest on borrowings (however represented), bond discounts costs of financing and refinancing capital (net worth plus long-term liabilities), legal and professional fees paid in connection with preparing prospectuses, costs of preparing and issuing stock rights, and directly associated costs are unallowable except for interest assessed by State or local taxing authorities under the conditions specified in 31.205-41 (but see 31.205-28).

31.205-21 Labor relations costs.

Costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

31.205-22 Legislative lobbying costs.

(a) Costs associated with the following activities are unallowable:

(1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activities;

(2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;

(3) Any attempt to influence (i) the introduction of Federal or state legislation, or (ii) the enactment or modification of any pending Federal or state legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence (i) the introduction of Federal or state legislation, or (ii) the enactment or modification of any pending Federal or state legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign; or

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities.

(b) The following activities are excepted from the coverage of (a) above:

(1) Providing a technical and factual presentation of information on a topic directly related to the performance of a contract through hearing testimony, statements or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient member, legislative body or

subdivision, or a cognizant staff member thereof; provided such information is readily obtainable and can be readily put in deliverable form; and further provided that costs under this section for transportation, lodging or meals are unallowable unless incurred for the purpose of offering testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing.

(2) Any lobbying made unallowable by (a)(3) above to influence state legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract.

(3) Any activity specifically authorized by statute to be undertaken with funds from the contract.

(c) When a contractor seeks reimbursement for indirect costs, total lobbying costs shall be separately identified in the indirect cost rate proposal, and thereafter treated as other unallowable activity costs.

(d) Contractors shall submit as part of their annual indirect cost rate proposals a certification that the requirements and standards of this subsection have been complied with.

(e) Contractors shall maintain adequate records to demonstrate that the certification of costs as being allowable or unallowable pursuant to this subsection complies with the requirements of this subsection.

(f) Time logs, calendars, or similar records shall not be required to be created for purposes of complying with this subsection during any particular calendar month when—

(1) The employee engages in lobbying (as defined in paragraphs (a) and (b) of this subsection) 25 percent or less of the employee's compensated hours of employment during that calendar month; and

(2) Within the preceding 5-year period, the organization has not materially misstated allowable or unallowable costs of any nature, including legislative lobbying costs.

When the conditions of subparagraphs (f)(1) and (2) of this subsection are met, contractors are not required to establish records to support the lowability of claimed costs in additi to records already required or ma tained. Also, when the conditions subparagraphs (f)(1) and (2) of t subsection are met, the absence time logs, calendars, or similar recor will not serve as a basis for disallowi costs by contesting estimates of lob ing time spent by employees during calendar month.

(g) Existing procedures should utilized to resolve in advance any nificant questions or disagreemen concerning the interpretation or app cation of this subsection.

[49 FR 18278, Apr. 27, 1984, as amended 51 FR 12301, Apr. 9, 1986; 52 FR 19804, M 27, 1987]

31.205-23 Losses on other contracts.

An excess of costs over income und any other contract (including the co tractor's contributed portion und cost-sharing contracts) is unallowab

31.205-24 Maintenance and repair costs.

(a) Costs necessary for the upkeep property (including Government pro erty, unless otherwise provided fo that neither add to the permane value of the property nor apprecia prolong its intended life, but keep it an efficient operating condition, are be treated as follows (but see 31.20 11):

(1) Normal maintenance and repa costs are allowable.

(2) Extraordinary maintenance a repair costs are allowable, provid those costs are allocated to the app cable periods for purposes of dete mining contract costs (but see 31.10

(b) Expenditures for plant a equipment, including rehabilitati which should be capitalized and su ject to depreciation, according to ge erally accepted accounting principl as applied under the contractor's e tablished policy or, when applicab according to 30.404, Capitalization o Tangible Assets, are allowable only o a depreciation basis.

31.205-25 Manufacturing and producti engineering costs.

(a) The costs of manufacturing an production engineering effort as d scribed in (1) through (4) below are all allowable:

(1) Developing and deploying new or improved materials, systems, processes, methods, equipment, tools and techniques that are or are expected to be used in producing products or services;

(2) Developing and deploying pilot production lines;

(3) Improving current production functions, such as plant layout, production scheduling and control, methods and job analysis, equipment capabilities and capacities, inspection techniques, and tooling analysis (including tooling design and application improvements); and

(4) Material and manufacturing producibility analysis for production suitability and to optimize manufacturing processes, methods, and techniques.

(b) This cost principle does not cover:

(1) Basic and applied research effort (as defined in 31.205-18(a)) related to new technology, materials, systems, processes, methods, equipment, tools and techniques. Such technical effort is governed by 31.205-18, Independent research and development costs and bid and proposal costs; and

(2) Development effort for manufacturing or production materials, systems, processes, methods, equipment, tools and techniques that are intended for sale is also governed by 31.205-18.

(c) Where manufacturing or production development costs are capitalized or required to be capitalized under the contractor's capitalization policies, allowable cost will be determined in accordance with the requirements of 31.205-11, Depreciation.

31.205-26 Material costs.

(a) Material costs include the costs of such items as raw materials, parts, sub-assemblies, components, and manufacturing supplies, whether purchased or manufactured by the contractor, and may include such collateral items as inbound transportation and intransit insurance. In computing material costs, consideration shall be given to reasonable overruns, spoilage, or defective work (unless otherwise provided in any contract provision relating to inspecting and correcting defective work). These costs are allowable, subject to the requirements of paragraphs (b) through (e) below.

(b) Costs of material shall be adjusted for income and other credits, including available trade discounts, refunds, rebates, allowances, and cash discounts, and credits for scrap, salvage, and material returned to vendors. Such income and other credits shall either be credited directly to the cost of the material or be allocated as a credit to indirect costs. When the contractor can demonstrate that failure to take cash discounts was reasonable, lost discounts need not be credited.

(c) Reasonable adjustments arising from differences between periodic physical inventories and book inventories may be included in arriving at costs; *provided*, such adjustments relate to the period of contract performance.

(d) When materials are purchased specifically for and are identifiable solely with performance under a contract, the actual purchase cost of those materials should be charged to the contract. If material is issued from stores, any generally recognized method of pricing such material is acceptable if that method is consistently applied and the results are equitable. When estimates of future material costs are required, current market price or anticipated acquisition cost may be used, but the basis of pricing must be disclosed.

(e) Allowance for all materials, supplies, and services that are sold or transferred between any divisions, subsidiaries, or affiliates of the contractor under a common control shall be on the basis of cost incurred in accordance with this subpart. However, allowance may be at a price when it is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor or any division, subsidiary, or affiliate of the contractor under a common control, and when the price—

(1) Is or is based on an *established catalog or market price of commercial items sold in substantial quantities to the general public* in accordance with 15.804; or

(2) Is the result of *adequate price competition* in accordance with 15.804 and is the price at which an award was made to the affiliated organization after obtaining quotations on an equal basis from such organization and one or more outside sources that produce the item or its equivalent in significant quantity.

(3) Provided, that in either subparagraph (1) or (2) above—

(i) The price is not in excess of the transferor's current sales price to its most favored customer (including any division, subsidiary or affiliate of the contractor under a common control) for a like quantity under comparable conditions; and

(ii) The contracting officer has not determined the price to be unreasonable.

(f) The price determined in accordance with subparagraph (e)(1) above should be adjusted to reflect the quantities being acquired and may be adjusted to reflect actual cost of any modifications necessary because of contract requirements.

31.205-27 Organization costs.

(a) Except as provided in paragraph (b) of this section, expenditures in connection with (1) planning or executing the organization or reorganization of the corporate structure of a business, including mergers and acquisitions, (2) resisting or planning to resist the reorganization of the corporate structure of a business or a change in the controlling interest in the ownership of a business, and (3) raising capital (net worth plus long-term liabilities), are unallowable. Such expenditures include but are not limited to incorporation fees and costs of attorneys, accountants, brokers, promoters and organizers, management consultants and investment counselors, whether or not employees of the contractor. Unallowable *reorganization* costs include the cost of any change in the contractor's financial structure, excluding administrative costs of short-term borrowings for working capital, resulting in alterations in the rights and interests of security holders, whether or not additional capital is raised.

(b) The cost of activities primarily intended to provide compensation will not be considered organizational costs subject to this subsection, but will be governed by 31.205-6. These activities include acquiring stock for (1) executive bonuses, (2) employee savings plans, and (3) employee stock ownership plans.

[48 FR 42301, Sept. 19, 1983, as amended at 53 FR 10830, Apr. 1, 1988]

31.205-28 Other business expenses.

The following types of recurring costs are allowable when allocated on an equitable basis:

(a) Registry and transfer charges resulting from changes in ownership of securities issued by the contractor.

(b) Cost of shareholders' meetings.

(c) Normal proxy solicitations.

(d) Preparing and publishing reports to shareholders.

(e) Preparing and submitting required reports and forms to taxing and other regulatory bodies.

(f) Incidental costs of directors' and committee meetings.

(g) Other similar costs.

31.205-29 Plant protection costs.

Costs of items such as (a) wages, uniforms, and equipment of personnel engaged in plant protection, (b) depreciation on plant protection capital assets and (c) necessary expenses to comply with military requirements, are allowable.

31.205-30 Patent costs.

(a) The following patent costs are allowable to the extent that they are incurred as requirements of a Government contract (but see 31.205-33):

(1) Costs of preparing invention disclosures, reports, and other documents.

(2) Costs for searching the art to the extent necessary to make the invention disclosures.

(3) Other costs in connection with the filing and prosecution of a United States patent application where title or royalty-free license is to be conveyed to the Government.

(b) General counseling services relating to patent matters, such as advice on patent laws, regulations, clauses

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and employee agreements, are allowable (but see 31.205-33).

(c) Other than those for general counseling services, patent costs not required by the contract are unallowable. (See also 31.205-37.)

31.205-31 Plant reconversion costs.

Plant reconversion costs are those incurred in restoring or rehabilitating the contractor's facilities to approximately the same condition existing immediately before the start of the Government contract, fair wear and tear excepted. Reconversion costs are unallowable except for the cost of removing Government property and the restoration or rehabilitation costs caused by such removal. However, in special circumstances where equity so dictates, additional costs may be allowed to the extent agreed upon before costs are incurred. Care should be exercised to avoid duplication through allowance as contingencies, additional profit or fee, or in other contracts.

31.205-32 Precontract costs.

Precontract costs are those incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract (see 31.109).

31.205-33 Professional and consultant service costs.

(a) *Definition. Professional and consultant services,* as used in this subpart, are those services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the contractor. Examples include those services acquired by contractors or subcontractors in order to enhance their legal, economic, financial, or technical positions. Professional and consultant services are generally acquired to obtain information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance, such as studies, analyses, evaluations, liaison with Government officials, or other forms of representation.

(b) Costs of professional and consultant services are allowable subject to this paragraph and paragraphs (c) through (h) of this subsection when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see 31.205-30).

(c) Costs of professional and consultant services performed under any of the following circumstances are unallowable:

(1) Services to improperly obtain, distribute, or use information or data protected by law or regulation (e.g., FAR 52.215-12, Restriction on Disclosure and Use of Data);

(2) Services that are intended to improperly influence the contents of solicitations, the evaluation of proposals or quotations, or the selection of sources for contract award, whether award is by the Government, or by a prime contractor or subcontractor; or

(3) Any other services obtained, performed, or otherwise resulting in violation of any statute or regulation prohibiting improper business practices or conflicts of interest;

(4) Services performed which are not consistent with the purpose and scope of the services contracted for or otherwise agreed to.

(d) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with organization and reorganization (see also 31.205-27), defense of antitrust suits, defense against Government claims or appeals, or the prosecution of claims or appeals against the Government (see 33.201) are unallowable (but see 31.205-47). Such costs incurred in connection with patent infringement litigation are unallowable unless otherwise provided for in the contract.

(e) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors arising from either:

(1) An agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest, or

(2) Dual sourcing, co-production, or similar programs, are unallowable, except when—

(i) Incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or

(ii) When agreed to in writing by the contracting officer.

(f) In determining the allowability of costs (including retainer fees) in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the contracting officer shall consider the following factors, among others:

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the contractor's capability in the particular area.

(3) The past pattern of acquiring such services and their costs, particularly in the years prior to the award of Government contracts.

(4) The impact of Government contracts on the contractor's business.

(5) Whether the proportion of Government work to the contractor's total business is such as to influence the contractor in favor of incurring the cost, particularly when the services rendered are not of a continuing nature and have little relationship to work under Government contracts.

(6) Whether the service can be performed more economically by employment rather than by contracting.

(7) The qualifications of the individual or concern rendering the service and the customary fee charged, especially on nongovernment contracts.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, termination provisions).

(g) Retainer fees, to be allowable, must be supported by evidence that—

(1) The services covered by the retainer agreement are necessary and customary;

(2) The level of past services justifies the amount of the retainer fees (if no services were rendered, fees are not automatically unallowable);

(3) The retainer fee is reasonable in comparison with maintaining an in-house capability to perform the covered services, when factors such as cost and level of expertise are considered; and

(4) The actual services performed are documented in accordance with paragraph (h) of this subsection.

(h) Fees for services rendered shall be allowable only when supported by evidence of the nature and scope of the service furnished. (See also 31.205-38(g).) However, retainer agreements generally are not based on specific statements of work. Evidence necessary to determine that work performed is proper and does not violate law or regulation shall include:

(1) Details of all agreements (e.g., work requirements, rate of compensation, and nature and amount of other expenses, if any) with the individuals or organizations providing the services and details of actual services performed;

(2) Invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided; and

(3) Consultants' work products and related documents, such as trip reports indicating persons visited and subjects discussed, minutes of meetings, and collateral memoranda and reports.

[55 FR 3883, Feb. 5, 1990]

31.205-34 Recruitment costs.

(a) Subject to paragraphs (b) and (c) below, and provided that the size of the staff recruited and maintained is in keeping with workload requirements, the following costs are allowable:

(1) Costs of help-wanted advertising.

(2) Costs of operating an employment office needed to secure and maintain an adequate labor force.

(3) Costs of operating an aptitude and educational testing program.

(4) Travel costs of employees engaged in recuiting personnel.

(5) Travel costs of applicants for interviews.

(6) Costs for employment agencies not in excess of standard commercial rates.

(b) Help-wanted advertising costs are unallowable if the advertising—

(1) Is for personnel other than those required to perform obligations under a Government contract;

(2) Does not describe specific positions or classes of positions;

(3) Is excessive relative to the number and importance of the positions or to the industry practices;

(4) Includes material that is not relevant for recruitment purposes, such as extensive illustrations or descriptions of the company's products or capabilities;

(5) Is designed to *pirate* personnel from another Government contractor; or

(6) Includes color (in publications).

(c) Excessive compensation costs offered to prospective employees to *pirate* them from another Government contractor are unallowable. Such excessive costs may include salaries, fringe benefits, or special emoluments which are in excess of standard industry practices or the contractor's customary compensation practices.

31.205-35 Relocation costs.

(a) Relocation costs are costs incident to the permanent change of duty of assignment (for an indefinite or stated period, but in either event for not less than 12 months) of an existing employee or upon recruitment of a new employee. The following types of relocation costs are allowable as noted, subject to paragraphs (b) through (f) below:

(1) Cost of travel of the employee and members of the immediate family (see 31.205-46) and transportation of the household and personal effects to the new location.

(2) Cost of finding a new home, such as advance trips by employees and spouses to locate living quarters, and temporary lodging during the transition periods not exceeding separate cumulative totals of 60 days for employees and 45 days for spouses and dependents, including advance trip time.

(3) Closing costs (i.e., brokerage fees, egal fees, appraisal fees, points, finance charges, etc.) incident to the disposition of actual residence owned y the employee when notified of ransfer, except that these costs when dded to the costs described in subaragraph (a)(4) below shall not exceed 14 percent of the sales price of the property sold.

(4) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing up expenses), utilities, taxes, property insurance, mortgage interest, after settlement date or lease date of new permanent residence, except that these costs when added to the costs described in subparagraph (a)(3) above, shall not exceed 14 percent of the sales price of the property sold.

(5) Other necessary and reasonable expenses normally incident to relocation, such as disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

(6) Costs incident to acquiring a home in a new location, except that (i) these costs will not be allowable for existing employees or newly recruited employees who, before the relocation, were not homeowners and (ii) the total costs shall not exceed 5 percent of the purchase price of the new home.

(7) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who, before the relocation, were not homeowners and the total payments are limited to an amount determined as follows:

(i) The difference between the mortgage interest rates of the old and new residences times the current balance of the old mortgage times 3 years.

(ii) When mortgage differential payments are made on a lump sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized shall be proportionately adjusted to reflect payments only for the actual time of the relocation.

(8) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable

differential payments may not exceed the actual rental costs for the new home, less the fair market rent for the vacated home times 3 years.

(9) Cost of canceling an unexpired lease.

(b) The costs described in paragraph (a) above must also meet the following criteria to be considered allowable:

(1) The move must be for the benefit of the employer.

(2) Reimbursement must be in accordance with an established policy or practice that is consistenly followed by the employer and is designed to motivate employees to relocate promptly and economically.

(3) The costs must not otherwise be unallowable under subpart 31.2.

(4) Amounts to be reimbursed shall not exceed the employee's actual expenses, except that for miscellaneous costs of the type discussed in subparagraph (a)(5) above, a flat amount, not to exceed $1,000, may be allowed in lieu of actual costs.

(c) The following types of costs are not allowable:

(1) Loss on sale of a home.

(2) Costs incident to acquiring a home in a new location as follows:

(i) Real estate brokers fees and commissions.

(ii) Cost of litigation.

(iii) Real and personal property insurance against damage or loss of property.

(iv) Mortgage life insurance.

(v) Owner's title policy insurance when such insurance was not previously carried by the employee on the old residence (however, cost of a mortgage title policy is allowable).

(vi) Property taxes and operating or maintenance costs.

(3) Continuing mortgage principal payments on residence being sold.

(4) Payments for employee income or FICA (social security) taxes incident to reimbursed relocation costs.

(5) Payments for job counseling and placement assistance to employee spouses and dependents who were not employees of the contractor at the old location.

(6) Costs incident to furnishing equity or nonequity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.

(d) If relocation costs for an employee have been allowed either as an allocable indirect or direct cost, and the employee resigns within 12 months for reasons within the employee's control, the contractor shall refund or credit the relocation costs to the Government.

(e) Subject to the requirements of paragraphs (a) through (d) above, the costs of family movements and of personnel movements of a special or mass nature are allowable. The cost, however, should be assigned on the basis of work (contracts) or time period benefited.

(f) Relocation costs (both outgoing and return) of employees who are hired for performance on specific contracts or long-term field projects are allowable if—

(1) The term of employment is not less than 12 months;

(2) The employment agreement specifically limits the duration of employment to the time spent on the contract or field project for which the employee is hired;

(3) The employment agreement provides for return relocation to the employee's permanent and principal home immediately prior to the outgoing relocation, or other location of equal or lesser cost; and

(4) The relocation costs are determined under the rules of paragraphs (a) through (d) above. However, the costs to return employees, who are released from employment upon completion of field assignments pursuant to their employment agreements, are not subject to the refund or credit requirement of paragraph (d).

[48 FR 42301, Sept. 19, 1983, as amended at 52 FR 9038, Mar. 20, 1987]

31.205-36 Rental costs.

(a) This subsection is applicable to the cost of renting or leasing real or personal property, except ADPE (see 31.205-2), acquired under *operating leases* as defined in Statement of Financial Accounting Standards No. 13 (FAS-13), Accounting for Leases. Compliance with 31.205-11(m) requires that assets acquired by means of capital leases, as defined in FAS-13, shall be treated as purchased assets; i.e., be capitalized and the capitalized value of such assets be distributed over their useful lives as depreciation charges, or over the lease term as amortization charges, as appropriate (but see subparagraph (b)(4) below).

(b) The following costs are allowable:

(1) Rental costs under operating leases, to the extent that the rates are reasonable at the time of the lease decision, after consideration of (i) rental costs of comparable property, if any; (ii) market conditions in the area; (iii) the type, life expectancy, condition, and value of the property leased; (iv) alternatives available; and (v) other provisions of the agreement.

(2) Rental costs under a sale and leaseback arrangement only up to the amount the contractor would be allowed if the contractor retained title.

(3) Charges in the nature of rent for property between any divisions, subsidiaries, or organization under common control, to the extent that they do not exceed the normal costs of ownership, such as depreciation, taxes, insurance, facilities capital cost of money, and maintenance (excluding interest or other unallowable costs pursuant to part 31), provided that no part of such costs shall duplicate any other allowed cost. Rental cost of personal property leased from any division, subsidiary, or affiliate of the contractor under common control, that has an established practice of leasing the same or similar property to unaffiliated lessees shall be allowed in accordance with subparagraph (b)(1) above.

(4) Rental costs under leases entered into before March 1, 1970 for the remaining term of the lease (excluding options not exercised before March 1, 1970) to the extent they would have been allowable under Defense Acquisition Regulation (Formerly ASPR) 15-205.34 or Federal Procurement Regulations section 1-15.205-34 in effect January 1, 1969.

(c) The allowability of rental costs under unexpired leases in connection with terminations is treated in 31.205-42(e).

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

31.205-37 Royalties and other costs for use of patents.

(a) Royalties on a patent or amortization of the cost of purchasing a patent or patent rights necessary for the proper performance of the contract and applicable to contract products or processes are allowable unless—

(1) The Government has a license or the right to a free use of the patent;

(2) The patent has been adjudicated to be invalid, or has been administratively determined to be invalid;

(3) The patent is considered to be unenforceable; or

(4) The patent is expired.

(b) Care should be exercised in determining reasonableness when the royalties may have been arrived at as a result of less-than-arm's-length bargaining; e.g., royalties—

(1) Paid to persons, including corporations, affiliated with the contractor;

(2) Paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Government contract would be awarded; or

(3) Paid under an agreement entered into after the contract award.

(c) In any case involving a patent formerly owned by the contractor, the royalty amount allowed should not exceed the cost which would have been allowed had the contractor retained title.

(d) See 31.109 regarding advance agreements.

31.205-38 Selling costs.

(a) *Selling* is a generic term encompassing all efforts to market the contractor's products or services, some of which are covered specifically in other subsections of 31.205. Selling activity includes the following broad categories:

(1) Advertising.

(2) Corporate image enhancement including broadly-targeted sales efforts, other than advertising.

(3) Bid and proposal costs.

(4) Market planning.

(5) Direct selling.

(b) Advertising costs are defined at 31.205-1(b) and are subject to the allowability provisions of 31.205-1 (d) and (f). Corporate image enhancement activities are included within the definitions of public relations at 31.205-1(a) and entertainment at 31.205-14 and are subject to the allowability provisions at 31.205-1 (e) and (f) and 31.205-14, respectively. Bid and proposal costs are defined at 31.205-18 and have their allowability controlled by that subsection. Market planning involves market research and analysis and generalized management planning concerned with development of the contractor's business. The allowability of long-range market planning costs is controlled by the provisions of 31.205-12. Other market planning costs are allowable to the extent that they are reasonable. Costs of activities which are correctly classified and disallowed under cost principles referenced in this paragraph (b) are not to be reconsidered for reimbursement under any other provision of this subsection.

(c) Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. Direct selling is characterized by person-to-person contact and includes such activities as familiarizing a potential customer with the contractor's products or services, conditions of sale, service capabilities, etc. It also includes negotiation, liaison between customer and contractor personnel, technical and consulting activities, individual demonstrations, and any other activities having as their purpose the application or adaptation of the contractor's products or services for a particular customer's use. The cost of direct selling efforts is allowable if reasonable in amount.

(d) The costs of any selling efforts other than those addressed in paragraphs (b) or (c) of this subsection are unallowable.

(e) Costs of the type identified in paragraphs (b), (c), and (d) of this subsection are often commingled on the contractor's books in the selling expense account because these activities are performed by the sales departments. However, identification and segregation of unallowable costs is required under the provisions of 31.201-6 and 30.405, and such costs are not allowable merely because they are incurred in connection with allowable selling activities.

(f) Notwithstanding any other provision of this subsection, costs of direct selling efforts, as defined in paragraph (c) of this subsection, incurred in connection with potential and actual Foreign Military Sales, as defined by the Arms Export Control Act, or foreign sales of military products or services are unallowable on U.S. Government contracts for U.S. Government requirements.

(g) Notwithstanding any other provision of this subsection, sellers' or agents' compensation, fees, commissions, percentages, retainer or brokerage fees, whether or not contingent upon the award of contracts, are allowable only when paid to bona fide employees or established commercial or selling agencies maintained by the contractor for the purpose of securing business (see 3.408-2).

[51 FR 12301, Apr. 9, 1986, as amended at 52 FR 19805, May 27, 1987, 55 FR 38517, Sept. 18, 1990]

31.205-39 Service and warranty costs.

Service and warranty costs include those arising from fulfillment of any contractual obligation of a contractor to provide services such as installation, training, correcting defects in the products, replacing defective parts, and making refunds in the case of inadequate performance. When not inconsistent with the terms of the contract, such service and warranty costs are allowable. However, care should be exercised to avoid duplication of the allowance as an element of both estimated product cost and risk.

31.205-40 Special tooling and special test equipment costs.

(a) The terms *special tooling* and *special test equipment* are defined in 45.101.

(b) The cost of special tooling and special test equipment used in performing one or more Government contracts is allowable and shall be allocated to the specific Government contract or contracts for which acquired, except that the cost of (1) items acquired by the contractor before the effective date of the contract (or replacement of such items), whether or not altered or adapted for use in performing the contract, and (2) items which the contract schedule specifically excludes, shall be allowable only as depreciation or amortization.

(c) When items are disqualified as special tooling or special test equipment because with relatively minor expense they can be made suitable for general purpose use and have a value as such commensurate with their value as special tooling or special test equipment, the cost of adapting the items for use under the contract and the cost of returning them to their prior configuration are allowable.

31.205-41 Taxes.

(a) The following types of costs are allowable:

(1) Federal, State, and local taxes (see part 29), except as otherwise provided in paragraph (b) below that are required to be and are paid or accrued in accordance with generally accepted accounting principles. Fines and penalties are not considered taxes.

(2) Taxes otherwise allowable under subparagraph (a)(1) above, but upon which a claim of illegality or erroneous assessment exists; provided the contractor, before paying such taxes—

(i) Promptly requests instructions from the contracting officer concerning such taxes; and

(ii) Takes all action directed by the contracting officer arising out of subparagraph (2)(i) above or an independent decision of the Government as to the existence of a claim of illegality or erroneous assessment, to (A) determine the legality of the assessment or (B) secure a refund of such taxes.

(3) Pursuant to subparagraph (a) (2) above, the reasonable costs of any action taken by the contractor at the direction or with the concurrence of the contracting officer. Interest or penalties incurred by the contractor for non-payment of any tax at the direction of the contracting officer or by reason of the failure of the contracting officer to ensure timely direction after a prompt request.

(b) The following types of costs are not allowable:

(1) Federal income and excess profits taxes.

(2) Taxes in connection with financing, refinancing, refunding operations, or reorganizations (see 31.205-20 and 31.205-27).

(3) Taxes from which exemptions are available to the contractor directly, or available to the contractor based on an exemption afforded the Government, except when the contracting officer determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing to the Government. When partial exemption from a tax is attributable to Government contract activity, taxes charged to such work in excess of that amount resulting from application of the preferential treatment are unallowable. These provisions intend that tax preference attributable to Government contract activity be realized by the Government. The term *exemption* means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise.

(4) Special assessments on land that represent capital improvements.

(5) Taxes (including excises) on real or personal property, or on the value, use, possession or sale thereof, which is used solely in connection with work other than on Government contracts (see paragraph (c) below).

(6) Taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended.

(7) Income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the books of account and financial statements.

(c) Taxes on property (see subparagraph (b)(5) above) used solely in connection with either non-Government or Government work should be considered directly applicable to the respective category of work unless the amounts involved are insignificant or comparable results would otherwise be obtained; e.g., taxes on contractor-owned work-in-process which is used solely in connection with non-Government work should be allocated to such work; taxes on contractor-owned work-in-process inventory (and Government-owned work-in-process inventory when taxed) used solely in connection with Government work should be charged to such work. The cost of taxes incurred on property used in both Government and non-Government work shall be apportioned to all such work based upon the use of such property on the respective final cost objectives.

(d) Any taxes, interest, or penalties that were allowed as contract costs and are refunded to the contractor shall be credited or paid to the Government in the manner it directs. If a contractor or subcontractor obtains a foreign tax credit that reduces its U.S. Federal income tax return because of the payment of any tax or duty allowed as contract costs, and if those costs were reimbursed by a foreign government, the amount of the reduction shall be paid to the Treasurer of the United States at the time the Federal income tax return is filed. However, any interest actually paid or credited to a contractor incident to a refund of tax, interest, or penalty shall be paid or credited to the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest, or penalties.

[48 FR 42301, Sept. 19, 1983, as amended at 55 FR 3884, Feb. 5, 1990]

31.205-42 Termination costs.

Contract terminations generally give rise to the incurrence of costs or the need for special treatment of costs that would not have arisen had the contract not been terminated. The following cost principles peculiar to terminktion situations are to be used in conjunction with the other cost principles in subpart 31.2:

(a) *Common items.* The costs of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss. The contracting officer should consider the contractor's plans and orders for current and planned production when determining if items can reasonably be used on other work of the contractor. Contemporaneous purchases of common items by the contractor shall be regarded as evidence that such items are reasonably usable on the contractor's other work. Any acceptance of common items as allocable to the terminated portion of the contract should be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirements of other work.

(b) *Costs continuing after termination.* Despite all reasonable efforts by the contractor, costs which cannot be discontinued immediately after the effective date of termination are generally allowable. However, any costs continuing after the effective date of the termination due to the negligent or willful failure of the contractor to discontinue the costs shall be unallowable.

(c) *Initial costs.* Initial costs (see 15.804-6(f)), including starting load and preparatory costs, are allowable as follows:

(1) Starting load costs not fully absorbed because of termination are nonrecurring labor, material, and related overhead costs incurred in the early part of production and result from factors such as—

(i) Excessive spoilage due to inexperienced labor;

(ii) Idle time and subnormal production due to testing and changing production methods;

(iii) Training; and

(iv) Lack of familiarity or experience with the product, materials, or manufacturing processes.

(2) Preparatory costs incurred in preparing to perform the terminated contract include such costs as those incurred for initial plant rearrangement and alterations, management and personnel organization, and production planning. They do not include special machinery and equipment and starting load costs.

(3) When initial costs are included in the settlement proposal as a direct charge, such costs shall not also be in-

cluded in overhead. Initial costs attributable to only one contract shall not be allocated to other contracts.

(4) If initial costs are claimed and have not been segregated on the contractor's books, they shall be segregated for settlement purposes from cost reports and schedules reflecting that high unit cost incurred during the early stages of the contract.

(5) If the settlement proposal is on the inventory basis, initial costs should normally be allocated on the basis of total end items called for by the contract immediately before termination; however, if the contract includes end items of a diverse nature, some other equitable basis may be used, such as machine or labor hours.

(d) *Loss of useful value.* Loss of useful value of special tooling, and special machinery and equipment is generally allowable, provided—

(1) The special tooling, or special machinery and equipment is not reasonably capable of use in the other work of the contractor;

(2) The Government's interest is protected by transfer of title or by other means deemed appropriate by the contracting officer; and

(3) The loss of useful value for any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other Government contracts for which the special tooling, or special machinery and equipment was acquired.

(e) *Rental under unexpired leases* Rental costs under unexpired leases, less the residual value of such leases, are generally allowable when shown to have been reasonably necessary for the performance of the terminated contract, if—

(1) The amount of rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and

(2) The contractor makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.

(f) *Alterations of leased property.* The cost of alterations and reasonable restorations required by the lease may be allowed when the alterations were necessary for performing the contract.

(g) *Settlement expenses.* (1) Settlement expenses, including the following, are generally allowable:

(i) Accounting, legal, clerical, and similar costs reasonably necessary for—

(A) The preparation and presentation, including supporting data, of settlement claims to the contracting officer; and

(B) The termination and settlement of subcontracts.

(ii) Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.

(iii) Indirect costs related to salary and wages incurred as settlement expenses in (i) and (ii); normally, such indirect costs shall be limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

(2) If settlement expenses are significant, a cost account or work order shall be established to separately identify and accumulate them.

(h) *Subcontractor claims.* Subcontractor claims, including the allocable portion of the claims common to the contract and to other work of the contractor, are generally allowable. An appropriate share of the contractor's indirect expense may be allocated to the amount of settlements with subcontractors; provided, that the amount allocated is reasonably proportionate to the relative benefits received and is otherwise consistent with 31.201-4 and 31.203(c). The indirect expense so allocated shall exclude the same and similar costs claimed directly or indirectly as settlement expenses.

31.205-43 Trade, business, technical and professional activity costs.

The following types of costs are allowable:

(a) Memberships in trade, business, technical, and professional organizations.

(b) Subscriptions to trade, business, professional, or other technical periodicals.

(c) When the principal purpose of a meeting, conference, symposium, or seminar is the dissemination of trade, business, technical or professional information or the stimulation of production or improved productivity:

(1) Costs of organizing, setting up, and sponsoring the meetings, symposia, etc., including rental of meeting facilities, transportation, subsistence, and incidental costs;

(2) Costs of attendance by contractor employees, including travel costs (see 31.205-46); and

(3) Costs of attendance by individuals who are not employees of the contractor, *provided*;

(i) Such costs are not also reimbursed to the individual by the employing company or organization, and

(ii) The individual's attendance is essential to achieve the purpose of the conference, meeting, symposium, etc.

[48 FR 42301, Sept. 19, 1983, as amended at 53 FR 27467, July 20, 1988]

31.205–44 Training and education costs.

(a) *Allowable costs*. Training and education costs are allowable to the extent indicated below.

(b) *Vocational training*. Costs of preparing and maintaining a noncollege level program of instruction, including but not limited to on-the-job, classroom, and apprenticeship training, designed to increase the vocational effectiveness of employees, are allowable. These costs include (1) salaries or wages of trainees (excluding overtime compensation), (2) salaries of the director of training and staff when the training program is conducted by the contractor, (3) tuition and fees when the training is in an institution not operated by the contractor, and/or (4) training materials and textbooks.

(c) *Part-time college level education*. Allowable costs of part-time college education at an undergraduate or postgraduate level, including that provided at the contractor's own facilities, are limited to—

(1) Fees and tuition charged by the educational institution, or, instead of tuition, instructors' salaries and the related share of indirect cost of the educational institution, to the extent that the sum thereof is not in excess of the tuition that would have been paid to the participating educational institution;

(2) Salaries and related costs of instructors who are employees of the contractor; and

(3) Training materials and textbooks; and

(4) Straight-time compensation of each employee for time spent attending classes during working hours not in excess of 156 hours per year where circumstances do not permit the operation of classes or attendance at classes after regular working hours. In unusual cases, the period may be extended (see paragraph (h) below).

(d) *Full-time education*. Costs of tuition, fees, training materials and textbooks (but not subsistence, salary, or any other emoluments) in connection with full-time education, including that provided at the contractor's own facilities, at a postgraduate but not undergraduate college level, are allowable only when the course or degree pursued is related to the field in which the employee is working or may reasonably be expected to work and are limited to a total period not to exceed 2 school years or the length of the degree program, whichever is less, for each employee so trained.

(e) *Specialized programs*. Costs of attendance of up to 16 weeks per employee per year at specialized programs specifically designed to enhance the effectiveness of managers or to prepare employees for such positions are allowable. Such costs include enrollment fees and related charges and employees' salaries, subsistence, training materials, textbooks, and travel. Costs allowable under this paragraph do not include costs for courses that are part of a degree-oriented curriculum, which are only allowable pursuant to paragraphs (c) and (d) of this subsection.

(f) *Other expenses*. Maintenance expense and normal depreciation or fair rental on facilities owned or leased by the contractor for training purposes are allowable in accordance with 31.205-17, 31.205-24, and 31.205-36.

(g) *Grants*. Grants to educational or training institutions, including the donation of facilities or other properties, scholarships, and fellowships are considered contributions and are unallowable.

(h) *Advance agreements.* (1) Training and education costs in excess of those otherwise allowable under (c) and (d) of this subsection, including subsistence, salaries, or any other emoluments, may be allowed to the extent set forth in an advance agreement negotiated under 31.109. To be considered for an advance agreement, the contractor must demonstrate that the costs are consistently incurred under an established managerial, engineering, or scientific training and education program, and that the course or degree pursued is related to the field in which employees are now working or may reasonably be expected to work. Before entering into the advance agreement, the contracting officer shall give consideration to such factors as—

(i) The length of employees' service with the contractor;

(ii) Employees' past performance and potential;

(iii) Whether employees are in formal development programs; and

(iv) The total number of participating employees.

(2) Any advance agreement must include a provision requiring the contractor to refund to the Government training and education costs for employees who resign within 12 months of completion of such training or education for reasons within an employee's control.

(i) *Training or education costs for other than bona—fide employees.* Costs of tuition, fees, textbooks, and similar or related benefits provided for other than bona—fide employees are unallowable, except that the costs incurred for educating employee dependents (primary and secondary level studies) when the employee is working in a foreign country where public education is not available and where suitable private education is inordinately expensive may be included in overseas differential.

(j) *Employee dependent education plans.* Costs of college plans for employee dependents are unallowable.

[48 FR 42301, Sept. 19, 1983, as amended at 52 FR 9038, Mar. 20, 1987; 52 FR 27806, July 24, 1987; 52 FR 30077, Aug. 12, 1987]

31.205-45 Transportation costs.

Allowable transportation costs include freight, express, cartage, and postage charges relating to goods purchased, in process, or delivered. When these costs can be identified with the items involved, they may be directly costed as transportation costs or added to the cost of such items. When identification with the materials received cannot be made, inbound transportation costs may be charged to the appropriate indirect cost accounts if the contractor follows a consistent and equitable procedure. Outbound freight, if reimbursable under the terms of the contract, shall be treated as a direct cost.

31.205-46 Travel costs.

(a)(1) Costs for transportation, lodging, meals, and incidental expenses incurred by contractor personnel on official company business are allowable subject to paragraphs (b) through (f) of this section. Costs for transportation may be based on mileage rates, actual costs incurred, or on a combination thereof, provided the method used results in a reasonable charge. Costs for lodging, meals, and incidental expenses may be based on per diem, actual expenses, or a combination thereof, provided the method used results in a reasonable charge.

(2) Except as provided in paragraph (a)(3) of this section, costs incurred for lodging, meals, and incidental expenses (as defined in the regulations cited in (a)(2) (i) through (iii) of this paragraph) shall be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the maximum per diem rates in effect at the time of travel as set forth in the—

(i) Federal Travel Regulations, prescribed by the General Services Administration, for travel in the conterminous 48 United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 022-001-81003-7;

(ii) Joint Travel Regulations, Volume 2, DoD Civilian Personnel, Appendix A, prescribed by the Department of Defense, for travel in Alaska, Hawaii, The Commonwealth of Puerto Rico, and territories and possessions of the United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 908-010-00000-1; or

(iii) Standarized Regulations (Government Civilians, Foreign Areas), section 925, *Maximum Travel Per Diem Allowances of Foreign Areas*, prescribed by the Department of State, for travel in areas not covered in (a)(2) (i) and (ii) of this paragraph, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 744-088-00000-0.

(3) In special or unusual situations, actual costs in excess of the above-referenced maximum per diem rates are allowable provided that such amounts do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations referenced in (a)(2) (i), (ii), or (iii) or this section. For such higher amounts to be allowable, all of the following conditions must be met:

(i) One of the conditions warranting approval of the actual expense method, as set forth in the regulations referred in (a)(2) (i), (ii), or (iii) of this section, must exist.

(ii) A written justification for use of the higher amounts must be approved by an officer of the contractor's organization or designee to ensure that the authority is properly administered and controlled to prevent abuse.

(iii) If it becomes necessary to exercise the authority to use the higher actual expense method repetitively or on a continuing basis in a particular area, the contractor must obtain advance approval from the contracting officer.

(iv) Documentation to support actual costs incurred shall be in accordance with the contractor's established practices provided that a receipt is required for each expenditure in excess of $25.00. The approved justification required by (a)(3)(ii) and, if applicable, (a)(3)(iii) of this paragraph must be retained.

(4) Paragraphs (a)(2) and (a)(3) of this section do not incorporate the regulations cited in (a)(2) (i), (ii), and (iii) in their entirety. Only the coverage in the referenced regulations dealing with special or unusual situations, the maximum per diem rates, and definitions of lodging, meals and incidental expenses are incorporated herein.

(5) An advance agreement (see 31.109) with respect to compliance with paragraphs (a)(2) and (a)(3) of this section may be useful and desirable.

(b) Travel costs incurred in the normal course of overall administration of the business are allowable and shall be treated as indirect costs.

(c) Travel costs directly attributable to specific contract performance are allowable and may be charged to the contract under 31.202.

(d) Airfare costs in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours are unallowable except when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for airfare costs in excess of the above standard airfare to be allowable, the applicable condition(s) set forth in this paragraph must be documented and justified.

(e)(1) *Cost of travel by contractor-owned, -leased, or -chartered aircraft*, as used in this subparagraph, includes the cost of lease, charter, operation (including personnel), maintenance, depreciation, insurance, and other related costs.

(2) The costs of travel by contractor-owned, -leased, or -chartered aircraft are limited to the standard airfare described in paragraph (d) of this subsection for the flight destination unless travel by such aircraft is specifically required by contract specification, term, or condition, or a higher amount is approved by the contracting officer. A higher amount may be agreed to when one or more of the circumstances for justifying higher than standard airfare listed in paragraph (d) of this subsection are applicable, or

when an advance agreement under subparagraph (e)(3) of this subsection has been executed. In all cases, travel by contractor-owned, -leased, or -chartered aircraft must be fully documented and justified. For each contractor-owned, -leased, or -chartered aircraft used for any business purpose which is charged or allocated, directly or indirectly, to a Government contract, the contractor must maintain and make available manifest/logs for all flights on such company aircraft. As a minimum, the manifest/log shall indicate—

(i) Date, time, and points of departure;

(ii) Destination, date, and time of arrival;

(iii) Name of each passenger and relationship to the contractor;

(iv) Authorization for trip; and

(v) Purpose of trip.

(3) Where an advance agreement is proposed (see 31.109), consideration may be given to the following:

(i) Whether scheduled commercial airlines or other suitable, less costly, travel facilities are available at reasonable times, with reasonable frequency, and serve the required destinations conveniently.

(ii) Whether increased flexibility in scheduling results in time savings and more effective use of personnel that would outweigh additional travel costs.

(f) Costs of contractor-owned or leased automobiles, as used in this paragraph, include the costs of lease, operation (including personnel), maintenance, depreciation, insurance, etc. These costs are allowable, if reasonable, to the extent that the automobiles are used for company business. That portion of the cost of company-furnished automobiles that relates to personal use by employees (including transportation to and from work) is compensation for personal services and is unallowable as stated in 31.205-6(m)(2).

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 12301, Apr. 9, 1986; 51 FR 27489, July 31, 1986; 51 FR 36972, Oct. 16, 1986]

31.205-47 Costs related to legal and other proceedings.

(a) *Definitions.Conviction,* as used in this subsection, is defined in 9.403.

Costs, include, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; all elements of compensation, related costs and expenses of employees, officers and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bears a direct relationship to the proceedings.

Fraud, as used in this subsection, means (1) acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents, (2) acts which constitute a cause for debarment or suspension under 9.406-2(a) and 9.407-2(a) and (3) acts which violate the False Claims Act, 31 U.S.C., sections 3729-3731, or the Anti-Kickback Act, 41 U.S.C., sections 51 and 54.

Penalty, does not include restitution, reimbursement, or compensatory damages.

Proceeding, includes an investigation.

(b) Costs incurred in connection with any proceeding brought by Federal, State, local or foreign Government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employers) are unallowable if a result is—

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either a finding of contractor liability or imposition of a monetary penalty;

(3) A final decision by an appropriate official of an executive agency to:

(i) Debar or suspend the contractor;

(ii) Rescind or void a contract; or

(iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation;

(4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in subparagraphs (b) (1) through (3) of this subsection (but see

paragraphs (c) and (d) of this subsection); or

(5) Not covered by subparagraphs (b) (1) through (4) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of subparagraphs (b) (1) through (4) of this subsection.

(c) To the extent they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by the United States that is resolved by consent or compromise pursuant to an agreement entered into between the contractor and the United States, and which are unallowable solely because of paragraph (b) of this subsection, may be allowed to the extent specifically provided in such agreement.

(d) To the extent that they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by a State, local, or foreign government may be allowable when the contracting officer (or other official specified in agency procedures) determines, that the costs were incurred either:

(1) As a direct result of a specific term or condition of a Federal contract; or

(2) As a result of compliance with specific written direction of the cognizant contracting officer.

(e) Costs incurred in connection with proceedings described in paragraph (b) of this subsection, but which are not made unallowable by that paragraph, may be allowable to the extent that:

(1) The costs are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;

(2) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and

(3) The percentage of costs allowed does not exceed the percentage determined to be appropriate considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. Such percentage shall not exceed 80 percent. However, if an agreement reached under paragraph (c) of this subsection has explicitly considered this 80 percent rule, then the full amount of costs resulting from that agreement shall be allowable.

(f) Costs not covered elsewhere in this subsection are unallowable if incurred in connection with—

(1) Defense against Government claims or appeals or the prosecution of claims or appeals against the Government (see 33.201).

(2) Organization, reorganization, (including mergers and acquisitions) or resisting mergers and acquisitions (see also 31.205-27).

(3) Defense of antitrust suits.

(4) Defense of suits brought by employees or ex-employees of the contractor under section 2 of the Major Fraud Act of 1988 where the contractor was found liable or settled.

(5) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors arising from either (1) an agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or (2) dual sourcing, coproduction, or similar programs, are unallowable, except when (i) incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or (ii) when agreed to in writing by the contracting officer.

(6) Patent infringement litigation, unless otherwise provided for in the contract.

(7) Representation of, or assistance to, individuals, groups, or legal entities which the contractor is not legally bound to provide, arising from an action where the participant was convicted of violation of a law or regulation or was found liable in a civil or administrative proceeding.

(g) Costs which may be unallowable under 31.205-47, including directly associated costs, shall be segregated and accounted for by the contractor separately. During the pendency of any proceeding covered by paragraph (b) and subparagraphs (f)(4) and (f)(7) of this subsection, the contracting officer shall generally withhold payment of such costs. However, if in the best interests of the Government, the contracting officer may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

[48 FR 42301, Sept. 19, 1983, as amended at 51 FR 12302, Apr. 9, 1986; 54 FR 13024, Mar. 29, 1989]

31.205-48 Deferred research and development costs.

Research and development, as used in this subsection, means the type of technical effort which is described in 31.205-18 but which is sponsored by, or required in performance of, a contract or grant. Research and development costs (including amounts capitalized) that were incurred before the award of a particular contract are unallowable except when allowable as precontract costs. In addition, when costs are incurred in excess of either the price of a contract or amount of a grant for research and development effort, such excess may not be allocated as a cost to any other Government contract.

31.205-49 Goodwill.

Goodwill, an unidentifiable intangible asset, originates under the purchase method of accounting for a business combination when the price paid by the acquiring company exceeds the sum of the identifiable individual assets acquired less liabilities assumed, based upon their fair values. The excess is commonly referred to as goodwill. Goodwill may arise from the acquisition of a company as a whole or a portion thereof. Any costs for amortization, expensing, write-off, or write-down of goodwill (however represented) are unallowable.

[49 FR 26743, June 29, 1984]

31.205-50 Executive lobbying costs.

Costs incurred in attempting to improperly influence (see FAR 3.401), either directly or indirectly, an employee or officer of the executive branch of the Federal Government to give consideration or to act regarding a regulatory or contract matter are unallowable.

[51 FR 12302, Apr. 9, 1986]

31.205-51 Costs of alcoholic beverages.

Costs of alcoholic beverages are unallowable.

[51 FR 12302, Apr. 9, 1986]

31.205-52 Asset valuations resulting from business combinations.

When the purchase method of accounting for a business combination is used, allowable amortization, cost of money, and depreciation shall be limited to the total of the amounts that would have been allowed had the combination not taken place.

[55 FR 25530, June 21, 1990]

Subpart 31.3—Contracts With Educational Institutions

31.301 Purpose.

This subpart provides the principles for determining the cost of research and development, training, and other work performed by educational institutions under contracts with the Government.

31.302 General.

Office of Management and Budget (OMB) Circular No. A-21, Cost Principles for Educational Institutions, revised, provides principles for determining the costs applicable to research and development, training, and other work performed by educational institutions under contracts with the Government.

31.303 Requirements.

(a) Contracts that refer to this subpart 31.3 for determining allowable costs under contracts with educational institutions shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-21 in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

Subparts 31.4—31.5 [Reserved]

Subpart 31.6—Contracts With State, Local, and Federally Recognized Indian Tribal Governments

31.601 Purpose.

This subpart provides the principles for determining allowable cost of contracts and subcontracts with State, local, and federally recognized Indian tribal governments.

31.602 General.

Office of Management and Budget (OMB) Circular No. A-87, Cost Principles for State and Local Governments, Revised, sets forth the principles for determining the allowable costs of contracts and subcontracts with State, local, and federally recognized Indian tribal governments. These principles are for cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in financing a particular contract.

31.603 Requirements.

(a) Contracts that refer to this subpart 31.6 for determining allowable costs under contracts with State, local and Indian tribal governments shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-87 which is in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

Subpart 31.7—Contracts With Nonprofit Organizations

31.701 Purpose.

This subpart provides the principles for determining the cost applicable to work performed by nonprofit organizations under contracts with the Government. A nonprofit organization, for purpose of identification, is defined as a business entity organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is carrying on propaganda or otherwise attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from federal income taxation under section 501 of the Internal Revenue Code.

31.702 General.

Office of Management and Budget (OMB) Circular No. A-122, Cost Principles for Nonprofit Organizations, sets forth principles for determining the costs applicable to work performed by nonprofit organizations under contracts (also applies to grants and other agreements) with the Government.

31.703 Requirements.

(a) Contracts which refer to this subpart 31.7 for determining allowable costs shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-122 in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42328, Sept. 19, 1983, unless otherwise noted.

32.000 Scope of part.

This part prescribes policies and procedures for contract financing and other payment matters. This includes—

(a) Payment methods, including partial payments and progress payments based on percentage or stage of completion;

(b) Loan guarantees, advance payments, and progress payments based on costs;

(c) Administration of debts to the Government arising out of contracts;

(d) Contract funding, including the use of contract clauses limiting costs or funds;

(e) Assignment of claims to aid in private financing; and

(f) Selected payment clauses.

32.001 Definition.

Contract action, as used in this part, means an action resulting in a contract, as defined in FAR subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

[52 FR 30077, Aug. 12, 1987]

Subpart 32.1—General

32.100 Scope of subpart.

This subpart provides policies and procedures applicable to the general subject of contract financing and payment.

32.101 Authority.

The basic authority for the contract financing described in this part is contained in section 305 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 255), section 2307 of the Armed Services Procurement Act (10 U.S.C. 2307), and Title III of the Defense Production Act of 1950 (50 U.S.C. App. 2091).

32.102 Description of contract financing methods.

(a) Advance payments are advances of money by the Government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contracts. Since they are not measured by performance, they differ from partial, progress, or other payments based on the performance or partial performance of a contract. Advance payments may be made to prime contractors for the purpose of making subadvances to subcontractors.

(b) Progress payments based on costs are made on the basis of costs incurred by the contractor as work progresses under the contract. This form of contract financing does not include—

(1) Payments based on the percentage or stage of completion accomplished;

(2) Payments for partial deliveries accepted by the Government; or

(3) Partial payments for a contract termination proposal.

(c) Loan guarantees are made by Federal Reserve banks, on behalf of designated guaranteeing agencies, to enable contractors to obtain financing from private sources under contracts for the acquisition of supplies or services for the national defense.

(d) Partial payments for accepted supplies and services that are only a part of the contract requirements are authorized under section 305 of the Federal Property and Administrative Services Act (41 U.S.C. 255). Although partial payments are generally treated as a method of payment and not as a method of contract financing, using partial payments can assist contractors to participate in Government contracts without, or with minimal, contract financing. When appropriate, agencies shall use this payment method.

(e) (1) Progress payments based on a percentage or stage of completion are authorized by the statutes cited in 32.101.

(2) This type of progress payment may be used as a payment method under agency procedures. Agency procedures must ensure that payments are commensurate with work accomplished, which meets the quality standards established under the contract. Furthermore, progress payments may not exceed 80 percent of the eligible costs of work accomplished on undefinitized contract actions.

[48 FR 42328, Sept. 19, 1987, as amended at 52 FR 30077, Aug. 12, 1987]

32.103 Progress payments construction contracts.

When satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made, a percentage of the progress payment may be retained. Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause. Determinations to retain and the specific amount to be withheld shall be made by the contracting officer on a case-by-case basis. Such decisions will be based on the contracting officer's assessment of past performance and the likelihood that such performance will continue. The amount of retainage withheld shall not exceed 10 percent of the approved estimated amount in accordance with the terms of the contract and may be adjusted as the contract approaches completion to recognize better than expected performance, the ability to rely on alternative safeguards, and other factors. Upon completion of all contract requirements, retained amounts shall be paid promptly.

[51 FR 19716, May 30, 1986]

32.104 Providing contract financing.

(a) Prudent contract financing can be a useful working tool in Government acquisition by expediting the performance of essential contracts. Government financing shall be provided only to the extent actually needed for prompt and efficient performance, considering the availability of private financing. Contract financing shall be administered so as to aid, not impede, the acquisition. At the same time, the contracting officer shall avoid any undue risk of monetary loss to the Government through the financing. The contractor's use of the contract financing provided and the contractor's financial status shall be monitored.

(b) If the contractor is a small business concern, the contracting officer shall give special attention to meeting the contractor's contract financing need. However, a contractor's receipt of a certificate of competency from the Small Business Administration has no bearing on the contractor's need for or entitlement to contract financing.

32.105 Uses of contract financing.

(a) Contract financing methods covered in this part are intended to be self-liquidating through contract performance. Consequently, agencies shall only use the methods for financing of contractor working capital, not for the expansion of contractor-owned facilities or the acquisition of fixed assets. However, under loan guarantees, exceptions may be made for—

(1) Facilities expansion of a minor or incidental nature, if a relatively small part of the guaranteed loan is used for the expansion and the contractor's repayment would not be delayed or impaired; or

(2) Other instances of facilities expansion for which contract financing is appropriate under agency procedures.

(b) The limitations in this section do not apply to contracts under which facilities are being acquired for Government ownership.

32.106 Order of preference.

The contracting officer shall consider the following order of preference when a contractor requests contract financing, unless an exception would be in the Government's interest in a specific case:

(a) Private financing without Government guarantee. It is not intended, however, that the contractor be required to obtain private financing (1) at unreasonable terms, or (2) from other agencies.

(b) Progress payments based on costs at customary rates (see 32.501-1).

(c) Loan guarantees.

(d) Progress payments based on costs with unusual terms (see 32.501).

(e) Advance payments (see exceptions in 32.402(b)).

32.107 Need for contract financing not a deterrent.

(a) If the contractor or offeror meets the standards prescribed for responsible prospective contractors at 9.104, the contracting officer shall not treat the contractor's need for contract financing as a handicap for a contract award; e.g., as a responsibility factor or evaluation criterion.

(b) The contractor should not be disqualified from contract financing solely because the contractor failed to indicate a need for contract financing before the contract was awarded.

32.108 Financial consultation.

Each contracting office should have available and use the services of contract financing personnel competent to evaluate credit and financial problems. In resolving any questions concerning (a) the financial capability of an offeror or contractor to perform a contract or (b) what form of contract financing is appropriate in a given case, the contracting officer should consult the appropriate contract financing office.

32.109 Termination financing.

To encourage contractors to invest their own funds in performance despite the susceptibility of the contract to termination for the convenience of the Government, the contract financing procedures under this part may be applied to the financing of terminations either in connection with or independently of financing for contract performance (see 49.112-1).

32.110 Contract performance in foreign countries.

(a) In applying the coverage of part 32 to a contract performed partly or completely in a foreign country, the contracting officer shall give due consideration to the sovereignty, laws, and procedures of the country concerned and shall obtain legal advice as necessary. The legal advice may indicate a need for additional protective arrangements within the foreign jurisdiction or for deviations from the contract clauses prescribed in this part.

(b) The contracting officer shall act as necessary to comply with applicable foreign laws, while providing the most effective protection of the Government's interest.

32.111 Contract clauses.

(a) The contracting officer shall insert the following clauses, appropriately modified with respect to payment due dates, in accordance with agency regulations—

(1) The clause at 52.232-1, Payments, in solicitations and contracts when a fixed-price supply contract, a fixed-price service contract, or a contract for nonregulated communication services is contemplated;

(2) The clause at 52.232-2, Payment under Fixed-Price Research and Development Contracts, in solicitations and contracts when a fixed-price re-

search and development contract is contemplated;

(3) The clause at 52.232-3, Payments under Personal Services Contracts, in solicitations and contracts for personal services;

(4) The clause at 52.232-4, Payments under Transportation Contracts and Transportation-Related Services Contracts, in solicitations and contracts for transportation or transportation-related services;

(5) The clause at 52.232-5, Payments under Fixed-Price Construction Contracts, in solicitations and contracts for construction when a fixed-price contract is contemplated; and

(6) The clause at 52.232-6, Payments under Communication Service Contracts with Common Carriers, in solicitations and contracts for regulated communication services by common carriers.

(b) The contracting officer shall insert the clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, appropriately modified with respect to payment due dates in accordance with agency regulations, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated. If (i) the nature of the work to be performed requires the contractor to furnish material that is regularly sold to the general public in the normal course of business by the contractor and (ii) the price is under the limitations prescribed in 16.601(b)(3), the contracting officer shall use the clause with its Alternate I. If a labor-hour contract is contemplated, and if no specific reimbursement for materials furnished is intended, the contracting officer may use the clause with its Alternate II.

(c) The contracting officer shall insert the following clauses, appropriately modified with respect to payment due dates in accordance with agency regulations:

(1) The clause at 52.232-8, Discounts for Prompt Payment, in solicitations and contracts when a fixed-price supply contract or fixed-price service contract is contemplated.

(2) A clause, substantially the same as the clause at 52.232-9, Limitation on Withholding of Payments, in solicitations and contracts when a supply contract, research and development contract, service contract, time-and-materials contract, or labor-hour contract is contemplated that includes two or more terms authorizing the temporary withholding of amounts otherwise payable to the contractor for supplies delivered or services performed.

(d) The contracting officer shall insert the following clauses, appropriately modified with respect to payments due dates in accordance with agency regulations:

(1) The clause at 52.232-10, Payments under Fixed-Price Architect-Engineer Contracts, in fixed-price architect-engineer contracts.

(2) The clause at 52.232-11, Extras, in solicitations and contracts when a fixed-price supply contract, fixed-price service contract, or a transportation contract is contemplated.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

Subpart 32.2—[Reserved]

Subpart 32.3—Loan Guarantees for Defense Production

32.300 Scope of subpart.

This subpart prescribes policies and procedures for designated agencies' guarantees of loans made by private financial institutions to borrowers performing contracts related to national defense (see 30.102).

32.301 Definitions.

Borrower, as used in this subpart, means a contractor, subcontractor (at any tier), or other supplier who receives a guaranteed loan.

Federal Reserve Board means the Board of Governors of the Federal Reserve System.

Guaranteed loan or *V loan*, as used in this subpart, means a loan, revolving credit fund, or other financial arrangement made pursuant to Regulation V of the Federal Reserve Board, under which the guaranteeing agency is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of the guaranteed percentage.

Guaranteeing agency, as used in this subpart, means any agency that the President has authorized to guarantee loans, through Federal Reserve Banks, for expediting national defense production.

32.302 Authority.

Congress has authorized Federal Reserve Banks to act, on behalf of guaranteeing agencies, as fiscal agents of the United States in the making of loan guarantees for defense production (Section 301, Defense Production Act of 1950 (50 U.S.C. App. 2091)). By Executive Order 10480, August 14, 1953 (3 CFR 1949-53), as amended, the President has designated the following agencies as guaranteeing agencies:

(a) Department of Defense.

(b) Department of Energy.

(c) Department of Commerce.

(d) Department of the Interior.

(e) Department of Agriculture.

(f) General Services Administration.

(g) National Aeronautics and Space Administration.

32.303 General.

(a) Section 301 of the Defense Production Act authorizes loan guarantees for contract performance or other operations related to national defense, subject to amounts annually authorized by Congress on the maximum obligation of any guaranteeing agency under any loan, discount, advance, or commitment in connection therewith, entered into under section 301. (See 50 U.S.C. App. 2091 for statutory limitations and exceptions concerning the authorization of loan guarantee amounts and the use of loan guarantees for the prevention of insolvency or bankruptcy.)

(b) The guarantee shall be for less than 100 percent of the loan unless the agency determines that—

(1) The circumstances are exceptional;

(2) The operations of the contractor are vital to the national defense; and

(3) No other suitable means of financing are available.

(c) Loan guarantees are not issued to other agencies of the Government.

(d) Guaranteed loans are essentially the same as conventional loans made by private financial institutions, except that the guaranteeing agency is obligated, on demand of the lender, to purchase a stated percentage of the loan and to share any losses in the amount of the guaranteed percentage. It is the responsibility of the private financial institution to disburse and collect funds and to administer the loan. Under Regulation V of the Federal Reserve Board (12 CFR 245), any private financing institution may submit an application to the Federal Reserve Bank of its district for guarantee of a loan or credit.

(e) Federal Reserve Banks will make the loan guarantee agreements on behalf of the guaranteeing agencies.

(f) Under Section 302(c) of Executive Order 10480, August 14, 1953 (3 CFR 1949-53), as amended, all actions and operations of Federal Reserve Banks, as fiscal agents, are subject to the supervision of the Federal Reserve Board. The Federal Reserve Board is authorized to prescribe the following, after consultation with the heads of guaranteeing agencies:

(1) Regulations governing the actions and operations of fiscal agents.

(2) Rates of interest, guarantee and commitment fees, and other charges that may be made for loans, discounts, advances, or commitments guaranteed by the guaranteeing agencies through the Federal Reserve Banks. These prescriptions may be in the form of specific rates or limits, or in other forms.

(3) Uniform forms and procedures to be used in connection with the guarantees.

(g) The guaranteeing agency is responsible for certifying eligibility for the guarantee and fixing the maximum dollar amount and maturity date of the guaranteed loan to meet the contractor's requirement for financing performance of the defense production contract on hand at the time the guarantee application is submitted.

32.304 Procedures.

32.304-1 Application for guarantee.

(a) A contractor, subcontractor, or supplier that needs operating funds to perform a contract related to national defense may apply to a financing institution for a loan. If the financing institution is willing to extend credit, but considers a Government guarantee necessary, the institution may apply to the Federal Reserve Bank of its district for the guarantee. Application forms and guidance are available at all Federal Reserve Banks.

(b) The Federal Reserve Bank will promptly send a copy of the application, including a list of the relevant defense contracts held by the contractor, to the Federal Reserve Board. The Board will transmit the application and the list of contracts to the interested guaranteeing agency, so that the agency can determine the eligibility of the contractor.

(c) To expedite the process, the Federal Reserve Bank may, pursuant to instructions of a guaranteeing agency, submit lists of the defense contracts to the interested contracting officers.

(d) While eligibility is being determined, the Federal Reserve Bank will make any necessary credit investigations to supplement the information furnished by the applicant financing institution in order to—

(1) Expedite necessary defense financing; and

(2) Protect the Government against monetary loss.

(e) The Federal Reserve Bank will send its report and recommendation to the Federal Reserve Board. The Board will transmit them to the interested guaranteeing agency.

32.304-2 Certificate of eligibility.

(a) The contracting officer shall prepare the certificate of eligibility for a contract that the contracting officer deems to be of material consequence, when—

(1) The contract financing office requests it;

(2) Another interested agency requests it; or

(3) The application for a loan guarantee relates to a contract or subcontract within the cognizance of the contracting officer.

(b) The agency shall evaluate the relevant data, including the certificate of eligibility, the accompanying data, and any other relevant information on the contractor's financial status and performance, to determine whether authorization of a loan guarantee would be in the Government's interest.

(c) If the contractor has several major national defense contracts, it is normally not necessary to evaluate the eligibility of relatively minor contracts. The determination of eligibility should be processed, without delay, based on the the preponderance of the amount of the contracts.

(d) The certificate of eligibility shall include the following determinations:

(1) The supplies or services to be acquired are essential to the national defense.

(2) The contractor has the facilities and the technical and management ability required for contract performance.

(3) There is no practicable alternate source for the acquisition without prejudice to the national defense. (This statement shall not be included if the contractor is a small business concern.)

(e) The contracting officer shall consider the following factors in determining if a practicable alternate source exists:

(1) Prejudice to the national defense, because reletting of a contract with another source would conflict with a major policy on defense acquisition; e.g., policies relating to the mobilization base.

(2) The urgency of contract performance schedules.

(3) The technical ability and facilities of other potential sources.

(4) The extent to which other sources would need contract financing to perform.

(5) The willingness of other sources to enter into contracts.

(6) The time and expense involved in repurchasing for contracts or parts of contracts. This may include potential claims under a termination for convenience or delays incident to default at a later date.

(7) The comparative prices available from other sources.

(8) The disruption of established subcontracting arrangements.

(9) Other pertinent factors.

(f) The contracting officer shall attach sufficient data to the certificate of eligibility to support the determinations made. Available pertinent information shall be included on—

(1) The contractor's past performance;

(2) The relationship of the contractor's operations to performance schedules; and

(3) Other factors listed in paragraph (e) above, if relevant to the case under consideration.

(g) If the contracting officer determines that a certificate of eligibility is not justified, the facts and reasons supporting that conclusion shall be documented and furnished to the agency contract finance office.

(h) The guaranteeing agency shall review the proposed guarantee terms and conditions. If they are considered appropriate, the guaranteeing agency shall complete a standard form of authorization as prescribed by the Federal Reserve Board. The agency shall transmit the authorization through the Federal Reserve Board to the Federal Reserve Bank. The Bank is authorized to execute and deliver to the financing institution a standard form of guarantee agreement, with the terms and conditions approved for the particular case. The financing institution will then make the loan.

(i) Substantially the same procedure may be followed for the application of an offeror who is actively negotiating or bidding for a defense contract, except that the guarantee shall not be authorized until the contract has been executed.

(j) The contracting officer shall report to the agency contract finance office any information about the contractor that would have a potentially adverse impact on a pending guarantee application. The contracting officer is not required, however, to initiate any special investigation for this purpose.

(k) With regard to existing contracts, the agency shall not consider the percentage of guarantee requested by the financing institution in determining the contractor's eligibility.

32.304-3 Asset formula.

(a) Under guaranteed loans made primarily for working capital purposes, the agency shall normally limit the guarantee, by use of an asset formula, to an amount that does not exceed a specified percentage (90 percent or less) of the contractor's investment (e.g., payrolls and inventories) in defense production contracts. The asset formula may include all items under defense contracts for which the contractor would be entitled to payment on performance or termination. The formula shall exclude—

(1) Amounts for which the contractor has not done any work or made any expenditure;

(2) Amounts that would become due as the result of later performance under the contracts; and

(3) Cash collateral or bank deposit balances.

(b) Progress payments are deducted from the asset formula.

(c) The agency may relax the asset formula to an appropriate extent for the time actually necessary for contract performance, if the contractor's working capital and credit are inadequate.

32.304-4 Guarantee amount and maturity.

The agency may change the guarantee amount or maturity date, within the limitations at 32.304-3, as follows:

(a) If the contractor enters into additional defense production contracts after the application for, but before authorization of, a guarantee, the agency may adjust the loan guarantee amount or maturity date to meet any significant increase in financing need.

(b) If the contractor enters into defense production contracts during the term of the guaranteed loan, the parties may adjust the existing guarantee agreement to provide for financing the new contracts. Pertinent information and the Federal Reserve Bank reports will be submitted to the guaranteeing agency under the procedures for the original guarantee application, described in 32.304-1. Normally, a new certificate of eligibility is required.

32.304-5 Assignment of claims under contracts.

(a) The agency shall generally require a contractor that is provided a guaranteed loan to execute an assignment of claims under defense production contracts (including any contracts entered into during the term of the guaranteed loan that are eligible for financing under the loan); however, the agency need not require assignment if any of the following conditions are present:

(1) The contractor's financial condition is so strong that the protection to the Government provided by an assignment of claims is unnecessary.

(2) In connection with the assignment of claims under a major contract, the increased protection of the loan that would be provided by the assignments under additional, relatively smaller contracts is not considered necessary by the agency.

(3) The assignment of claims would create an administrative burden disproportionate to the protection required; e.g., if the contractor has a large number of contracts with individually small dollar amounts.

(b) The contractor shall also execute an assignment of claims if requested to do so by the guarantor or the financing institution.

(c) A subcontract or purchase order issued to a subcontractor shall not be considered eligible for financing under guaranteed loans when the issuer of the subcontract or purchase order reserves (1) the privilege of making payments directly to the assignor or to the assignor and assignee jointly, after notice of the assignment, or (2) the right to reduce or set off assigned proceeds under defense production contracts by reason of claims against the borrower arising after notice of assignment and independently of defense production contracts under which the borrower is the seller.

32.304-6 Other collateral security.

The following are examples of other forms of security that, although seldom invoked under guaranteed loans, may be required when considered necessary for protection of the Government interest:

(a) Mortgages on fixed assets.

(b) Liens against inventories.

(c) Endorsements.

(d) Guarantees.

(e) Subordinations or standbys of other indebtedness.

32.304-7 Contract surety bonds and loan guarantees.

(a) Contract surety bonds are incompatible with the Government's interests under guaranteed loans, unless the interests of the surety are subordinated to the guaranteed loan.

(b) If a substantial share of the contractor's defense contracts are covered by surety bonds, or the amount of the bond is substantial in relation to the contractor's net worth, the agency shall not authorize the guarantee of a loan on a bonded contract unless the surety enters into an agreement with the financing institution to subordinate the surety's rights and claims in favor of the guaranteed loan.

(c) The agency approval of a guarantee for a loan involving relatively substantial subcontracts covered by surety bonds shall also depend on the establishment of a reasonable allocation agreement between the sureties and the financing institution. The agreement should give the financing institution the benefit, with regard to payments to be made on the contract, of the portion of its loans fairly attributable to expenditures made under the bonded subcontracts before notice of default.

32.304-8 Other borrowing.

(a) Because of the limitations under guaranteed loans, some contractors seek to supplement the loan by other borrowing (outside the guarantee) from the financing institution or other sources. It has been recognized in practice that, while prohibition of borrowings outside the guaranteed loan is preferable when practicable in a given V-loan case, such other borrowings should be permitted when necessary.

(b) If the agency consents to the contractor obtaining other borrowing during the guaranteed loan period, the agency shall apply the following restrictions:

(1) A reasonable limit on the amount of other borrowing.

(2) If guaranteed and unguaranteed loans are made by the same financing institution, a requirement that any collateral security requested by the institution under the unguaranteed loan

is also to be secondary collateral for the guaranteed loan.

(3) A requirement that the contractor provide appropriate certificates to the guaranteeing agency, at intervals not longer than 30 days, to disclose outstanding unguaranteed borrowings.

32.305 Loan guarantees for terminated contracts.

(a) The purpose of guaranteed loans; i.e., to provide for financing based on the borrower's recoverable investment in defense production contracts, may also apply to contracts that have been terminated (partially or totally) for the convenience of the Government. Guaranteed loans also may be made before such termination if it is known that termination of particular contracts for the convenience of the Government is about to occur. These loans are expected to provide necessary financing pending termination settlements and payments. They may also finance continuing performance of defense production contracts that are eligible for guaranteed loans.

(b) The procedure for such guarantees is substantially the same as that outlined in 32.304, except that certificates of eligibility are not required for (1) contracts that have been totally terminated or (2) the terminated portion of contracts that have been partially terminated. The agency shall take precautions necessary to avoid Government losses and to ensure the loans will be self-liquidating from the proceeds of defense production contracts.

(c) Loan guarantees for contract termination financing shall not be provided before specific contract terminations are certain.

32.306 Loan guarantees for subcontracts.

If the request for a loan guarantee concerns a subcontractor that is financially weak in comparison with its contractor, the Government's interests may be fostered by the contractor making progress payments to the subcontractor. If so, the agency shall try to arrange for the contractor to provide the progress payments. As a result, the need for the loan guarantee may be reduced or eliminated and the contractor would bear part or all of the risk of loss arising from the selection of the subcontractor.

Subpart 32.4—Advance Payments

32.400 Scope of subpart.

This subpart provides policies and procedures for advance payments on prime contracts and subcontracts. It does not include policies and procedures for advance payments for the types of transactions listed in 32.404.

32.401 Statutory authority.

The agency may authorize advance payments in negotiated and sealed bid contracts if the action is appropriate under (a) section 305 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 255), (b) the Armed Services Procurement Act (10 U.S.C. 2307), or (c) Pub. L. 85-804 (50 U.S.C. 1431-1435) and Executive Order 10789, November 14, 1958 (3 CFR 1958 Supp. pp. 72-74) (see part 50 of the Federal Acquisition Regulation (FAR) for other applications of this statute).

[48 FR 42328, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

32.402 General.

(a) A limitation on authority to grant advance payments under Pub. L. 85-804 (50 U.S.C. 1431-1435) is described at FAR 50.203(b)(4). This limitation also applies to advance payments authorized under 10 U.S.C. 2307.

(b) Advance payments may be provided on any type of contract; however, the agency shall authorize advance payments sparingly. Except for the contracts described in 32.403(a) and (b), advance payment is the least preferred method of contract financing (see 32.106) and generally they should not be authorized if other types of financing are reasonably available to the contractor in adequate amounts. Loans and credit at excessive interest rates or other exorbitant charges, or loans from other Government agencies, are not considered reasonably available financing.

(c) If statutory requirements and standards for advance payment determinations are met, the contracting officer shall generally recommend that the agency authorize advance payments.

(1) The statutory requirements are that—

(i) The contractor gives adequate security;

(ii) The advance payments will not exceed the unpaid contract price (see 32.410(b), subparagraph (a)(2)); and

(iii) The agency head or designee determines, based on written findings, that the advance payment—

(A) Is in the public interest (under 32.401(a) or (b)); or

(B) Facilitates the national defense (under 32.401(c)).

(2) The standards for advance payment determinations are that—

(i) The advance payments will not exceed the contractor's interim cash needs based on—

(A) Analysis of the cash flow required for contract performance;

(B) Consideration of the reimbursement or other payment cycle; and

(C) To the extent possible, employment of the contractor's own working capital;

(ii) The advance payments are necessary to supplement other funds or credit available to a contractor;

(iii) The recipient is otherwise qualified as a responsible contractor;

(iv) The Government will benefit from performance prospects or there are other practical advantages; and

(v) The case fits one or more of the categories described in 32.403.

(d) If necessary, the agency may authorize advance payments in addition to progress or partial payments on the same contract (see 32.501-1(c)).

(e) Each agency that provides advance payments shall—

(1) Place the responsibility for making findings and determinations, and for approval of contract terms concerning advance payments (see 32.410), at an organizational level high enough to ensure uniform application of this subpart (see the limitation at 50.201(b) which also applies to advance payments authorized under Pub. L. 85-804 (50 U.S.C. 1431-1435)); and

(2) Establish procedures for coordination, before advance payment authorization, with the activity that provides contract financing support.

(f) If the contract provides for advance payments under Pub. L. 85-804, the contracting officer shall ensure conformance with the requirements of FAR 50.307.

32.403 Applicability.

Advance payments may be considered useful and appropriate for the following:

(a) Contracts for experimental, research, or development work with nonprofit educational or research institutions.

(b) Contracts solely for the management and operation of Government-owned plants.

(c) Contracts for acquisition at cost of facilities for Government ownership.

(d) Contracts of such a highly classified nature that the agency considers it undesirable for national security to permit assignment of claims under the contract.

(e) Contracts entered into with financially weak contractors whose technical ability is considered essential to the agency. In these cases, the agency shall closely monitor the contractor's performance and financial controls to reduce the Government's financial risk.

(f) Contracts for which a loan by a private financial institution is not practicable, whether or not a loan guarantee under this part is issued; for example, if—

(1) Financing institutions will not assume a reasonable portion of the risk under a guaranteed loan;

(2) Loans with reasonable interest rates or finance charges are not available to the contractor; or

(3) Contracts involve operations so remote from a financial institution that the institution could not be expected to suitably administer a guaranteed loan.

(g) Contracts with small business concerns, under which circumstances that make advance payments appropriate often occur (but see 32.104(b)).

(h) Contracts under which exceptional circumstances make advance payments the most advantageous contract financing method for both the Government and the contractor.

32.404 Exclusions.

(a) This subpart does not apply to advance payments authorized by law for—

(1) Rent;

(2) Tuition;

(3) Insurance premiums;

(4) Expenses of investigations in foreign countries;

(5) Extension or connection of public utilities for Government buildings or installations;

(6) Subscriptions to publications;

(7) Purchases of supplies or services in foreign countries, if—

(i) The purchase price does not exceed $10,000 (or equivalent amount of the applicable foreign currency); and

(ii) The advance payment is required by the laws or government regulations of the foreign country concerned;

(8) Enforcement of the customs or narcotics laws; or

(9) Other types of transactions excluded by agency procedures under statutory authority.

(b) Agencies may issue their own instructions to deal with advance payment items in paragraph (a) above authorized under statutes relevant to their agencies.

32.405 Applying Pub. L. 85-804 to advance payments under sealed bid contracts.

(a) Actions that designated agencies may take to facilitate the national defense without regard to other provisions of law relating to contracts, as explained in 50.101(a), also include making advance payments. These advance payments may be made at or after award of sealed bid contracts as well as negotiated contracts.

(b) Bidders may request advance payments before or after award, even if the invitation for bids does not contain an advance payment provision. However, the contracting officer shall reject any bid requiring that advance payments be provided as a basis for acceptance.

(c) When advance payments are requested, the agency may—

(1) Enter into the contract and provide for advance payments conforming to this part 32;

(2) Enter into the contract without providing for advance payments if the contractor does not actually need advance payments; or

(3) Deny award of the contract if the request for advance payments has been disapproved under 32.409-2 and funds adequate for performance are not otherwise available to the offeror.

[48 FR 42328, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

32.406 Letters of credit.

(a) The Department of the Treasury (Treasury) prescribes regulations and instructions covering the use of letters of credit for advance payments under contracts. See Treasury Department Circular 1075 (31 CFR part 205), and the implementing instructions in the Treasury Financial Manual, available in offices providing financial advice and assistance.

(b) If agencies provide advance payments to contractors, use of the following methods is required unless the agency has obtained a waiver from the Treasury Department:

(1) By letter of credit if the contracting agency expects to have a continuing relationship with the contractor for a year or more, with advances totaling at least $120,000 a year.

(2) By direct Treasury check if the circumstances do not meet the criteria in subparagraph (1) above.

(c) If the agency has entered into multiple contracts (or a combination of contract(s) and assistance agreement(s)) involving eligibility of a contractor for more than one letter of credit, the agency shall follow arrangements made under Treasury procedures for (1) consolidating funding to the same contractor under one letter of credit or (2) replacing multiple letters of credit with a single letter of credit.

(d) The letter of credit enables the contractor to withdraw Government funds in amounts needed to cover its own disbursements of cash for contract performance. Whenever feasible, the agency shall, under the direction

nd approval of the Department of
he Treasury, use a letter of credit
ethod that requires the contractor
ot to withdraw the Government
unds until the contractor's checks
ave been (1) forwarded to the payees
lelay of drawdown technique), or (2)
resented to the contractor's bank for
ayment (checks paid technique) (see
l CFR 205.3 and 205.4(d)).

(e) The Treasury regulations provide
or terminating the advance financing
rrangement if the contractor is un-
illing or unable to minimize the
lapsed time between receipt of the
dvance and disbursement of the
unds. In such cases, if reversion to
ormal payment methods is not feasi-
le, the Treasury regulation provides
or use of a working capital method of
dvance; i.e., for limiting advances to
.) only the estimated disbursements
or a given initial period and (2) subse-
uently, for only actual cash disburse-
ents (31 CFR 205.3(k) and 205.7).

8 FR 42328, Sept. 19, 1983, as amended at
FR 19805, May 27, 1987]

.407 Interest.

(a) Except as provided in paragraph
) below, the contracting officer shall
arge interest on the daily unliquida-
d balance of all advance payments at
e higher of—

(1) The published prime rate of the
nking institution (depository) in
hich the special bank account (see
.409-3) is established; or

(2) The rate established by the Sec-
tary of the Treasury under 50 U.S.C.
pp. 1215(b)(2).

(b) The interest rate for advance
yments shall be adjusted for
anges in the prime rate of the de-
sitory and the semiannual determi-
tion by the Secretary of the Treas-
y under 50 U.S.C. App. 1215(b)(2).
e contracting officer shall obtain
ta from the depository on changes
the interest rate during the month.
terest shall be computed at the end
each month on the daily unliquida-
l balance of advance payments at
applicable daily interest rate.

c) Interest shall be required on con-
cts that are for acquisition, at cost,
facilities for Government owner-
p, if the contracts are awarded in combination with, or in contemplation of, supply contracts or subcontracts.

(d) The agency head or designee may authorize advance payments without interest under the following types of contracts, if in the Government's interest:

(1) Contracts for experimental, research, or development work (including studies, surveys, and demonstrations in socio-economic areas) with nonprofit education or research institutions.

(2) Contracts solely for the management and operation of Government-owned plants.

(3) Cost-reimbursement contracts with governments, including State or local governments, or their instrumentalities.

(4) Other classes of contracts, or unusual cases, for which the exclusion of interest on advances is specifically authorized by agency procedures.

(e) If a contract provides for interest-free advance payments, the contracting officer may require the contractor to charge interest on advances or downpayments to subcontractors and credit the Government for the proceeds from the interest charges. Interest rates shall be determined as described in paragraphs (a) and (b) above. The contracting officer need not require the contractor to charge interest on an advance to a subcontractor that is an institution of the kind described in paragraph (d)(1).

(f) The contracting officer shall not allow interest charges, required by this 32.407, as reimbursable costs under cost-reimbursement contracts, whether the interest charge was incurred by the prime contractor or a subcontractor.

32.408 Application for advance payments.

(a) A contractor may apply for advance payments before or after the award of a contract.

(b) The contractor shall submit any advance payment request in writing to the contracting officer and provide the following information:

(1) A reference to the contract if the request concerns an existing contract, or a reference to the solicitation if the request concerns a proposed contract.

(2) A cash flow forecast showing estimated disbursements and receipts for the period of contract performance. If the application pertains to a type of contract described in 32.403(a) or (b), the contractor shall limit the forecast to the contract to be financed by advance payments.

(3) The proposed total amount of advance payments.

(4) The name and address of the bank at which the contractor expects to establish a special account as depository for the advance payments. If advance payments in the form of a letter of credit are anticipated, the contractor shall identify the specific account at the bank to be used. This subparagraph (4) is not applicable if an alternate method is used under agency procedures.

(5) A description of the contractor's efforts to obtain unguaranteed private financing or a V-loan (see 32.301) under eligible contracts. This requirement is not applicable to the contract types described in 32.403(a) or (b).

(6) Other information appropriate to an understanding of (i) the contractor's financial condition and need, (ii) the contractor's ability to perform the contract without loss to the Government, and (iii) financial safeguards needed to protect the Government's interest. Ordinarily, if the contract is a type described in 32.403(a) or (b), the contractor may limit the response to this subparagraph (6) to information on the contractor's reliability, technical ability, and accounting system and controls.

32.409 Contracting officer action.

After analysis of the contractor's application and any appropriate investigation, the contracting officer shall recommend approval or disapproval and transmit the request and recommendation to the approving authority designated under 32.402(e).

32.409-1 Recommendation for approval.

If recommending approval, the contracting officer shall transmit the following, under agency procedures, to the approving authority:

(a) Contract data, including—

(1) Identification and date of the award;

(2) Citation of the appropriation;

(3) Type and dollar amount of the contract;

(4) Items to be supplied, schedule of deliveries or performance, and status of any deliveries or performance;

(5) The contract fee or profit contemplated; and

(6) A copy of the contract, if available.

(b) The contractor's request and supporting information.

(c) A report on the contractor's past performance, responsibility, technical ability, and plant capacity.

(d) Comments on (1) the contractor's need for advance payments and (2) potential Government benefits from the contract performance.

(e) Proposed advance payment contract terms, including proposed security requirements.

(f) The findings, determination, and authorization (see 32.410).

(g) The recommendation for approval of the advance payment request.

(h) Justification of any proposal for waiver of interest charges (see 32.407).

32.409-2 Recommendation for disapproval.

If recommending disapproval, the contracting officer shall, under agency procedures, transmit—

(a) The items prescribed in 32.409-1(a), (b), and (c); and

(b) The recommendation for disapproval and the reasons.

32.409-3 Security, supervision, and covenants.

(a) If advance payments are approved, the contracting officer shall enter into an agreement with the contractor covering bank accounts and suitable covenants protecting the Government's interest (see 32.411). This requirement generally applies under all statutory authorities, but modified requirements applicable to certain specific cases are prescribed in paragraphs (e) through (g) below.

(b) The agency shall (1) ensure that the amount of advance payments does not exceed the contractor's financial needs, and (2) closely supervise the contractor's withdrawal of funds from special bank accounts in which the advance payments are deposited.

(c) In the terms of the agreement, the contracting officer should provide for a paramount lien in favor of the Government. This lien may supplement or replace other security requirements. The lien should cover—

(1) Supplies being acquired;

(2) Any credit balance in the special bank account in which advance payments are deposited; and

(3) All property that the contractor acquires for performing the contract, except to the extent to which the Government otherwise has valid title to the property.

(d) Security requirements vary to fit the circumstances of different cases. Minimum security requirements are covered by the clauses prescribed in the contract. The contracting officer may supplement these as necessary in each case for protection of the Government's interest. Examples of additional security terms are—

(1) Personal or corporate endorsements or guarantees;

(2) Pledges of collateral;

(3) Subordination or standby of other indebtedness;

(4) Controls or limitations on profit distributions, salaries, bonuses or commissions, rentals and royalties, capital expenditures, creation of liens, retirement of stock or debt, and creation of additional obligations; and

(5) Advance payment bonds (rarely required).

(e) In an advance payment agreement with an instrumentality of the Government, a State, a local government, or an agency or instrumentality of a State or local government, the contracting officer may omit the requirement for deposit of the advances in a special bank account, if the official approving the advance determines that other adequate security exists to protect the Government's interest.

(f) The requirements of this 32.409-3 do not apply when using letters of credit if an agency's procedures provide for—

(1) The use under a cost-reimbursement contract of Federal funds deposited in the contractor's bank account (without the contractor acquiring title to the funds); and

(2) The security of such deposit of public moneys in accordance with governing regulations of the Treasury Department.

(g) If a separate special bank account is not required; e.g., advance payment by a letter of credit, an agency may require a special bank account for an individual case, or classes of cases, if the circumstances warrant.

32.410 Findings, determination, and authorization.

(a) Each determination concerning advance payments shall be supported by written findings (see 32.402(c)(1)(iii)).

(b) The following is an example of the format and text of findings, determination, and authorization with alternative words, phrases, and paragraphs to be selected to conform to the circumstances involved:

FINDINGS, DETERMINATION, AND AUTHORIZATION FOR ADVANCE PAYMENTS

FINDINGS

(a) The undersigned hereby finds that:

(1) The ——— [*insert the name of the contracting activity*] and ——— [*insert the name of the contractor*] (have entered) (propose to enter) into (negotiated) (sealed bid) Contract No. ——, dated ———

[*Summarize the specific facts and significant circumstances concerning the contract and the contractor, that, together with the other findings, will clearly support the determination below.*]

(2) Advance payments (in an amount not to exceed $——— at any time outstanding) (in an aggregate amount not exceeding $———, less the aggregate amounts repaid, or withdrawn by the Government) are required by the Contractor to perform under the contract. The amount does not exceed the unpaid contract price or the estimated interim cash needs arising during the reimbursement cycle.

(3) The advance payments are necessary for prompt, efficient contract performance that will benefit the Government.

(4) The proposed advance payment clause provides for security for the protection of the Government. The clause requires that all payments will be desposited in a special bank account and that the Government will have a paramount lien on (i) the credit balance in the special bank account, (ii) any supplies contracted for, and (iii) any material or other property acquired for performance of the contract. [*Insert the following, if*

applicable (The Contractor's financial management system provides for effective control over and accountability for all Federal funds under governing regulations of the Treasury Department.) (An advance payment bond is required.)] This security is considered adequate.

(5) Advance payments are the only adequate means of financing available to the Contractor, and the amount designated in (2) above is based, to the extent possible, on the use of the Contractor's own working capital in performing the contract.

[*Insert paragraph (6), (7), or (8), as applicable*].

(6) The Contractor is a nonprofit (educational) (and) (research) institution, and the contract is for (experimental) (,) (research and development) work.

(7) The contract is solely for the management and operation of a Government-owned plant.

(8) The following unusual facts and circumstances favor making advance payments to the Contractor without interest:

[*List the pertinent facts and circumstances.*]

DETERMINATION

(b) Based on the findings in (a) above, the undersigned determined that the making of the proposed advance payments, (with interest at the rate of —[*Insert the interest rate computed in accordance with 32.407*] percent on the daily unliquidated balance of the advance payments,) (without interest, except as provided by the proposed advance payment clause,) (is in the public interest) (will facilitate the national defense).

AUTHORIZATION

(c) The advance payments, of which (the amount at any time outstanding) (the aggregate amount, less the aggregate amounts repaid, or withdrawn by the Government), shall not exceed $——, are hereby authorized under (section 305 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 255)) (the Armed Services Procurement Act (10 U.S.C. 2307)) (the Extraordinary Contracting Authority of Government Agencies in Connection with National Defense Functions (50 U.S.C. 1431-1435) and Executive Order No. 10789 of November 14, 1958 (3 CFR 1958 Supp. pp. 72-74)) [*or, if other, cite appropriate authority*] on (terms substantially as contained in the proposed advance payment clause, a copy (an outline) of which is annexed to this authorization) (the following terms:) [*Insert the appropriate terms.*]

(All prior authorizations for advance payments under Contract No. —— are superseded.)

____

(*Signature*)

____

(*Name typed*)

____

(*Title of authorized official*)

[*Each Findings, Determination, and Authorization shall be individually prepared to fit the particular circumstances at hand. Subparagraphs (a)(1), (2), (3) and (4) and paragraphs (b) and (c) shall be used in each case. If the contract is (a) for experimental, developmental, or research work and with a nonprofit educational or research institution, or (b) only for management and operation of a Government-owned plant, subparagraph (a)(5) should not be included. If the advance payment is to be made without interest to the contractor, include subparagraph (a)(6), (7), or (8). If any advance payments have previously been authorized for the contract, include the final sentence of paragraph (c). The alternate parenthetical wording or other modifications may be used as appropriate. The paragraphs actually used shall be renumbered sequentially*].

[48 FR 42328, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

32.411 Agreement for special bank account.

The contracting officer shall use substantially the following form of agreement for a special bank account for advance payments:

AGREEMENT FOR SPECIAL BANK ACCOUNT

This agreement is entered into this — day of ——, 19—, between the United States of America, (the Government), represented by the Contracting Officer executing this agreement, —— [*Insert the name of the contractor*], a —— [*Insert the name of the State of incorporation*] corporation (the Contractor), and ——, a banking corporation under the laws of ——, located at —— (the Bank).

RECITALS

(a) Under date of ——, 19—, the Government and the Contractor entered into Contract No. ——, or a related supplemental agreement, providing for advance payments to the Contractor. A copy of the advance payment terms was furnished to the Bank.

(b) The contract or supplemental agreement requires that amounts advanced to the Contractor be deposited separate from the Contractor's general or other funds, in a Special Bank Account at a member bank of the Federal Reserve System or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (12 U.S.C. 1811). The parties agree to deposit the amounts with the Bank, which meets the requirement.

(c) This Special Bank Account is designated "——— [*Insert the contractor's name*], ——— [*Insert the name of the Government agency*] Special Bank Account."

COVENANTS

In consideration of the foregoing, and for other good and valuable considerations, the parties agree to the following conditions:

(a) The Government shall have a lien on the credit balance in the account to secure the repayment of all advance payments made to the Contractor. The lien is paramount to any lien or claim of the Bank regarding the account.

(b) The Bank is bound by the terms of the contract relating to the deposit and withdrawal of funds in the Special Bank Account, but is not responsible for the application of funds withdrawn from the account. The Bank shall act on written directions from the Contracting Officer, the administering office, or a duly authorized representative of either. The Bank is not liable to any party to this agreement for any action that complies with the written directions. Any written directions received by the Bank through the Contracting Officer on ——— [*Insert the name of the agency*] stationery and purporting to be signed by, or by the direction of ——— or duly authorized representative, shall be, as far as the rights, duties, and liabilities of the Bank are concerned, considered as being properly issued and filed with the Bank by the ——— [*Insert the name of the agency*].

(c) The Government, or its authorized representatives, shall have access to the books and records maintained by the Bank regarding the Special Bank Account at all reasonable times and for all reasonable purposes, including (but not limited to), the inspection or copying of the books and records and any and all pertinent memoranda, checks, correspondence, or documents. The Bank shall preserve the books and records for a period of 6 years after the closing of this Special Bank Account.

(d) In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings regarding the Special Bank Account, the Bank will promptly notify ——— [*Insert the name of the administering office*].

(e) While this Special Bank Account exists, the Bank shall inform the Government each month of the Bank's published prime interest rate and changes to the rate during the month. The Bank shall give this information to the Contracting Officer on the last business day of the month. [*This covenant will not be included in Special Bank Account Agreements covering interest-free advance payments*].

Each of the parties to this agreement has executed the agreement on ———, 19—

____

____

[*Signatures and official titles*]

32.412 Contract clause.

(a) The contracting officer shall insert the clause at 52.232-12, Advance Payments, in solicitations and contracts under which the Government will provide advance payments, except as provided in 32.412(b).

(b) If the agency desires to waive the countersignature requirement because of the contractor's financial strength, good performance record, and favorable experience concerning cost disallowances, the contracting officer shall use the clause with its Alternate I.

(c) If a cost-reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate II.

(d) If the agency considers a more rapid liquidation appropriate, the contracting officer shall use the clause with its Alternate III.

(e) If the agency provides advance payments under the contract at no interest to the prime contractor, the contracting officer shall use the clause with its Alternate IV.

(f) If the requirement for a special bank account is eliminated in accordance with 32.409-3 (e) or (g), the contracting officer shall insert in the solicitation or contract the clause set forth in Alternate V of 52.232-12, Advance Payments, instead of the basic clause.

[48 FR 42328, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

Subpart 32.5—Progress Payments Based on Costs

32.500 Scope of subpart.

This subpart prescribes policies, procedures, forms, solicitation provisions, and contract clauses for providing contract financing through progress payments based on costs. This subpart does not apply to—

(a) Payments under cost-reimbursement contracts, other than reimbursement of the contractor's progress payments to subcontractors and suppliers (see 32.504(f)); or

(b) Contracts for construction or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based on a percentage or stage of completion.

32.501 General.

Progress payments may be customary or unusual. Customary progress payments are those made under the general guidance in this subpart, using the customary progress payment rate, the cost base, and frequency of payment established in the Progress Payments clause, and either the ordinary liquidation method or the alternate method as provided in subsections 32.503-8 and 32.503-9. Any other progress payments are considered unusual, and may be used only in exceptional cases when authorized in accordance with subsection 32.501-2.

32.501-1 Customary progress payment rates.

(a) The customary progress payment rate is 80 percent, applicable to the total costs of performing the contract. The customary rate for contracts with small business concerns is 85 percent. The Department of Defense (DOD) may establish other customary rates for foreign military sales and for flexible progress payments.

(b) Any rate higher than those permitted in paragraph (a) above shall be considered an unusual progress payment. The contracting officer shall not include a higher rate in a contract unless advance agency approval is obtained as prescribed in 32.501-2.

(c) When advance payments and progress payments are authorized under the same contract, a progress payment rate higher than the customary rate shall not be authorized.

(d) In accordance with the Defense Procurement Improvement Act of 1986 (Pub. L. 99-145) and, for civilian agencies, as a matter of policy, progress payments are limited to 80 percent on work accomplished under undefinitized contract actions. A higher rate is not authorized under unusual progress payments or flexible progress payments for the undefinitized actions.

[48 FR 42328, Sept. 19, 1987, as amended at 52 FR 30077, Aug. 12, 1987]

32.501-2 Unusual progress payments.

(a) The contracting officer may provide unusual progress payments only if—

(1) The contract necessitates predelivery expenditures that are large in relation to contract price and in relation to the contractor's working capital and credit;

(2) The contractor fully documents an actual need to supplement any private financing available, including guaranteed loans; and

(3) The contractor's request is approved by the head of the contracting activity or a designee. In addition, see 32.502-2.

(b) The excess of the unusual progress payment rate approved over the customary progress payment rate should be the lowest amount possible under the circumstances.

(c) Progress payments will not be considered unusual merely because they are on letter contracts or the definitive contracts that supersede letter contracts.

32.501-3 Contract price.

(a) For the purpose of making progress payments and determining the limitation on progress payments, the contract price shall be as follows:

(1) Under firm-fixed-price contracts, the contract price is the current contract price plus any unpriced modifications for which funds have been obligated.

(2) If the contract is redeterminable or subject to economic price adjust-

ment, the contract price is the initial price until modified.

(3) Under a fixed-price incentive contract, the contract price is the target price plus any unpriced modifications for which funds have been obligated. However, if the contractor's properly incurred costs exceed the target price, the contracting officer may provisionally increase the price up to the ceiling or maximum price.

(4) Under a letter contract, the contract price is the maximum amount obligated by the contract as modified.

(5) Under an unpriced order issued against a basic ordering agreement, the contract price is the maximum amount obligated by the order, as modified.

(6) Any portion of the contract specifically providing for reimbursement of costs only shall be excluded from the contract price.

(b) The contracting officer shall not make progress payments or increase the contract price beyond the funds obligated under the contract, as amended.

32.501-4 Consideration for progress payments.

(a) There is no requirement for a separate consideration for providing progress payments or changing progress payment or liquidation rates, if coverage is included in the terms of the contract when awarded.

(b) Occasionally, unanticipated circumstances arise during contract performance which, under the policies of this subpart, result in the contract being amended to provide progress payments. In such a case, adequate new consideration is required.

(c) The contractor may provide the new consideration by monetary or nonmonetary means. A monetary consideration could be a reduction in the contract price. A nonmonetary consideration could be the incorporation of terms in the contract modification giving the Government a new and substantial benefit.

(d) The fair and reasonable consideration should approximate as nearly as practicably ascertainable the amount by which the price would have been maller had the Progress Payments ause been contained in the initial contract. In the absence of definite information on this point, the contracting officer should apply the following criteria in evaluating whether the proposed new consideration is adequate:

(1) The value to the contractor of the anticipated amount and duration of unliquidated progress payments at the imputed financial costs of the equivalent working capital.

(2) The estimated profit rate to be earned through contract performance.

(e) The contracting officer shall not provide for any other type of specific charges, such as interest, for progress payments.

32.501-5 Other protective terms.

If the contracting officer considers it necessary for protection of the Government's interest, protective terms such as the following may be used in addition to the Progress Payments clause of the contract:

(a) Personal or corporate guarantees.

(b) Subordinations or standbys of indebtedness.

(c) Special bank accounts.

(d) Protective covenants of the kinds in paragraph (p) of the clause at 52.232-12, Advance Payments.

32.502 Preaward matters.

This section covers matters that generally are relevant only before contract award. This does not preclude taking actions discussed here after award, if appropriate; e.g., postaward addition of a Progress Payments clause for consideration.

32.502-1 Use of customary progress payments.

The use of a Progress Payments clause in solicitations and resulting contracts generally shall be based upon considerations of the criteria in this subsection. Reasonable doubts should be resolved in favor of including the Progress Payments clause in the solicitation. Bids conditioned on progress payments when the solicitation did not provide for progress payments shall be rejected as nonresponsive.

(a) Subject to paragraphs (b) and (c) below, the contracting officer may provide for customary progress payments if the contractor (1) will not be able to bill for the first delivery of products, or other performance milestones, for a substantial time after work must begin (normally 4 months or more for small business concerns; 6 months or more for others), and (2) will make expenditures for contract performance during the predelivery period that have a significant impact on the contractor's working capital. Progress payments may also be authorized, particularly for small suppliers, if the contractor demonstrates actual financial need or the unavailability of private financing (see 32.106(a)).

(b) To reduce undue administrative effort and expense, the contracting officer generally should not provide for progress payments on contracts of less than $1,000,000 unless—

(1) The contractor is a small business concern and the contract will involve approximately $100,000 or more; or

(2) The contractor will perform a group of small contracts at the same time and the total impact on working capital is equivalent to a single contract of $1,000,000 or more.

(c) The contracting officer shall not provide for progress payments if the contract items are quick turnover types for which progress payments are not a customary commercial practice. Examples of items customarily not subject to progress payments include (1) subsistence, (2) clothing, (3) medical and dental supplies, and (4) standard commercial items not requiring a substantial accumulation of predelivery expenditures by the contractor.

(d) (1) In considering whether to provide for progress payments in circumstances under which a series of orders are awarded (e.g., indefinite delivery contracts or basic ordering agreements contemplating requisitions, task orders, etc., or their equivalent), the contracting officer shall apply the standards in paragraphs (a) through (c) above, based on—

(i) An estimate of the total work to be done; and

(ii) The probable impact on working capital of the predelivery expenditures and production lead times of the majority of the individual orders.

(2) In authorizing progress payments under multiple-order contracts, the contracting officer should establish a single liquidation rate applicable to all orders.

32.502-2 Contract finance office clearance.

The contracting officer shall obtain the approval of the contract finance office or other offices designated under agency procedures before taking any of the following actions:

(a) Providing a progress payment rate higher than the customary rate (see 32.501-1).

(b) Deviating from the progress payments terms prescribed in this part.

(c) Providing progress payments to a contractor—

(1) Whose financial condition is in doubt;

(2) Who has had an advance payment request or loan guarantee denied for financial reasons (or approved but withdrawn or lapsed) within the previous 12 months; or

(3) Who is named in the consolidated list of contractors indebted to the United States (known commonly as the *Hold-up List*).

32.502-3 Solicitation provisions.

(a) The contracting officer shall insert the provision at 52.232-13, Notice of Progress Payments, in invitations for bids and requests for proposals that include a Progress Payments clause.

(b) (1) Under the authority of the statutes cited in 32.101, an invitation for bids may restrict the availability of progress payments to small business concerns only.

(2) The contracting officer shall insert the provision at 52.232-14, Notice of Availability of Progress Payments Exclusively for Small Business Concerns, in invitations for bids if it is anticipated that (1) both small business concerns and others may submit bids in response to the same invitation and (2) only the small business bidders would need progress payments.

(c) The contracting officer shall insert the provision at 52.232-15, Progress Payments Not Included, in invitations for bids if the solicitation will not contain one of the provisions prescribed in paragraphs (a) and (b) above.

32.502-4 Contract clauses.

(a) The contracting officer shall insert the clause at 52.232-16, Progress Payments, in solicitations and fixed-price contracts under which the Government will provide progress payments based on costs.

(b) If the contractor is a small business concern, the contracting officer shall use the clause with its Alternate I.

(c) If the contract is a letter contract, the contracting officer shall use the clause with its Alternate II.

(d) If the nature of the contract necessitates separate progress payment rates for portions of work that are clearly severable and accounting segregation would be maintained (e.g., annual production requirements), the application of separate progress payment rates shall be fully described in a supplementary special provision within the contract. Separate progress payment requests and subsequent invoices shall be submitted by the contractor for the severable portions of work in order to maintain accounting integrity.

[48 FR 42328, Sept. 19, 1983, as amended 52 FR 30077, Aug. 12, 1987]

32.503 Postaward matters.

This section covers matters that are generally relevant only after award of a contract. This does not preclude taking actions discussed here before award, if appropriate; e.g., preaward review of accounting systems and controls.

32.503-1 Contractor requests.

Each contractor request for progress payment shall—

(a) Be submitted on Standard Form 1443, Contractor's Request for Progress Payment;

(b) Comply with the instructions on the reverse of the applicable form, and the contract terms; and

(c) Include any additional information reasonably requested by the contracting officer.

32.503-2 Supervision of progress payments.

(a) The extent of progress payments supervision, by prepayment review or periodic review, should vary inversely with the contractor's experience, performance record, reliability, quality of management, and financial strength, and with the adequacy of the contractor's accounting system and controls. Supervision shall be of a kind and degree sufficient to provide timely knowledge of the need for, and timely opportunity for, any actions necessary to protect Government interests.

(b) The administering office must keep itself informed of the contractor's overall operations and financial condition, since difficulties encountered and losses suffered in operations outside the particular progress payment contract may affect adversely the performance of that contract and the liquidation of the progress payments.

(c) For contracts with contractors (1) whose financial condition is doubtful or not strong in relation to progress payments outstanding or to be outstanding, (2) with management of doubtful capacity, (3) whose accounting controls are found by experience to be weak, or (4) experiencing substantial difficulties in performance, full information on progress under the contract involved (including the status of subcontracts) and on the contractor's other operations and overall financial condition should be obtained and analyzed frequently, with a view to protecting the Government's interests better and taking such action as may be proper to make contract performance more certain.

(d) So far as practicable, all cost problems, particularly those involving indirect costs, that are likely to create disagreements in future administration of the contract should be identified and resolved at the inception of the contract (see 31.109).

32.503-3 Initiation of progress payments and review of accounting system.

(a) For contractors that the administrative contracting officer (ACO) has found by previous experience or recent audit review (within the last 12 months) to be (1) reliable, competent, and capable of satisfactory performance, (2) possessed of an adequate accounting system and controls, and (3) in sound financial condition, progress payments in amounts requested by the contractor should be approved as a matter of course.

(b) For all other contractors, the ACO shall not approve progress payments before determining (1) that (i) the contractor will be capable of liquidating any progress payments or (ii) the Government is otherwise protected against loss by additional protective provisions, and (2) that the contractor's accounting system and controls are adequate for proper administration of progress payments. The services of the cognizant independent audit agency or office should be used to the greatest extent practicable. However, if the auditor so advises, a complete audit may not be necessary.

32.503-4 Approval of progress payment requests.

(a) When the reliability of the contractor and the adequacy of the contractor's accounting system and controls have been established (see 32.503-3 above) the ACO may, in approving any particular progress payment request (including initial requests on new contracts), rely upon that accounting system and upon the contractor's certification, without requiring audit or review of the request before payment.

(b) The ACO should not routinely ask for audits of progress payment requests. However, when there is reason to (1) question the reliability or accuracy of the contractor's certification or (2) believe that the contract will involve a loss, the ACO should ask for a review or audit of the request before payment is approved or the request is otherwise disposed of.

(c) When there is reason to doubt the amount of a progress payment request, only the doubtful amount should be withheld, subject to later adjustment after review or audit; any clearly proper and due amounts should be paid without awaiting resolution of the differences.

32.503-5 Administration of progress payments.

(a) While the ACO may, in approving progress payment requests under 32.503-3 above, rely on the contractor's accounting system and certification without prepayment review, postpayment reviews (including audits when considered necessary) shall be made periodically, or when considered desirable by the ACO to determine the validity of progress payments already made and expected to be made.

(b) These postpayment reviews or audits shall, as a minimum, include a determination of whether or not—

(1) The unliquidated progress payments are fairly supported by the value of the work accomplished on the undelivered portion of the contract;

(2) The applicable limitation on progress payments in the Progress Payments clause has been exceeded;

(3) (i) The unpaid balance of the contract price will be adequate to cover the anticipated cost of completion, or

(ii) The contractor has adequate resources to complete the contract; and

(4) There is reason to doubt the adequacy and reliability of the contractor's accounting system and controls and certification.

(c) (1) Generally, the progress payments made under multiple-order contracts should be administered under each individual order as if the order constituted a separate contract.

(2) If the contractor requests it and the contracting officer approving individual progress payments agrees, the administration of progress payments may be based on the overall contract or agreement. Under this method, the contractor shall include a supporting schedule with each request for a progress payment. The schedule should identify the costs applicable to each order.

(3) The contracting officer may treat a group of orders as a single unit for administration of progress payments if each order in the group is (i) subject to a uniform liquidation rate, and (ii) under the jurisdiction of the same payment office.

32.503-6 Suspension or reduction of payments.

(a) *General.* The Progress Payments clause provides a Government right to reduce or suspend progress payments, or to increase the liquidation rate, under specified conditions. These conditions and actions are discussed in paragraphs (b) through (g) below.

(1) The contracting officer shall take these actions only in accordance with the contract terms and never precipitately or arbitrarily. These actions should be taken only after—

(i) Notifying the contractor of the intended action and providing an opportunity for discussion;

(ii) Evaluating the effect of the action on the contractor's operations, based on the contractor's financial condition, projected cash requirements, and the existing or available credit arrangements; and

(iii) Considering the general equities of the particular situation.

(2) The contracting officer shall take immediate unilateral action only if warranted by circumstances such as overpayments or unsatisfactory contract performance.

(3) In all cases, the contracting officer shall (i) act fairly and reasonably, (ii) base decisions on substantial evidence, and (iii) document the contract file. Findings made under paragraph (c) of the Progress Payments clause shall be in writing.

(b) *Contractor noncompliance.* (1) The contractor must comply with all material requirements of the contract. This includes the requirement to maintain an efficient and reliable accounting system and controls, adequate for the proper administration of progress payments. If the system or controls are deemed inadequate, progress payments shall be suspended (or the portion of progress payments associated with the unacceptable portion of the contractor's accounting system shall be suspended) until the necessary changes have been made.

(2) If the contractor fails to comply with the contract without fault or negligence, the contracting officer will not take action permitted by paragraph (c)(1) of the Progress Payments clause, other than to correct overpayments and collect amounts due from the contractor.

(c) *Unsatisfactory financial condition.* (1) If the contracting officer finds that contract performance (including full liquidation of progress payments) is endangered by the contractor's financial condition, or by a failure to make progress, the contracting officer shall require the contractor to make additional operating or financial arrangements adequate for completing the contract without loss to the Government.

(2) If the contracting officer concludes that further progress payments would increase the probable loss to the Government, the contracting officer shall suspend progress payments and all other payments until the unliquidated balance of progress payments is eliminated.

(d) *Excessive inventory.* If the inventory allocated to the contract exceeds reasonable requirements (including a reasonable accumulation of inventory for continuity of operations), the contracting officer should, in addition to requiring the transfer of excessive inventory from the contract, take one or more of the following actions, as necessary, to avoid or correct overpayment:

(1) Eliminate the costs of the excessive inventory from the costs eligible for progress payments, with appropriate reduction in progress payments outstanding.

(2) Apply additional deductions to billings for deliveries (increase liquidation).

(e) *Delinquency in payment of costs of performance.* (1) If the contractor is delinquent in paying the costs of contract performance in the ordinary course of business, the contracting officer shall evaluate whether the delinquency is caused by an unsatisfactory financial condition and, if so, shall apply the guidance in paragraph (c) above. If the contractor's financial condition is satisfactory, the contracting officer shall not deny progress payments if the contractor agrees to—

(i) Cure the payment delinquencies;

(ii) Avoid further delinquencies; and

(iii) Make additional arrangements adequate for completing the contract without loss to the Government.

(2) If the contractor has, in good faith, disputed amounts claimed by subcontractors, suppliers, or others, the contracting officer shall not consider the payments delinquent until the amounts due are established by the parties through litigation or arbitration. However, the amounts shall be excluded from costs eligible for progress payments so long as they are disputed.

(3) Determinations of delinquency in making contributions under employee pension, profit sharing, or stock ownership plans, and exclusion of costs for such contributions from progress payment requests, shall be in accordance with paragraph (a)(2) of the clause at 52.232-6, Progress Payments, without regard to the provisions of 32.503-6.

(f) *Fair value of undelivered work.* (1) For the purposes of subpart 32.5, the fair value of undelivered work is the lesser of (i) the contract price of the undelivered work, minus the estimated costs required for completing contract performance, or (ii) the incurred costs applicable to the undelivered items.

(2) The contracting officer shall monitor the relationship of unliquidated progress payments to the fair value of undelivered work under the contract. If the unliquidated progress payments exceed the fair value of undelivered work, the contracting officer shall, governed by the principles in paragraphs (c) and (e) above, take appropriate action to eliminate this excess using the loss ratio adjustment described in paragraph (g) below, and based on full consideration of—

(i) The degree of completion of contract performance;

(ii) The quality and amount of work performed on the undelivered portion of the contract;

(iii) The amount of work remaining to be done and the estimated costs of completion of performance; and

(iv) The amount remaining unpaid under the contract.

(g) *Loss contracts.* (1) If the sum of the total costs incurred under a contract plus the estimated costs to complete the performance are likely to exceed the contract price, the contracting officer shall compute a loss ratio factor and adjust future progress payments to exclude the element of loss. The loss ratio factor is computed as follows:

(i) Revise the current contract price used in progress payment computations (the current ceiling price under fixed-price incentive contracts) to include any pending change orders and unpriced orders to the extent funds for the orders have been obligated.

(ii) Divide the revised contract price by the sum of the total costs incurred to date plus the estimated additional costs of completing the contract performance.

(2) If the contracting officer believes a loss is probable, future progress payment requests shall be modified as follows:

(i) The contract price shall be the revised amount computed under subparagraph (1)(i) above.

(ii) The total costs eligible for progress payments shall be the product of (A) the sum of paid costs eligible for progress payments times (B) the loss ratio factor computed under subparagraph (1)(ii) above.

(iii) The costs applicable to items delivered, invoiced, and accepted shall not include costs in excess of the contract price of the items.

(3) The contracting officer may use audit assistance, technical services, management reports, and other sources of pertinent data to evaluate progress payment requests. If the contracting officer concludes that the contractor's figures in the contractor's progress payment request are not correct, the contracting officer shall—

(i) In the manner prescribed in paragraph (4) below, prepare a supplementary analysis to be attached to the contractor's request;

(ii) Advise the contractor in writing of the differences; and

(iii) Adjust all further progress payments in accordance with paragraph (1) above, using the contracting officer's figures, until the difference is resolved.

(4) The following is an example of the supplementary analysis required in paragraph (3) above:

Section I:
Contract price [illegible]

Change orders and unpriced orders (to extent funds have been obligated)	50,000
Revised contract price	$1,000,000
Section II:	
Total costs incurred to date	$900,000
Estimated additional costs to complete	300,000
Total costs to complete	$1,200,000

$$\text{Loss ratio factor} \quad \frac{\$1,000,000}{\$1,200,000} = 83.3\%$$

Total costs eligible for progress payments	$900,000
Loss ratio factor	× 83.3%
Recognized costs for progress payments	$749,700
Progress payment rate	× 80.0%
Alternate amount to be used	$599,760
Section III:	
Factored costs of items delivered *	$250,000
Recognized costs applicable to undelivered items ($749,700 – $250,000)	$499,700

* This amount shall be the same as the contract price of the items delivered.

[48 FR 42328, Sept. 19, 1983, as amended at 52 FR 30077, Aug. 12, 1987; 54 FR 5056, Jan. 31, 1989; 54 FR 48989, Nov. 28, 1989]

32.503-7 Limitation on general and administrative expenses (G&A) for progress payments.

If the contractor established an inventory suspense account under Appendix A of Cost Accounting Standard (CAS) 410, Allocation of Business Unit General and Administrative Expenses to Final Cost Objectives (4 CFR part 410), and the account is $5 million or more, the following limitations shall apply to progress payments:

(a) G&A shall not be eligible for progress payments until the value of work in process inventories under new contracts exceeds that under the old. For this purpose, new contracts shall be considered to be those awarded after CAS 410 became applicable to the work of the contractor. Old contracts are those included in the suspense account prescribed in CAS 410.

(b) The amount of G&A eligible for progress payments under the contract shall be the contractor's pro rata share of G&A allocable to the excess under paragraph (a) above.

32.503-8 Liquidation rates—ordinary method.

Progress payments are recouped by the Government through the deduction of liquidations from payments that would otherwise be due to the contractor for completed contract items. To determine the amount of the liquidation, a liquidation rate is applied to the contract price of contract items delivered and accepted. The ordinary method is that the liquidation rate is the same as the progress payment rate; at the beginning of a contract, only this method may be used. If the contract is subject to the CAS limitation in 32.503-7 on G&A eligible for progress payments, the ordinary method includes the use of an adjusted liquidation rate to reflect the applicable G&A suspense account. The adjusted liquidation rate shall be established by (a) dividing the unbilled G&A by the contract price, (b) multiplying the quotient by the progress payment rate stated in the contract, and (c) subtracting the resulting rate from the progress payment rate. For example, if the price is $1,100,000 and the unbilled G&A is $47,600, the adjusted liquidation rate would be 76.5 percent, computed as follows:

Unbilled G&A divided by contract price (47,600/1,100,000)	4.33%
Result x progress payment rate (4.33% x 80%)	3.46%
Result subtracted from progress payment rate (80% - 3.46%)	76.54%

[48 FR 42328, Sept. 19, 1983, as amended 52 FR 30077, Aug. 12, 1987]

32.503-9 Liquidation rates—alternate method.

(a) The liquidation rate determined under 32.503-8 shall apply throughout the period of contract performance unless the contracting officer adjusts the liquidation rate under the alternate method in this 32.503-9. The objective of the alternate liquidation rate method is to permit the contractor to retain the earned profit element of the contract prices for completed items in the liquidation process. The contracting officer may reduce the liquidation rate if—

(1) The contractor requests a reduction in the rate;

(2) The rate has not been reduced in the preceding 12 months;

(3) The contract delivery schedule extends at least 18 months from the contract award date;

(4) Data on actual costs are available (i) for the products delivered, or (ii) if no deliveries have been made, for a performance period of at least 12 months;

(5) The reduced liquidation rate would result in the Government recouping under each invoice the full extent of the progress payments applicable to the costs allocable to that invoice;

(6) The contractor would not be paid for more than the costs of items delivered and accepted (less allocable progress payments) and the earned profit on those items;

(7) The unliquidated progress payments would not exceed the limit prescribed in paragraph (a)(4) of the Progress Payments clause;

(8) The parties agree on an appropriate rate; and

(9) The contractor agrees to certify annually, or more often if requested by the contracting officer, that the alternate rate continues to meet the conditions of subsections 5, 6, and 7 above. The certificate must be accompanied by adequate supporting information.

(b) The contracting officer shall change the liquidation rate in the following circumstances:

(1) The rate shall be increased for both previous and subsequent transactions, if the contractor experiences a lower profit rate than the rate anticipated at the time the liquidation rate was established. Accordingly, the contracting officer shall adjust the progress payments associated with contract items already delivered, as well as subsequent progress payments.

(2) The rate shall be increased or decreased in keeping with the successive changes to the contract price or target profit when—

(i) The target profit is changed under a fixed-price incentive contract with successive targets; or

(ii) A redetermined price involves a change in the profit element under a contract with prospective price redetermination at stated intervals.

(c) Whenever the liquidation rate is changed, the contracting officer shall issue a contract modification to specify the new rate in the Progress Payments clause. Adequate consideration for these contract modifications is provided by the consideration included in the initial contract. The parties shall promptly make the payment or liquidation required in the circumstances.

32.503-10 Establishing alternate liquidation rates.

(a) The contracting officer shall ensure that the liquidation rate is—

(1) High enough to result in Government recoupment of the applicable progress payments on each billing; and

(2) Supported by documentation included in the administration office contract file.

(b) The minimum liquidation rate is the expected progress payments divided by the contract price. Each of these factors is discussed below:

(1) Usually, the contracting officer shall compute the expected progress payments by multiplying the estimated cost of performing the contract by the progress payment rate. In certain cases, part of the contractor's G&A is excluded from the estimated cost for the purpose of calculating expected progress payments for the liquidation rate. These cases pertain to the implementation of CAS 410 (see 32.503-7 and 32.503-8).

(2) For purposes of computing the liquidation rate, the contracting officer may adjust the estimated cost and the contract price to include the estimated value of any work authorized but not yet priced and any projected economic adjustments; however, the contracting officer's adjustment shall not exceed the Government's estimate of the price of all authorized work or the funds obligated for the contract.

(3) The following are examples of the computation. Assuming an estimated price of $1,100,000 and total estimated costs eligible for progress payments of $1,000,000:

(i) If the progress payment rate is 80 percent, the minimum liquidation rate should be 72.7 percent, computed as follows:

$$\frac{(\$1{,}000{,}000 \times 80\%)}{\$1{,}100{,}000} = 72.7\%$$

(ii) If the progress payment rate is 85 percent, the minimum liquidation rate should be 77.3 percent, computed as follows:

$$\frac{(\$1{,}000{,}000 \times 85\%)}{\$1{,}100{,}000} = 77.3\%$$

(iii) If the contract is subject to CAS limitation on G&A eligible for progress payments (see 32.503-7), an adjusted alternate liquidation rate shall be established by subtracting the estimated G&A not eligible for progress payments from the total estimated contract costs. For example, if the price is $1,100,000, costs are $1,000,000, and unbilled G&A is $47,600, the liquidation rate should be 69.3 percent, computed as follows:

$$\frac{(\$1{,}000{,}000 - \$47{,}600)}{\$1{,}100{,}000} \times 80\% = 69.3\%$$

(4) Minimum liquidation rates will generally be expressed to tenths of a percent. Decimals between tenths will be rounded up to the next highest tenth (not necessarily the nearest tenth), since rounding down would produce a rate below the minimum rate calculated.

[48 FR 42328, Sept. 19, 1983, as amended 52 FR 30077, Aug. 12, 1987]

32.503-11 Adjustments for price reduction.

(a) If a retroactive downward price reduction occurs under a redeterminable contract that provides for progress payments, the contracting officer shall—

(1) Determine the refund due and obtain repayment from the contractor for the excess of payments made for delivered items over amounts due as recomputed at the reduced prices; and

(2) Increase the unliquidated progress payments amount for overdeductions made from the contractor's billings for items delivered.

(b) The contracting officer shall also increase the unliquidated progress payments amount if the contractor makes an interim or voluntary price reduction under a redeterminable or incentive contract.

2.503-12 Maximum unliquidated amount.

(a) The contracting officer shall ensure that any excess of the unliquidated progress payments over the contractual limitation in paragraph (a) of the Progress Payments clause in the contract is promptly corrected through one or more of the following actions:

(1) Increasing the liquidation rate.

(2) Reducing the progress payment rate.

(3) Suspending progress payments.

(b) The excess described in paragraph (a) above is most likely to arise under the following circumstances:

(1) The costs of performance exceed the contract price.

(2) The alternate method of liquidation (see 32.503-9) is used and the actual costs of performance exceed the cost estimates used to establish the liquidation rate.

(3) The rate of progress or the quality of contract performance is unsatisfactory.

(4) The rate of rejections, waste, or spoilage is excessive.

(c) As required, the services of the cognizant independent audit agency or office should be fully utilized, along with the services of qualified cost analysis and engineering personnel.

32.503-13 Quarterly statements for price revision contracts.

Under price revision or redeterminable contracts that include progress payments clauses, the contracting officer shall occasionally compare the quarterly statements submitted under the price revision or renegotiation clause at 52.216-5, 52.216-6, 52.216-16, or 52.216-17 with the contractor's requests for progress payments. The contracting officer should ensure, as far as is reasonably possible, that costs of delivered items in the quarterly statements are excluded from the costs of undelivered items (the basis for unliquidated progress payments) in the contractor's request for progress payments.

32.503-14 Protection of Government title.

(a) Since the Progress Payments clause gives the Government title to all of the materials, work-in-process, finished goods, and other items of property described in paragraph (d) of the Progress Payments clause, under the contract under which progress payments have been made, the ACO must ensure that the Government title to these inventories is not compromised by other encumbrances. Ordinarily, the ACO, in the absence of reason to believe otherwise, may rely upon the contractor's certification contained in the progress payment request.

(b) If the ACO becomes aware of any arrangement or condition that would impair the Government's title to the property affected by progress payment, the ACO shall require additional protective provisions (see 32.501-5) to establish and protect the Government's title.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the ACO may, if necessary, suspend or reduce progress payments under the terms of the Progress Payments clause covering failure to comply with any material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the progress payments certification, the ACO should consult with legal counsel concerning possible violation of 31 U.S.C. 3729, the False Claims Act.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.503-15 Application of Government title terms.

(a) Property to which the Government obtains title by operation of the Progress Payments clause solely is not, as a consequence, Government-furnished property.

(b) Although property title is vested in the Government under the Progress Payments clause, the acquisition, handling, and disposition of certain types of property are governed by other clauses, as follows:

(1) The clause at 52.245-17, Special Tooling, for special tooling.

(2) The termination clauses at 52.249, for termination inventory.

(c) The contractor may sell or otherwise dispose of current production scrap in the ordinary course of business on its own volition, even if title has vested in the Government under the Progress Payments clause. The contracting officer shall require the contractor to credit the costs of the contract performance with the proceeds of the scrap disposition.

(d) When the title to materials or other inventories is vested in the Government under the Progress Payments clause, the contractor may transfer the inventory items from the contract for its own use or other disposition only if, and on terms, approved by the contracting officer. The contractor shall (1) eliminate the costs allocable to the transferred property from the costs of contract performance, and (2) repay or credit to the Government an amount equal to the unliquidated progress payments, allocable to the transferred property.

(e) If excess property remains after the contract performance is complete and all contractor obligations under the contract are satisfied, including full liquidation of progress payments, the excess property is outside the scope of the Progress Payments clause. Therefore, the contractor holds title to it.

32.503-16 Risk of loss.

(a) Under the Progress Payments clause, and except for normal spoilage, the contractor bears the risk for loss, theft, destruction, or damage to property affected by the clause, even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in this regulation related to progress payments, default, and terminations do not constitute a Government assumption of this risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk, the contractor is obligated to repay to the Government the amount of unliquidated progress payments based on costs allocable to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss may impede the satisfactory progress of contract performance, so that the contracting officer may need to act under paragraph (c)(5) of the Progress Payments clause.

32.504 Subcontracts.

(a) The contracting officer shall encourage the contractor to provide progress payments to subcontractors on terms that meet the standards in 32.502-1 for customary progress payments.

(b) The contractor's requests for progress payments may include the full amount paid to subcontractors as progress payments under the contract and subcontracts.

(c) If the contractor is considering making unusual progress payments to a subcontractor, the parties shall be guided by the policies in 32.501-2. If unusual progress payments for the subcontract are approved by the Government, the contracting officer shall issue a contract modification to specify the new rate in subdivision (j)(4) of the Progress Payments clause in the prime contract. This will allow the contractor to include the progress payments to the subcontractor in the cost basis for progress payments by the Government. This modification shall not be considered a deviation and shall not require the clearance prescribed in 32.502-2(b).

(d) The contractor has a duty to ensure that progress payments to subcontractors conform to the standards and principles prescribed in paragraph (j) of the Progress Payments clause in the prime contract. Although the contracting officer should, to the extent appropriate, review the subcontract as part of the overall administration of progress payments in the prime contract, there is no special requirement for contracting officer review or consent merely because the subcontract includes a progress payments clause except as provided in paragraph (c) above. However, the contracting officer shall ensure that the contractor has installed the necessary management control systems, including internal audit procedures.

(e) The subcontract terms shall include the substance of the Progress Payments clause in the prime contract, modified to indicate that the contractor, not the Government, awards the subcontract and administers the progress payments. The following exceptions apply to wording modifications:

(1) The subcontract terms on title to property under progress payments shall provide for vesting of title in the Government, not the contractor, as in paragraph (d) of the Progress Payments clause in the prime contract. A reference to the contractor may, however, be substituted for *Government* in subdivision (d)(2)(iv) of the clause.

(2) In the subcontract terms on reports and access to records, the contractor shall not delete the references to *Contracting Officer* and *Government* in adapting paragraph (g) of the Progress Payments clause in the contract, but may expand the terms as follows:

(i) The term *Contracting Officer* may be changed to *Contracting Officer or Prime Contractor.*

(ii) The term *the Government* may be changed to *the Government or Prime Contractor.*

(3) The subcontract special terms regarding default shall include paragraph (h) of the Progress Payments clause in the contract through its subdivision (i). The rest of paragraph (h) is optional.

(f) If the contractor makes progress payments to a subcontractor under a cost-reimbursement prime contract, the contracting officer shall accept the progress payments as reimbursable costs of the prime contract only under the following conditions:

(1) The payments are made under the criteria in 32.502-1 for customary progress payments.

(2) The payments do not exceed the progress payment rate in 32.501-1 unless unusual progress payments to the subcontractor have been approved in accordance with 32.501-2.

(3) The subcontractor complies with the liquidation principles of 32.503-8, 32.503-9, and 32.503-10.

(4) The subcontract contains progress payments terms as prescribed in this section.

[48 FR 42328, Sept. 19, 1983, as amended at 52 FR 9039, Mar. 20, 1987]

Subpart 32.6—Contract Debts

32.600 Scope of subpart.

This subpart prescribes policies and procedures for the Government's actions in ascertaining and collecting contract debts, charging interest on the debts, deferring collections, and compromising and terminating certain debts.

32.601 Definition.

Responsible official, as used in this subpart, means the contracting officer (see subpart 2.1) or other official designated under agency procedures to administer the collection of contract debts and applicable interest.

32.602 General.

The contract debts covered in this subpart arise in various ways. The following are some examples:

(a) Damages or excess costs related to defaults in performance.

(b) Breach of contract obligations concerning progress payments, advance payments, or Government-furnished property or material.

(c) Government expense of correcting defects.

(d) Overpayments related to errors in quantity or billing or deficiencies in quality.

(e) Retroactive price reductions resulting from contract terms for price redetermination or for determination of prices under incentive type contracts.

(f) Overpayments disclosed by quarterly statements required under price redetermination or incentive contracts.

(g) Delinquency in contractor payments due under agreements or arrangements for deferral or postponement of collections.

32.603 Applicability.

Except as otherwise specified, this subpart applies to all debts to the Government arising in connection with contracts and subcontracts for the acquisition of supplies or services.

32.604 Exclusions.

This subpart does not apply to claims of the Government against military or civilian employees or their dependents arising in connection with current or past employment by the Government. Sections 32.613, 32.614, and 32.616 do not apply to claims against common carriers for transportation overcharges and freight and cargo losses.

32.605 Responsibilities and cooperation among Government officials.

(a) To protect the Government's interests, contracting officers, contract financing offices, disbursing officials, and auditors shall cooperate fully with each other to—

(1) Discover promptly when a contract debt arises;

(2) Ascertain the correct amount of the debt;

(3) Act promptly and effectively to collect the debt;

(4) Administer deferment of collection agreements; and

(5) Provide up-to-date information on the status of the debt.

(b) For most kinds of contract debts, the contracting officer has the primary responsibility for determining the amounts of and collecting contract debt. Under some agency procedures, however, the individual who is responsible for payment under the contract, e.g., the disbursing officer, may have this primary responsibility.

32.606 Debt determination and collection.

(a) If any indication of a contract debt arises, the responsible official shall determine promptly whether an actual debt is due the Government and the amount. Any unwarranted delay may contribute to—

(1) Loss of timely availability of the funds to the program for which the funds were initially provided;

(2) Increased difficulty in collecting the debt; or

(3) Actual monetary loss to the Government.

(b) In determining the amount of any contract debt, the responsible official shall fairly consider both the Government's claim and any contract claims by the contractor against the Government. This determination does not constitute a settlement of such claims, nor is it a contracting officer's final determination under the Contract Disputes Act of 1978.

(c) The responsible official shall establish a control record for each contract debt, to include at least the following information:

(1) The name and address of the contractor.

(2) The contract number, if any.

(3) A description of the debt.

(4) The amount of debt and the appropriation to be credited.

(5) The date the debt was determined.

(6) The dates of demands for payment.

(7) The amounts and dates of collections, as they occur.

(8) The date of any appeal filed or action brought in the Court of Claims under the Disputes clause.

(9) The status of collections. Examples include—

(i) Actions reported to the disbursing officer (name, location, and date);

(ii) Funds requested to be withheld by the disbursing officer;

(iii) Funds requested to be withheld by other offices (date and office);

(iv) Deferment or installment payment arrangement requested;

(v) Deferment or installment request reviewed;

(vi) Supplemental information requested to support deferment requests; and

(vii) Actions transferred to the conract financing office.

(d) Except in cases in which an agreement has been entered into for deferment of collections (32.613) or bankruptcy proceedings against the contractor have been initiated, the contractor shall be required to liquidate the debt by—

(1) Cash payment in a lump sum, on demand; or

(2) Credit against existing unpaid bills due the contractor.

(e) The responsible officials shall use all proper means available to them for collecting debts as rapidly as possible. Practices for ascertaining and collecting debts shall be comprehensive, dynamic, and as uniform as practicable. Full consideration shall be given to personal contact and followup.

[48 FR 42328, Sept. 19, 1983, as amended at 55 FR 38517, Sept. 18, 1990]

32.607 Tax credit.

(a) If the contractor is entitled to a tax credit under section 1481 of the Internal Revenue Code (26 U.S.C. 1481) and requests recognition of the credit in the debt collection, the responsible official shall comply.

(b) The tax credit shall be considered to reduce the amount of the debt as of the date when interest on the debt begins to accrue.

(c) The amount of the debt reduction shall be the amount of the tax credit certificate, if a certificate was issued by the Internal Revenue Service (IRS). If the IRS has not yet issued a certificate, the responsible official may accept the contractor's estimate of the tax credit amount until the certificate is issued, subject to any verification that the responsible official considers appropriate.

(d) A reduction for a tax credit does not apply to a debt arising from a subcontract.

32.608 Negotiation of contract debts.

(a) The responsible official shall ensure that any negotiations concerning debt determinations are completed expeditiously. If consistent with the contract, the official shall make a unilateral determination promptly if the contractor is delinquent in any of the following actions:

(1) Furnishing pertinent information.

(2) Negotiating expeditiously.

(3) Entering into an agreement on a fair and reasonable price revision.

(4) Signing an interim memorandum evidencing a negotiated pricing agreement involving refund.

(5) Executing an appropriate contract modification reflecting the result of negotiations.

(b) The amount of indebtedness determined unilaterally shall be an amount that—

(1) Is proper based on the merits of the case;

(2) Does not exceed an amount that would have been considered acceptable in a negotiated agreement; and

(3) Is consistent with the contract terms.

(c) For unilateral debt determinations, the contracting officer shall issue a decision as required by the clause at 52.233-1, Disputes. Such decision shall include a demand for payment (see 33.211(a)(4)(vi)). No demand for payment under 32.610 shall be issued prior to a contracting officer's final decision. A copy of the final decision shall be sent to the appropriate finance office.

[48 FR 42328, Sept. 19, 1983, as amended at 54 FR 34755, Aug. 21, 1989]

32.609 Memorandum of pricing agreement with refund.

(a) If a refund to the Government is agreed upon in negotiations under a price revision type of contract, the responsible official shall promptly write a memorandum to document the agreement and the contract debt. The memorandum shall be signed by the negotiators for the Government and the contractor. If the procedures of either the agency or the contractor require approval of the negotiation results by higher authority, the memorandum shall be written without prejudice to the final pricing. After negotiations are completed, a supplemental agreement shall be executed without delay.

(b) The amount of refund shall be computed promptly, without waiting for itemization of adjustment of past billings, accounting adjustments, or the adjusted invoices.

32.610 Demand for payment of contract debt.

(a) A demand for payment shall be made as soon as the responsible official has computed the amount of refund due. If the debt arises from excess costs for a default termination, the demand shall be made without delay, as explained in 49.402-6.

(b) The demand shall include the following:

(1) A description of the debt, including the debt amount.

(2) Notification that any amounts not paid within 30 days from the date of the demand will bear interest from the date of the demand, or from any earlier date specified in the contract and that the interest rate shall be the rate established by the Secretary of the Treasury, for the period affected, under 50 U.S.C. App. 1215(b)(2).

(3) A notification that the contractor may submit a proposal for deferment of collection if immediate payment is not practicable or if the amount is disputed.

(4) Identification of the responsible official designated for determining the amount of the debt and for its collection.

(c) If subparagraph (b)(3) of the clause at 52.232-17, Interest, applies, the demand mentioned in paragraph (a) above shall accompany or be included in the transmittal mentioned in the clause.

[48 FR 42328, Sept. 19, 1983, as amended at 54 FR 34755, Aug. 21, 1989]

32.611 Routine setoff.

If a disbursing officer is the responsible official for collection of a contract debt, or is notified of the debt by the responsible official and has contractor invoices on hand for payment, the disbursing officer shall make an appropriate setoff. The disbursing officer shall give the contractor an explanation of the setoff. To the extent that the setoff reduces the debt, the explanation shall replace the demand prescribed in 32.610.

32.612 Withholding and setoff.

During the 30 days following the issuance of a demand, the advisability of withholding payments otherwise due to the contractor shall be considered based on the circumstances of the individual cases. If payment is not completed within 30 days, and deferment is not requested, withholding of principal and interest shall be initiated immediately. In the event the contract is assigned under the Assignment of Claims Act of 1940 (31 U.S.C. 3727 and 41 U.S.C. 15), the rights of the assignee will be scrupulously respected and withholding of payments shall be consistent with those rights. For additional information on assignment of claims, see subpart 32.8.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.613 Deferment of collection.

(a) If the responsible official receives a written request from the contractor for a deferment of the debt collection or installment payments, the official shall promptly review the request to see if the information included is adequate for action on the request. If not, the contractor shall be asked to furnish the needed information. Any necessary changes to the terms of the proposed deferment/installment agreement shall also be suggested.

(b) If the contractor has appealed the debt under the procedures of the Disputes clause of the contract, the information with the request for deferment may be limited to an explanation of the contractor's financial condition.

(c) If there is no appeal pending or action filed under the Disputes clause of the contract, the following information about the contractor should be submitted with the request:

(1) Financial condition.

(2) Contract backlog.

(3) Projected cash receipts and requirements.

(4) The feasibility of immediate payment of the debt.

(5) The probable effect on operations of immediate payment in full.

(d) Although the existence of a contractor appeal of the debt does not of itself require the Government to suspend or delay collection action, the responsible official shall consider whether deferment of the debt collection is advisable to avoid possible overcollection. The responsible official may authorize a deferment pending the resolution of appeal.

(e) Deferments pending disposition of appeal may be granted to small business concerns and financially weak contractors, with a reasonable balance of the need for Government security against loss and undue hardship on the contractor.

(f) If a contractor has not appealed the debt or filed an action under the Disputes clause of the contract, the responsible official may arrange for deferment/installment payments if the contractor is unable to pay at once in full or the contractor's operations under national defense contracts would be seriously impaired. The arrangement shall include appropriate covenants and securities and should be limited to the shortest practicable maturity.

(g) Contracts and arrangements for deferment may not provide that a claim of the Government will not become due and payable pending mutual agreement on the amount of the claim or, in the case of a dispute, until the decision is reached.

(h) At a minimum, the deferment agreement shall contain the following:

(1) A description of the debt.

(2) The date of first demand for payment.

(3) Notice of an interest charge, in conformity with 32.614 and the clause at 52.232-17, Interest.

(4) Identification of the office to which the contractor is to send debt payments.

(5) A requirement for the contractor to submit financial information requested by the Government and for reasonable access to the contractor's records and property by Government representatives.

(6) Provision for the Government to terminate the deferment agreement and accelerate the maturity of the debt if the contractor defaults or if bankruptcy or insolvency proceedings are instituted by or against the contractor.

(7) Protective requirements that are considered by the Government to be prudent and feasible in the specific circumstances. The coverage of protective terms at 32.409 and 32.501-5 may be used as a guide.

(i) If a contractor appeal of the debt determination is pending, the deferment agreement shall also include a requirement that the contractor shall—

(1) Diligently prosecute the appeal; and

(2) Pay the debt in full when the appeal is decided, or when the parties reach agreement on the debt amount.

(j) If the contractor does not plan to appeal the debt or file an action under the Disputes clause of the contract, the deferment/installment agreement shall include a specific schedule or plan for payment. It should permit the Government to make periodic financial reviews of the contractor and to require prepayments if the Government considers the contractor's ability to pay improved. It should also provide for required stated or measurable prepayments on the occurrence of specific events or contingencies that improve the contractor's ability to pay.

(k) If desired by the contractor, the deferment agreement may provide for the right to make prepayments without prejudice, for refund of overpayments, and for crediting of interest (see 32.614-2).

(l) Actions filed by contractors under the Disputes clause shall not suspend or delay collection. Until the action is decided, deferments shall only be granted if, within 30 days after the filing of such action, the contractor presents to the responsible official a good and sufficient bond, or other collateral acceptable to the responsible official, in the amount of the claim, and approved by the responsible official. Any amount collected by the Government in excess of the amount found to be due on appeal under the Disputes clause of the contract shall be refunded to the contractor with interest thereon from the date of collection by the Government at the annual rate established by the Secretary of Treasury under 50 U.S.C. App. 1215(b)(2). Simple interest shall be calculated through the period of indebtedness to reflect each 6-month period change in the rates established by the Secretary.

32.614 Interest.

32.614-1 Interest charges.

(a) Under the clause at 52.232-17, Interest, the responsible official shall apply interest charges to any contract debt unpaid after 30 days from the issuance of a demand, unless—

(1) The contract specifies another due date or procedure for charging or collecting interest;

(2) The contract is a kind excluded under 32.617; or

(3) The contract or debt has been exempted from interest charges under agency procedures.

(b) If not already applicable under the contract terms, interest on contract debt shall be made an element of any agreement entered into on deferment of collection.

(c) The interest charge shall be at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2) for the period in which the amount becomes due. The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

(1) The date on which the designated office receives payment from the contractor;

(2) The date of issuance of a Government check to the contractor from which an amount otherwise payable has been withheld as a credit against the contract debt;

(3) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the contractor; or

(4) The date of any applicable tax credit under 32.607.

32.614-2 Interest credits.

(a) An equitable interest credit shall be applied under the following circumstances:

(1) When the amount of debt initially determined is subsequently reduced; e.g., through a successful appeal.

(2) When the collection procedures followed in a given case result in an overcollection of the debt due.

(3) When the responsible official determines that the Government has unduly delayed payments to the con-

tractor on the same contract at some time during the period to which the interest charge applied, provided an interest penalty was not paid for such late payment.

(b) Any appropriate interest credits shall be computed under the following procedures:

(1) Interest at the rate under 32.614-1(c) shall be charged on the reduced debt from the date specified in the first demand made for payment of the higher debt.

(2) Interest may not be reduced for any time between the due date under the demand and the period covered by a deferment of collection, unless the contract includes an interest clause; e.g., the clause prescribed in 32.617.

(3) Interest shall not be credited in an amount that, when added to other amounts refunded or released to the contractor, exceeds the total amount that has been collected, or withheld for the purpose of collecting the debt. This limitation shall be further reduced by the amount of any limitation applicable under 32.614-2(b)(2).

32.615 Delays in receipt of notices or demands.

If delivery of the demands or notices required by the clause at 52.232-17, Interest, is delayed by the Government (e.g., undue delay after dating at the originating office or delays in the mail), the date of the debt and accrual of interest shall be extended to a time that is fair and reasonable under the particular circumstances.

32.616 Compromise actions.

For debts under $20,000, excluding interest, if further collection is not practicable or would cost more than the amount of recovery, the agency may compromise the debt or terminate or suspend further collection action. Compromise is authorized by the Federal Claims Collection Act of 1966 (31 U.S.C. 3711). Compromise actions shall conform to Federal claims collection standards (4 CFR 101-105), and agency regulations.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.617 Contract clause.

(a) The contracting officer shall insert the clause at 52.232-17, Interest, in solicitations and contracts, unless it is contemplated that the contract will be in one or more of the following categories:

(1) Small purchases.

(2) Contracts with Government agencies.

(3) Contracts with a State or local government or instrumentality.

(4) Contracts with a foreign government or instrumentality.

(5) Contracts without any provision for profit or fee with a nonprofit organization.

(6) Contracts described in subpart 5.5, Paid advertisements.

(7) Any other exceptions authorized under agency procedures.

(b) The contracting officer may insert the clause at 52.232-17, Interest, in solicitations and contracts when it is contemplated that the contract will be in any of the categories specified in 32.617(a).

Subpart 32.7—Contract Funding

32.700 Scope of subpart.

This subpart (a) describes basic requirements for contract funding and (b) prescribes procedures for using limitation of cost or limitation of funds clauses. Detailed acquisition funding requirements are contained in agency fiscal regulations.

32.701 [Reserved]

32.702 Policy.

No officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, 31 U.S.C. 1341), unless otherwise authorized by law. Before executing any contract, the contracting officer shall (a) obtain written assurance from responsible fiscal authority that adequate funds are available or (b) expressly condition the contract upon availability of funds in accordance with 32.703-2.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.703 Contract funding requirements.

32.703-1 General.

(a) If the contract is fully funded, funds are obligated to cover the price or target price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract.

(b) If the contract is incrementally funded, funds are obligated to cover the amount allotted and any corresponding increment of fee.

32.703-2 Contracts conditioned upon availability of funds.

(a) *Fiscal year contracts.* The contracting officer may initiate a contracting action properly chargeable to funds of the new fiscal year before these funds are available; *provided,* that the contract includes the clause at 52.232-18, Availability of Funds (see 32.705-1(a)). This authority may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) (1) necessary for normal operations and (2) for which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements.

(b) *Indefinite-quantity or requirements contracts.* A one-year indefinite-quantity or requirements contract for services that is funded by annual appropriations may extend beyond the fiscal year in which it begins; *provided,* that (1) any specified minimum quantities are certain to be ordered in the initial fiscal year (see 37.106) and (2) the contract includes the clause at 52.232-19, Availability of Funds for the Next Fiscal Year (see 32.705-1(b)).

(c) *Acceptance of supplies or services.* The Government shall not accept supplies or services under a contract conditioned upon the availability of funds until the contracting officer has given the contractor notice, to be confirmed in writing, that funds are available.

32.703-3 Contracts crossing fiscal years.

A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (see 41 U.S.C. 11a,
31 U.S.C. 1308, and 42 U.S.C. 2459
or when the contract calls for an e
product that cannot feasibly be sub
vided for separate performance
each fiscal year (e.g., contracts f
expert or consultant services).

[48 FR 42328, Sept. 19, 1983, as amended
51 FR 2665, Jan. 17, 1986]

32.704 Limitation of cost or funds.

(a) (1) When a contract contains t
clause at 52.232-20, Limitation of Co
52.232-21, Limitation of Cost (Fac
ties); or 52.232-22, Limitation
Funds, the contracting officer, up
learning that the contractor is
proaching the estimated cost of t
contract or the limit of the funds
lotted, shall promptly obtain fundi
and programming information pe
nent to the contract's continuati
and notify the contractor in writi
that—

(i) Additional funds have been all
ted, or the estimated cost has been
creased, in a specified amount;

(ii) The contract is not to be furth
funded and that the contractor sho
submit a proposal for an adjustme
of fee, if any, based on the percent
of work completed in relation to
total work called for under the c
tract;

(iii) The contract is to be termin
ed; or

(iv) (A) The Government is consid
ing whether to allot additional fu
or increase the estimated cost, (B)
contractor is entitled by the contr
terms to stop work when the fund
or cost limit is reached, and (C)
work beyond the funding or cost li
will be at the contractor's risk.

(2) Upon learning that a parti
funded contract containing any of
clauses referenced in subparagraph
above will receive no further fu
the contracting officer shall prom
give the contractor written notice
the decision not to provide funds.

(b) Under a cost-reimbursement c
tract, the contracting officer may is
a change order, a direction to repl
or repair defective items or work, c
termination notice without immedi
ly increasing the funds available. Si
a contractor is not obligated to in
costs in excess of the estimated cos

the contract, the contracting officer shall ensure availability of funds for directed actions. The contracting officer may direct that any increase in the estimated cost or amount allotted to a contract be used for the sole purpose of funding termination or other specified expenses.

(c) Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes Section 3679 (31 U.S.C. 1341) that may subject the violator to civil or criminal penalties.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.705 Contract clauses.

32.705-1 Clauses for contracting in advance of funds.

(a) The contracting officer shall insert the clause at 52.232-18, Availability of Funds, in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contracting action is to be initiated before the funds are available.

(b) The contracting officer shall insert the clause at 52.232-19, Availability of Funds for the Next Fiscal Year, in solicitations and contracts if a one-year indefinite-quantity or requirements contract for services is contemplated and the contract (a) is funded by annual appropriations and (b) is to extend beyond the initial fiscal year (see 32.703-2(b)).

32.705-2 Clauses for limitation of cost or funds.

(a) The contracting officer shall insert the clause at 52.232-20, Limitation of Cost, in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated, except those for consolidated facilities, facilities acquisition, or facilities use, whether or not the contract provides for payment of a fee.

(b) The contracting officer shall insert the clause at 52.232-21, Limitation of Cost (Facilities), in solicitations and contracts for consolidated facilities, facilities acquisition, or facilities use (see 45.301).

(c) The contracting officer shall insert the clause at 52.232-22, Limitation of Funds, in solicitations and contracts if an incrementally funded cost-reimbursement contract is contemplated.

Subpart 32.8—Assignment of Claims

32.800 Scope of subpart.

This subpart prescribes policies and procedures for the assignment of claims under the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 3727 (hereafter referred to as *the Act*).

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

32.801 Definitions.

Assignment of claims, as used in this subpart, means the transfer or making over by the contractor to a bank, trust company, or other financing institution, as security for a loan to the contractor, of its right to be paid by the Government for contract performance.

Designated agency, as used in this subpart, means any agency authorized to include a no-setoff commitment in its contracts. The designated agencies are the Department of Defense, the General Services Administration, the National Aeronautics and Space Administration, the Federal Aviation Administration, and any other agency authorized by statute or designated by the President.

No-setoff commitment, as used in this subpart, means a contractual undertaking that, to the extent permitted by the Act, payments by the designated agency to the assignee under an assignment of claims will not be reduced to liquidate the indebtedness of the contractor to the Government.

32.802 Conditions.

Under the Assignment of Claims Act, a contractor may assign moneys due or to become due under a contract if all the following conditions are met:

(a) The contract specifies payments aggregating $1,000 or more.

(b) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency.

(c) The contract does not prohibit the assignment.

(d) Unless otherwise expressly permitted in the contract, the assignment—

(1) Covers all unpaid amounts payable under the contract;

(2) Is made only to one party, except that any assignment may be made to one party as agent or trustee for two or more parties participating in the financing of the contract; and

(3) Is not subject to further assignment.

(e) The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the—

(1) Contracting officer or the agency head;

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

32.803 Policies.

(a) Any assignment of claims that has been made under the Act to any type of financing institution listed in 32.802(b) may thereafter be further assigned and reassigned to any such institution if the conditions in 32.802(d) and (e) continue to be met.

(b) A contract may prohibit the assignment of claims if the agency determines the prohibition to be in the Government's interest.

(c) Under a requirements or indefinite quantity type contract that authorizes ordering and payment by multiple Government activities, amounts due for individual orders for $1,000 or more may be assigned.

(d) Each designated agency (see 32.801) may include a no-setoff commitment only in time of war or national emergency in any contract permitting the assignment of claims. In such times there should be special considerations to justify a determination that exclusion of a no-setoff commitment is in the Government's interest.

(e) When an assigned contract does not include a no-setoff commitment, the Government may apply against payments to the assignee any liability of the contractor to the Government arising independently of the assigned contract if the liability existed at the time notice of the assignment was received even though that liability ha not yet matured so as to be due an payable.

32.804 Extent of assignee's protection.

(a) No payments made by the Government to the assignee under an contract assigned in accordance wit the Act may be recovered on accoun of any liability of the contractor t the Government. This immunity o the assignee is effective whether th contractor's liability arises from or independently of the assigned contract.

(b) Except as provided in paragrap (c) below, the inclusion of a no-setof commitment in an assigned contrac entitles the assignee to receive contract payments free of reduction o setoff for—

(1) Any liability of the contractor t the Government arising independentl of the contract; and

(2) Any of the following liabilities o the contractor to the Governmen arising from the assigned contract:

(i) Renegotiation under any statut or contract clause.

(ii) Fines.

(iii) Penalties, exclusive of amount that may be collected or witheld fro the contractor under, or for failure t comply with, the terms of the contract.

(iv) Taxes or social security contributions.

(v) Withholding or nonwithholdin of taxes or social security contributions.

(c) In some circumstances, a setof may be appropriate even though th assigned contract includes a no-setof commitment, e.g.—

(1) When the assignee has neithe made a loan under the assignment no made a commitment to do so; or

(2) To the extent that the amoun due on the contract exceeds th amount of any loans made or expecte to be made under a firm commitmen for financing.

32.805 Procedure.

(a) *Assignments*. (1) Assignments b corporations should be (i) executed b an authorized representative, (ii) attested by the secretary or the assistan secretary of the corporation, and (iii) impressed with the corporate seal or accompanied by a certified copy of the resolution of the corporation's board of directors authorizing the signing representative to execute the assignment.

(2) If the contractor is a partnership, the assignment may be signed by one partner, if it is accompanied by an acknowledged certification that the signer is a general partner of the partnership.

(3) If the contractor is an individual, the assignment must be signed by that individual and the signature acknowledged before a notary public or other person authorized to administer oaths.

(b) *Filing.* The assignee shall forward to each party specified in 32.802(e) an original and three copies of the notice of assignment, together with one true copy of the instrument of assignment. The true copy shall be a certified duplicate or photostat copy of the original assignment.

(c) *Format for notice of assignment.* The following is a suggested format for use by an assignee in providing the notice of assignment required by 32.802(e).

NOTICE OF ASSIGNMENT

TO: ——— [*address to one of the parties specified in 32.802(e)*].

This has reference to Contract No. ——— dated ———, entered into between ——— [*contractor's name and address*] and ——— [*government agency, name of office, and address*], for ——— [*describe nature of the contract*].

Moneys due or to become due under the contract described above have been assigned to the undersigned under the provisions of the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 3727, 41 U.S.C. 15.

A true copy of the instrument of assignment executed by the Contractor on ——— [*date*], is attached to the original notice.

Payments due or to become due under this contract should be made to the undersigned assignee.

Please return to the undersigned the three enclosed copies of this notice with appropriate notations showing the date and hour of receipt, and signed by the person acknowledging receipt on behalf of the addressee.

Very truly yours,

____

[*name of assignee*]

By ______________________

[*signature of signing officer*

Title ______________________

[*title of signing officer*]

____

____

[*address of assignee*]

ACKNOWLEDGEMENT

Receipt is acknowledged of the above notice and of a copy of the instrument of assignment. They were received at ——— (a.m.) (p.m.) on ———, 19———.

____

[*signature*]

____

[*title*]

____

On behalf of

____

[*name of addressee of this notice*]

(d) *Examination by the Government.* In examining and processing notices of assignment and before acknowleging their receipt, contracting officers should assure that the following conditions and any additional conditions specified in agency regulations, have been met:

(1) The contract has been properly approved and executed.

(2) The contract is one under which claims may be assigned.

(3) The assignment covers only money due or to become due under the contract.

(e) *Release of assignment.* (1) A release of an assignment is required whenever—

(i) There has been a further assignment or reassignment under the Act; or

(ii) The contractor wishes to reestablish its right to receive further payments after the contractor's obligations to the assignee have been satisfied and a balance remains due under the contract.

(2) The assignee, under a further assignment or reassignment, in order to establish a right to receive payment from the Government, must file with the addressees listed in 32.802(e) a—

(i) Written notice of release of the contractor by the assigning financing institution;

(ii) Copy of the release instrument;

(iii) Written notice of the further assignment or reassignment; and

(iv) Copy of the further assignment or reassignment instrument.

(3) If the assignee releases the contractor from an assignment of claims under a contract, the contractor, in order to establish a right to receive payment of the balance due under the contract, must file a written notice of release together with a true copy of the release of assignment instrument with the addressees noted in 32.802(e).

(4) The addressee of a notice of release of assignment or the official acting on behalf of that addressee shall acknowledge receipt of the notice.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986; 52 FR 9039, Mar. 20, 1987]

32.806 Contract clauses.

(a) (1) The contracting officer shall insert the clause at 52.232-23, Assignment of Claims, in solicitations and contracts when the contract amount is expected to be $1,000 or more, unless the contract will prohibit the assignment of claims (see 32.803(b)). The use of this clause is not required for purchase orders. However, the clause may be used in purchase orders for $1,000 or more that are accepted in writing by the contractor, if such use is consistent with agency policies and regulations.

(2) If a no-setoff commitment is to be included in the contract (see 32.801 and 32.803(d)) and the contract is expected to be for $1,000 or more, the contracting officer shall use the clause with its Alternate I.

(b) The contracting officer shall insert the clause at 52.232-24, Prohibition of Assignment of Claims, in solicitations and contracts for which a determination has been made under agency regulations that the prohibition of assignment of claims is in the Government's interest.

[48 FR 42328, Sept. 19, 1983, as amended at 51 FR 2665, Jan. 17, 1986]

Subpart 32.9—Prompt Payment

SOURCE: 53 FR 3690, Feb. 8, 1988, unle
otherwise noted.

32.900 Scope of subpart.

This subpart prescribes policies, pr
cedures, and clauses for implementin
Office of Management and Budg
(OMB) Circular A-125, *Prompt Pa*
ment.

[54 FR 13333, Mar. 31, 1989]

32.901 Applicability.

This subpart applies to all Gover
ment contracts (including small pu
chases as defined in subpart 13.1
except for contracts where payme
terms and late payment penalties ha
been established by other governme
tal authority (e.g., tariffs). The inte
est penalty provisions of this subpa
do not apply to contracts awarded
foreign vendors outside the Unit
States for work performed outside t
United States.

[54 FR 13333, Mar. 31, 1989]

32.902 Definitions.

Contract financing payment, as us
in this subpart, means a Governme
disbursement of monies to a contra
tor under a contract clause or oth
authorization prior to acceptance
supplies or services by the Gover
ment. Contract financing payments
clude advance payments, progress pa
ments based on cost under the clau
at 52.232-16, Progress Paymen
progress payments based on a perce
age or stage of completion (s
32.102(e)(1)) other than those ma
under the clause at 52.232-5, Pa
ments Under Fixed-Price Constructi
Contracts or the clause at 52-232-1
Payments Under Fixed-Price Arc
tect-Engineer Contracts, and inter
payments on cost-type contracts. Co
tract financing payments do not
clude invoice payments or payme
for partial deliveries.

Day, as used in this subpart, mea
calendar day, unless otherwise indic
ed.

Designated billing office, as used
this subpart, means the office
person designated in the contr

where the contractor first submits invoices and contract financing requests. This might be the Government disbursing office, contract administration office, office accepting the supplies delivered or services performed by the contractor, contract audit office, or a nongovernmental agent. In some cases, different offices might be designated to receive invoices and contract financing requests.

Designated payment office means the place designated in the contract to make invoice payments or contract financing payments. Normally, this will be the Government disbursing office.

Discount for prompt payment means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at 52.232-8, Discounts for Prompt Payment, if payment is made by the Government prior to the due date. The due date is calculated from the date of the contractor's invoice.

Due date means the date on which payment should be made.

Invoice payment, as used in this subpart, means a Government disbursement of monies to a contractor under a contract or other authorization for supplies or services accepted by the Government. This includes payments of partial deliveries that have been accepted by the Government and final cost or fee payments where amounts owed have been settled between the Government and the contractor. For purposes of this subpart, invoice payments also include all payments made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, and the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts. Invoice payments do not include contract financing payments.

Payment date means the date on which a check for payment is dated or an electronic funds transfer is made.

Proper invoice means a bill or written request for payment which meets the minimum standards specified in the clauses at 52.232-25, Prompt Payment, 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, or 52.232-27, Prompt Payment for Construction Contracts (also see 32.905(e)), and other terms and conditions contained in the contract for invoice submission.

Receiving report means written evidence meeting the requirements of 32.905(f) which indicates Government acceptance of supplies delivered or services performed by the contractor (see subpart 46.6).

[53 FR 3690, Feb. 8, 1988, as amended at 54 FR 13333, Mar. 31, 1989; 55 FR 25530, June 21, 1990]

32.903 Policy.

All solicitations and contracts subject to this subpart shall specify payment procedures, payment due dates, and interest penalties for late invoice payment. Invoice payments and contract financing payments will be made by the Government as close as possible to (or earlier as determined by the Agency head to be necessary on a case-by-case basis), but not later than the due dates specified in the contract by incorporation of the clauses at 52.232-25, Prompt Payment, 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts or 52.232-27, Prompt Payment for Construction Contracts. Payment will be based on receipt of a proper invoice or contract financing request and satisfactory contract performance. Agency procedures shall ensure that, when specifying due dates, full consideration is given to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract. Checks will be mailed and electronic funds transfers will be transmitted on or about the same day the payment action is dated. When appropriate, Government contracts should allow the contractor to be paid for partial deliveries that have been accepted by the Government (see 32.102(d)). Discounts for prompt payment offered by the contractor shall be taken only when payments are made within the discount period specified by the contractor. Agencies shall pay an interest penalty, without request from the contractor, for late invoice payments or improperly taken discounts for prompt payment. The interest penalty shall be absorbed within funds available for administration or operation of the program for which the penalty was incurred. The temporary unavailability of funds to make a timely payment does not relieve the obligation to pay interest penalties. For contracts awarded after October 1, 1989, if the interest penalty is not paid within 10 days after it is due and the contractor makes a written demand for payment within 40 days after payment of the principal amount due, agencies shall pay an additional penalty amount, which shall be calculated in accordance with regulations issued by the Office of Management and Budget.

[54 FR 13333, Mar. 31, 1989]

32.904 Responsibilities.

Agency heads shall establish the policies and procedures necessary to implement this subpart. Agency heads are authorized to prescribe additional standards for establishing due dates on invoice payments (32.905) and contract financing payments (32.906), as deemed necessary to support agency programs and foster prompt payment to contractors. Agency heads may also adopt different payment procedures in order to accommodate unique circumstances, provided that such procedures are consistent with the policies set forth in this subpart.

32.905 Invoice payments.

(a) Except as prescribed in 32.905(b), 32.905(c), and 32.905(d), the due date for making an invoice payment by the designated payment office shall be:

(1) The 30th day after the designated billing office has received a proper invoice from the contractor; or the 30th day after Government acceptance of supplies delivered or services performed by the contractor, whichever is later.

(i) On a final invoice where the payment amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance shall be deemed to have occurred contructively on the 7th day after the contractor has delivered supplies or performed services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement. In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance. The constructive acceptance requirement does not, however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities. Except in the case of a contract for the procurement of a brand name commercial item for authorized resale (e.g., commissary items), the contracting officer may specify a longer period for constructive acceptance in the solicitation and resulting contract, if required to afford the Government a reasonable opportunity to inspect and test the property furnished or to evaluate the services performed. The contract file shall indicate the justification for extending the constructive acceptance period beyond 7 days.

(iii) If the contract does not require submission of an invoice for payment (e.g., periodic lease payments), the due date will be as specified in the contract.

(2) However, if the designated billing office fails to annotate the invoice with the actual date of receipt of the invoice, the invoice payment due date shall be deemed to be the 30th day after the date the contractor's invoice is dated, provided a proper invoice i received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(b) The due date for making payments on contracts that contain the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, shall be as follows:

(1) The due date for work or service completed by the contractor shall b the later of the following two events:

(i) The 30th day after the designate billing office has received a proper invoice from the contractor.

(ii) The 30th day after Governmen acceptance of the work or servic completed by the contractor. On final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the settlement. For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance shall be deemed to have occurred constructively on the 7th day after the contractor has completed the work or services in accordance with the terms and conditions of the contract (see also 32.905(b)(4)). In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance.

(2) The due date for progress payments shall be the 30th day after Government approval of contractor estimates of work or services accomplished. For the sole purpose of computing an interest penalty that might be due the contractor, Government approval shall be deemed to have occurred constructively on the 7th day after contractor estimates have been received by the designated billing office (see also 32.905(b)(4)). In the event that actual approval occurs within the constructive approval period, the determination of an interest penalty shall be based on the actual date of approval.

(3) However, if the designated billing office fails to annotate the invoice or payment request with the actual date of receipt, the payment due date shall be the 30th day after the date the contractor's invoice or payment request is dated, provided a proper invoice or payment request is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(4) The constructive acceptance and constructive approval requirements described in 32.905(b)(1) and (b)(2) are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested progress payment amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval, if required to afford the Government a reasonable opportunity to inspect and test the property furnished or to evaluate the services performed.

(c) The due date for making payments on construction contracts shall be as follows:

(1) The due date for making progress payments based on contracting officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project, shall be 14 days after receipt of a proper payment request by the designated billing office. However, if the designated billing office fails to annotate the payment request with the actual date of receipt, the payment due date shall be deemed to be the 14th day after the date the contractor's payment request is dated, provided a proper payment request is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements. The contracting officer may specify a longer period in the solicitation and resulting contract if required to afford the Government a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contract file shall indicate the justification for extending the due date beyond 14 days. The contracting officer or his representative shall not approve progress payment requests unless the certification and substantiation of amounts requested are provided as required by the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(2) The due date for payment of any amounts retained by the contracting officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, shall be as specified in the contract or, if not specified, 30 days after approval by the contracting officer for release to the contractor. This release of retained amounts shall be based on the

contracting officer's determination that satisfactory progress has been made.

(3) The due date for final payments based on completion and acceptance of all work (including any retained amounts), and payments for partial deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract) shall be as follows:

(i) Either the 30th day after receipt by the designated billing office of a proper invoice from the contractor, or the 30th day after Government acceptance of the work or services completed by the contractor, whichever is later. However, if the designated billing office fails to annotate the invoice with the actual date of receipt, the invoice payment due date shall be deemed to be the 30th day after the date the contractor's invoice is dated, provided a proper invoice is received and there is no disagreement over quantity, quality, or contractor compliance with contract requirements.

(ii) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of contractor claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(4) For the sole purpose of computing an interest penalty that might be due the contractor for payments described in subdivision (c)(3)(i) of this section, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the contractor has completed the work or services in accordance with the terms and conditions of the contract (see also 32.905(c)(5)). In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance.

(5) The constructive acceptance and constructive approval requirements described in subparagraph (c)(4) of this section are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested
amount. These requirements do n
compel Government officials to acce
work or services, approve contract
estimates, perform contract admini
tration functions, or make paymer
prior to fulfilling their responsibilitie
The contracting officer may specify
longer period for constructive accep
ance or constructive approval in th
solicitation and resulting contract,
required to afford the Government
reasonable opportunity to adequatel
inspect the work and to determine th
adequacy of the contractor's perform
ance under the contract.

(d) The payment terms or contrac
for meat and meat food products, co
tracts for perishable agricultural co
modities, and contracts for dairy pro
ucts, edible fats or oils, and food pro
ucts prepared from edible fats or oi
are as follows:

(1) The due date on contractor i
voices for meat or meat food product
as defined in section 2(a)(3) of th
Packers and Stockyard Act of 1921
U.S.C. 182(3)), as further defined
Pub. L. 98-181, including any edib
fresh or frozen poultry meat, any pe
ishable poultry meat food produ
fresh eggs, and any perishable e
product, will be as close as possible
but not later than, the seventh d
after product delivery.

(2) The due date on contractor i
voices for perishable agricultural co
modities, as defined in section 1(4)
the Perishable Agricultural Commo
ities Act of 1930 (7 U.S.C. 499a(4)), w
be as close as possible to, but not lat
than, the tenth day after product d
livery, unless another date is specifi
in the contract.

(3) The due date on contractor i
voices for dairy products (as defined
section 111(e) of the Dairy Producti
Stabilization Act of 1983 (7 U.S.
4502(e)), edible fats or oils, and fo
products prepared from edible fats
oils, will be as close as possible to, b
not later than, the tenth day after t
date on which a proper invoice h
been received.

(e) A proper invoice must inclu
the items listed in subparagrap
(e)(1) through (e)(8) of this section.
the invoice does not comply with the
requirements, then the contract
must be notified of the defect withi

days (3 days on contracts for meat and meat food products, and 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils) after receipt of the invoice at the designated billing office. The reason that the invoice is not a proper invoice must be specified. If such notice is not timely, then an adjusted due date for the purpose of determining an interest penalty, if any, will be established in accordance with 32.907-1(b):

(1) Name and address of the contractor.

(2) Invoice date.

(3) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).

(4) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(5) Shipping and payment terms (e.g., shipment number and date of shipment, prompt payment discount terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(6) Name and address of contractor official to whom payment is to be sent (must be the same as that in the contract or on a proper notice of assignment).

(7) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(8) Any other information or documentation required by the contract (such as evidence of shipment).

(f) All invoice payments shall be supported by a receiving report or any other Government documentation authorizing payment. The receiving report or other Government documentation should be forwarded to the designated payment office by the 5th working day after Government acceptance or approval, unless other arrangements have been made. This period of time does not extend the due dates prescribed in 32.905. Acceptance should be completed as expeditiously as possible. The receiving report or other Government documentation authorizing payment shall, as a minimum, include the following:

(1) Contract number or other authorization for supplies delivered or services performed.

(2) Description of supplies delivered or services performed.

(3) Quantities of supplies received and accepted, if applicable.

(4) Date supplies delivered or services performed.

(5) Date supplies or services were accepted by the designated Government official (or progress payment request was approved if being made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts).

(6) Signature printed name, title, mailing address, and telephone number of the designated Government official responsible for acceptance or approval functions.

(7) If the contract provides for the use of certified invoices in lieu of a separate receiving report, the certified invoice must also contain the information described in subparagraphs (f)(1) through (f)(6) of this section.

(g) When a discount for prompt payment is to be taken, payment will be made as close as possible to, but not later than, the end of the discount period. Payment terms are specified in the clause at 52.232-8, Discounts for Prompt Payment.

(h) The designated billing office shall immediately annotate each invoice with the actual date it receives the invoice.

(i) The designated payment office shall annotate each invoice and receiving report with the date a proper invoice was received by the designated payment office.

[54 FR 13334, Mar. 31, 1989]

32.906 Contract financing payments.

(a) Unless otherwise prescribed in policies and procedures issued by the Agency head, the due date for making contract financing payments by the designated payment office will be the 30th day after the designated billing office has received a proper request. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. Agency heads may prescribe shorter periods for payment, if appropriate based on contract pricing or administrative considerations. For example, a shorter period may be justified by an Agency if the nature and extent of contract financing arrangements are integrated with Agency contract pricing policies. A period shorter than 7 days or longer than 30 days shall not be prescribed.

(b) For advance payments, loans, or other arrangements that do not involve recurrent submission of contract financing requests, payment shall be made in accordance with the applicable contract financing terms or as directed by the contracting officer.

(c) A proper contract financing request must comply with the terms and conditions specified by contract financing clauses or other authorizing terms. The contractor shall correct any defects in requests submitted in the manner specified in the contract or as directed by the contracting officer.

(d) The designated billing officer and designated payment office shall annotate each contract financing request with the date a proper request was received in their respective offices.

32.907 Interest penalties.

32.907-1 Late invoice payment.

(a) An interest penalty shall be paid automatically by the designated payment office, without request from the contractor, when all of the following conditions, if applicable, have been met:

(1) A proper invoice has been received by the designated billing office.

(2) A receiving report or other Government documentation authorizing payment has been processed and there was no disagreement over quantity, quality, or contractor compliance with any contract requirement.

(3) In the case of a final invoice, the payment amount is not subject to further contract settlement actions between the Government and the contractor.

(4) The designated payment office paid the contractor after the due date.

(b) The interest penalty computation shall not include (1) the time taken by the Government to notify the contractor of a defective invoice, unless it exceeds the periods prescribed in 32.905(e), or (2) the time taken by the contractor to correct the invoice. If the designated billing office failed to notify the contractor of a defective invoice within the periods prescribed in 32.905(e), then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period from the payment due date. Any interest penalty owed the contractor will be based on this adjusted due date.

(c) An interest penalty shall be paid automatically by the designated payment office, without request from the contractor, if a discount for prompt payment is taken improperly. The interest penalty shall be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the contractor is paid.

(d) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). The rate in effect on the day after the due date shall remain fixed during the period for which an interest penalty is calculated. This rate is referred to as the *Renegotiation Board Interest Rate*, and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty will accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in

e succeeding 30-day period. The in-
rest penalty amount, interest rate
d the period for which the interest
nalty was computed, will be sepa-
tely stated by the designated pay-
ent office on the check, in accompa-
ying remittance advice, or, in the
se of wire transfers, by an appropri-
e electronic data message accompa-
ying the wire transfer. Adjustments
ll be made by the designated pay-
ent office for errors in calculating
terest penalties, if requested by the
ntractor.

(e) Interest penalties under the
ompt Payment Act will not continue
accrue (1) after the filing of a claim
r such penalties under the clause at
.233-1, Disputes, or (2) for more
an 1 year. Interest penalties of less
an $1.00 need not be paid.

(f) Interest penalties are not re-
ired on payment delays due to dis-
reement between the Government
d contractor over the payment
nount, or other issues involving con-
act compliance, or on amounts tem-
rarily withheld or retained in ac-
rdance with the terms of the con-
act. Claims involving disputes, and
y interest that may be payable, will
resolved in accordance with the
sputes clause.

(g) For contracts awarded on or
ter October 1, 1989, a penalty
nount (calculated in accordance with
gulations issued by the Office of
anagement and Budget) shall be
id, in addition to the interest penal-
amount, if the contractor—

(1) Is owed an interest penalty;

(2) Is not paid the interest penalty
thin 10 days after the date the in-
ice amount is paid; and

(3) Makes a written demand that the
ency pay such a penalty not later
an 40 days after the date the invoice
nount is paid.

FR 3690, Feb. 8, 1988, as amended at 54
13336, Mar. 31, 1989]

907-2 Late contract financing payment.

No interest penalty shall be paid to
e contractor as a result of delayed
ntract financing payments.

08 Contract clauses.

) If the solicitation or contract
tains the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, the contracting officer shall insert the clause at 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts.

(b) The contracting officer shall insert the clause at 52.232-27, Prompt Payment for Construction Contracts, in all solicitations and contracts for construction (see part 36).

(c) The contracting officer shall insert the clause at 52.232-25, Prompt Payment, in all other solicitations and contracts (including small purchases as defined in subpart 13.1), except as indicated in 32.901.

(d) If payment may be made by electronic funds transfer, the contracting officer shall insert the clause at 52.232-28, Electronic Funds Transfer Payment Methods, in solicitations and contracts.

[54 FR 13336, Mar. 31, 1989]

32.909 Contractor inquiries.

Questions concerning delinquent payments should be directed to the designated billing office or designated payment office. If a question involves a disagreement in payment amount or timing, it should be directed to the contracting officer for resolution. The contracting officer shall coordinate within appropriate contracting channels and seek the advice of other offices as may be necessary to resolve disagreements. Small business concerns may obtain additional assistance related to payment issues, late payment interest penalties, and information on the Prompt Payment Act, by contacting the Agency's local representative from the Office of Small and Disadvantaged Business Utilization.

[53 FR 3690, Feb. 8, 1988, as amended at 54 FR 13336, Mar. 31, 1989]

PART 33—PROTESTS, DISPUTES, AND APPEALS

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Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

33.000 Scope of part.

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals.

[50 FR 2270, Jan. 15, 1985]

Subpart 33.1—Protests

Source: 50 FR 2270, Jan. 15, 1985, unless otherwise noted.

33.101 Definitions.

Interested Party for the purpose of filing a protest, as used in this subpart, means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

Protest, as used in this subpart, means a written objection by an interested party to a soliciation by an agency for offers for a proposed contract for the acquisition of supplies or services or a written objection by an interested party to a proposed award or the award of such a contract.

[50 FR 2270, Jan. 15, 1985, as amended at 53 FR 43391, Oct. 26, 1988; 54 FR 19827, May 8, 1989]

33.102 General.

(a) Contracting officers shall consider all protests, whether submitted before or after award and whether filed directly with the agency, the General Accounting Office (GAO), or for automatic data processing acquisitions under 40 U.S.C. 759 (hereinafter cited as *ADP contracts*), the General Services Board of Contract Appeals (GSBCA). The protestor shall be notified in writing of the final decision of the protest. (See 19.302 for protests of small business status and 22.608-3 for protests involving eligibility under the Walsh-Healey Public Contracts Act.)

(b) An interested party wishing to protest—

(1) Is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO or the GSBCA;

(2) May protest to the GAO in accordance with GAO regulations (4 CFR part 21). An interested party who has filed a protest regarding an ADP contract with the GAO may not file a protest with the GSBCA with respect to that contract.

(3) May protest to the GSBCA regarding an award of an ADP contract in accordance with GSBCA Rules of Procedure (48 CFR chapter 61). An interested party who has filed a protest regarding an ADP contract with GSBCA (40 U.S.C. 759(h)) may not file a protest with the GAO with respect to that contract.

[50 FR 2270, Jan. 15, 1985, as amended at 55 FR 38517, Sept. 18, 1990]

33.103 Protests to the agency.

(a) When a protest is filed only with the agency, an award shall not be made until the matter is resolved unless the contracting officer or other designated official first determines that one of the following applies:

(1) The supplies or services to be contracted for are urgently required.

(2) Delivery or performance will be unduly delayed by failure to make award promptly.

(3) A prompt award will otherwise be advantageous to the Government.

(b)(1) When a protest against the making of an award is received and award will be withheld pending dispoition of the protest, the offerors whose offers might become eligible for ward should be informed of the pro- est. If appropriate, those offerors hould be requested, before expiration f the time for acceptance of their ffer, to extend the time for accept- nce in accordance with 14.404-1(d) to void the need for resolicitation. In he event of failure to obtain such ex- ensions of offers, consideration hould be given to proceeding with ward under paragraph (a) above.

(2) Protests received after award iled only with the agency shall be andled in accordance with agency rocedures. The contracting officer eed not suspend contract perform- nce or terminate the awarded con- ract unless it appears likely that an ward may be invalidated and a delay n receiving the supplies or services is ot prejudicial to the Government's nterest. In this event, the contracting fficer should consider seeking a utual agreement with the contractor o suspend performance on a no-cost asis.

3.104 Protests to GAO.

(a) *General.* (1) A protestor shall urnish a copy of its complete protest o the official or location designated in he solicitation or, in the absence of uch a designation, to the contracting fficer, no later than 1 day after the rotest is filed with the GAO. Failure o furnish a complete copy of the pro- est within 1 day may result in dismis- al of the protest by GAO.

(2)(i) If the protestor files a request r documents with a protest, the gency shall furnish copies of those equested documents, and the docu- ents described in 33.104(a)(6), along ith the copy of the agency report to e protestor, unless the protestor is ot otherwise authorized by law to re- ive the requested documents or the cuments—

(A) Are not relevant to the protest;

(B) Would give the protestor a com- titive advantage; or

(C) Have been previously provided to e protestor.

ii) Documents referred to in subdi- ion (a)(2)(i) of this section not fur- hed to the protestor shall be identi- d, and the reason for not furnishing them stated in the agency report described in subparagraph (a)(3) of this section.

(iii) If the protestor, after receipt of the agency report, requests additional documents, the agency must respond to the GAO within 5 days by filing the requested documents or by identifying any documents which will not be furnished to the protestor, and stating the reason for not furnishing them.

(3) When a protest, before or after award, has been lodged with the GAO, the agency shall prepare a report. The report should include a copy of—

(i) The protest;

(ii) The offer submitted by the protesting offeror and a copy of the offer which is being considered for award or which is being protested;

(iii) The solicitation, including the specifications or portions relevant to the protest;

(iv) The abstract of offers or relevant portions;

(v) Any other documents that are relevant to the protest; and

(vi) The contracting officer's signed statement setting forth findings, actions, and recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to the allegation of the protest. If the contract action or contract performance continues after receipt of the protest, the report will include the determination(s) prescribed in paragraphs (b) or (c) of this section.

(vii) In addition to subdivisions (a)(3) (i) through (vi) of this section, the copy of the report forwarded to the GAO shall also identify the other parties who are being furnished copies of the report.

(4) Other persons, including offerors, involved in or affected by the protest shall be given notice of the protest and its basis in appropriate cases, within 1 work day after its receipt by the agency. The agency shall give immediate notice of the protest to the contractor if the award has been made or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving an award if the protest is denied. These persons shall also be advised that they may

submit their views and relevant information directly to the GAO with a copy to the contracting officer and to other participating interested parties within a specified period of time. Normally, the time specified will be 1 week.

(5) The agency shall submit a complete report (see subparagraph (a)(3) of this section) to GAO within 25 work days after receipt from GAO of the telephonic notice of such protest, or within 10 work days after receipt from GAO of a determination to use the express option, unless—

(i) The GAO advises the agency that the protest has been dismissed; or

(ii) The agency advises GAO in writing that the specific circumstances of the protest require a longer period and GAO establishes a new date. Any new date shall be documented in the agency's protest file.

(6)(i) Timely action on protests is essential. Upon notice that a protest has been lodged with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. To further expedite processing, when furnishing a copy of the report including relevant documents to the GAO, the agency shall simultaneously furnish a copy of the report including relevant documents to the protestor and the awardee or offeror who appears to have a substantial prospect of receiving an award if the protest is denied, and a copy of the report without relevant documents to other interested parties who have responded to the notice in subparagraph (a)(4) of this section, unless the protestor or other interested party is not otherwise authorized by law to receive those documents, or subdivisions (6)(i) (A) and (B) are applicable. Upon request, the agency shall also provide to any interested party a relevant document contained in the report.

(A) Documents previously furnished to or prepared by a party (e.g., the solicitation or the party's own proposal) need not be furnished to that party.

(B) Classified or privileged information or information that would give a party a competitive advantage and other information that the Government determines under appropriate authority to withhold should be deleted from the copy of the report or relevant documents furnished to that party.

(C) If documents are withheld from any of the parties, the agency must include in the report and in the copies of the report provided to the protestor and the interested parties, a list of the withheld documents.

(ii) The protestor and other interested parties shall be requested to furnish a copy of any comments on the report directly to the GAO, as well as to the contracting officer and to other participating interested parties.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) *Protests before award.* (1) When the agency has received notice from GAO of a protest filed directly with GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that—

(i) Urgent and compelling circumstances which significantly affect the interests of the United States will not permit awaiting the decision of GAO; and

(ii) Award is likely to occur within 30 calendar days of the written finding.

(2) A contract award shall not be authorized until the agency has notified GAO of the above finding.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the offerors whose offers might become eligible for award should be informed of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance in accordance with 14.404-1(d) to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration

hould be given to proceeding under
aragraph (b)(1) above.

(c) *Protests after award.* (1) When
he agency receives from GAO, within
0 calendar days after award, a notice
f a protest filed directly with GAO,
he contracting officer shall immedi-
tely suspend performance or termi-
ate the awarded contract, except as
rovided in paragraphs (c) (2) and (3)
elow.

(2) In accordance with agency proce-
ures, the head of the contracting ac-
vity may, on a nondelegable basis,
uthorize contract performance, not-
ithstanding the protest, upon a writ-
en finding that—

(i) Contract performance will be in
he best interests of the United States;
r

(ii) Urgent and compelling circum-
ances that significantly affect the in-
erests of the United States will not
ermit waiting for the GAO's decision.

(3) Contract performance shall not
e authorized until the agency has no-
fied GAO of the above finding.

(4) When it is decided to suspend
erformance or terminate the awarded
ontract, the contracting officer
hould attempt to negotiate a mutual
greement on a no-cost basis.

(5) When the agency receives notice
f a protest filed directly only with
he GAO more than 10 calendar days
fter award of the protested acquisi-
on, the contracting officer need not
uspend contract performance or ter-
inate the awarded contract unless
he contracting officer believes that
n award may be invalidated and a
elay in receiving the supplies or serv-
es is not prejudicial to the Govern-
ent's interest.

(d) *Findings and notice.* If the deci-
on is to proceed with contract award,
continue contract performance
nder (b) or (c) above, the contracting
ficer shall include the written find-
gs or other required documentation
the file. The contracting officer also
all give written notice of the deci-
on to the protester and other inter-
ted parties.

(e) *Conferences.* (1) A conference on
e merits of the protest may, at the
le discretion of the GAO, be held at
e request of the protestor, the
ency, or any interested party.

(2) A fact finding conference may, at the sole discretion of the GAO, be held at the request of any protestor, agency or interested party, or on the initiative of the GAO. The fact finding conference is intended to resolve specific factual disputes essential to the resolution of the protest which cannot otherwise be resolved from the record. Witnesses may be called to testify under oath and each party may question witnesses. A transcript will be made of the proceeding, and copies are available from the GAO for a fee. Written comments on the transcript may be submitted to the GAO within 3 days of receipt.

(f) *GAO decision time.* GAO will issue its recommendation on a protest within 90 work days, or within 45 calendar days under the express option, unless GAO establishes a longer period of time.

(g) *Notice to GAO.* The head of the agency or a designee (not below the level of the head of the contracting activity) responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General within 60 days of receipt of the GAO's recommendation if the agency has decided not to comply with the recommendation. The report shall explain the reasons why the GAO's recommendation will not be followed by the agency.

(h) *Award of protest costs.* (1) GAO may declare an appropriate interested party to be entitled to the costs of—

(i) Filing and pursuing the protest, including reasonable attorneys' fees; and

(ii) Bid and proposal preparation.

(2) Costs awarded under subparagraph (h)(1) of this section shall be paid promptly by the agency out of funds available to or for the use of the agency for the acquisition of supplies or services.

[50 FR 2270, Jan. 15, 1985, as amended at 50 FR 25680, June 20, 1985; 50 FR 27969, July 9, 1985; 53 FR 43391, Oct. 26, 1988; 55 FR 38517, Sept. 18, 1990]

33.105 Protests to GSBCA.

(a)(1) An interested party may protest an ADP acquisition subject to section 111 of the Federal Property and

Administrative Services Act (40 U.S.C. 759) by filing a protest with the GSBCA. ADP acquisition protests not covered under this statute may not be heard by the GSBCA, but may be heard by the agency, the courts, or GAO. A protester shall furnish a copy of its complete protest to the official or location designated in the solicitation, or in the absence of such a designation to the contracting officer, on the same day the protest is filed with the GSBCA. Any request for a hearing on either a suspension of procurement authority or on the merits shall be in the protest.

(2) The GSBCA procedures state that—

(i) Within one working day after receipt of a copy of the protest, the agency shall give either oral or written notice of the protest to all parties who were solicited or, if the solicitation has closed, only to those who submitted a sealed bid or offer; and

(ii) Written confirmation of notice and a listing of all persons and agencies receiving notice should be given to the Board within five working days after receipt of the protest.

(b) The GSBCA procedures state that within 10 work days after the filing of a protest, or such longer time as the GSBCA may establish, the agency shall file with the GSBCA and all other parties a protest file. Except where the agency determines under appropriate authority to withhold classified or privileged information or information that would give a competitive advantage, the protest file shall include the following:

(1) A contracting officer's decision, if any.

(2) The contract, if any.

(3) All relevant correspondence.

(4) Affidavits or statements of witnesses on the matter under protest.

(5) All documents relied upon by the contracting officer in taking the action protested.

(6) A copy of the solicitation, the protestor's bid or proposal and, if bid opening has occurred and no contract has been awarded, a copy of any relevant bids and the bid abstract.

(7) In a negotiated acquisition, a copy of offers or proposals being considered for award and relevant to the protest should be included in the GSBCA file only, for *in camera* review by the Board. The agency shall serve all parties with a list of documents provided to the Board for *in camera* review.

(8) Any additional existing evidence or information necessary to determine the merits of the protest.

(9) Any information otherwise withheld, where it is appropriate for *in camera* review by the Board.

(c) The GSBCA procedures state that within 15 work days after the filing of the protest, or such longer time as the Board may establish, the agency shall submit its answer to the Board setting forth its defenses to the protest and its findings, actions, and recommendations in the matter.

(d)(1) If a protest contains a timely request for a suspension of procurement authority, a hearing will be held whenever practicable but no later than 10 calendar days after the filing of the protest. The Board shall suspend the procurement authority unless the agency establishes that—

(i) Absent suspension, the contract award is likely within 30 calendar days; and

(ii) Urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision.

(2) Circumstances in (d)(1) above shall be established by a D&F executed by the agency head or designee.

(3) The Board's decision on suspension may be oral.

(e) A hearing on the merits, if requested, will be held within 25 work days after the filing of the protest and a GSBCA decision on the merits will be issued within 45 work days, unless the Board's chairman determines a longer period is required.

(f)(1) The GSBCA may declare an appropriate interested party to be entitled to the costs of—

(i) Filing and pursuing the protest, including reasonable attorney's fees and

(ii) Bid and proposal preparation.

(2) Costs awarded under (f)(1) above shall be paid promptly by the agency out of funds available to or for the use of the acquisition of supplies or services.

(g) The GSBCA's final decision may be appealed by the agency or by any interested party, including any intervening interested parties, as set forth in subpart 33.2.

[50 FR 2270, Jan. 15, 1985, as amended at 50 FR 23607, June 4, 1985; 53 FR 662, Jan. 11, 1988]

33.106 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.233-2, Service of Protest, in solicitations for other than small purchases.

(b) The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its *Alternate I.*

[50 FR 25681, June 20, 1985]

Subpart 33.2—Disputes and Appeals

SOURCE: 48 FR 42349, Sept. 19, 1983, unless otherwise noted. Redesignated at 50 FR 2270, Jan. 15, 1985.

33.201 Definitions.

Claim, as used in this subpart, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $50,000 s not a claim under the Contract Disputes Act of 1978 until certified as required by the Act and 33.207. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The ubmission may be converted to a laim, by written notice to the contracting officer as provided in 3.206(a), if it is disputed either as to ability or amount or is not acted pon in a reasonable time.

Misrepresentation of fact, as used in this part, means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985]

33.202 Contract Disputes Act of 1978.

The Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act) establishes procedures and requirements for asserting and resolving claims by or against contractors arising under or relating to a contract subject to the Act. In addition, the Act provides for the payment of interest on contractor claims, for the certification of contractor claims in excess of $50,000, and for a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

33.203 Applicability.

(a) Except as specified in paragraph (b) below, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with (1) a foreign government or agency of that government, or (2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the Act to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters *arising under* or *relating to* a contract. Agency Boards of Contract Appeals (BCA's) authorized under the Act continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the *all disputes* authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Act or to constrain the authority of the statutory agency BCA's in the handling and deciding of contractor appeals under the Act.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985]

33.204 Policy.

It is the Government's policy to try to resolve all contractual issues by mutual agreement at the contracting officer's level, without litigation. In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences.

33.205 Relationship of the Act to Pub. L. 85-804.

(a) Requests for relief under Pub. L. 85-804 (50 U.S.C. 1431-1435) are not claims within the Contract Disputes Act of 1978 or the Disputes clause at 52.233-1, Disputes, and shall be processed under part 50, Extraordinary Contractual Actions. However, relief formerly available only under Pub. L. 85-804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Contract Disputes Act of 1978 and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Act. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied not approved in its entirety unde paragraph (b) above may be cogniz ble as a request for relief under Pu L. 85-804 as implemented by part 5 However, the claim must first be sub mitted to the contracting officer fo consideration under the Contract Di putes Act of 1978 because the claim not cognizable under Public Law 85 804, as implemented by part 50, unles other legal authority in the agenc concerned is determined to be lackin or inadequate.

33.206 Initiation of a claim.

(a) Contractor claims shall be sub mitted in writing to the contracting o ficer for a decision. The contractin officer shall document the contrac file with evidence of the date of re ceipt of any submission from the con tractor deemed to be a claim by th contracting officer.

(b) The contracting officer sha issue a written decision on any Gov ernment claim initiated against a con tractor.

33.207 Contractor claim certification.

(a) A contractor claim exceedin $50,000 shall be accompanied by a cer tification that—

(1) The claim is made in good faith

(2) Supporting data are accurate an complete to the best of the contrac tor's knowledge and belief; and

(3) The amount requested accurate reflects the contract adjustment fo which the contractor believes the Gov ernment is liable.

(b) The aggregate amount of bot the increased and decreased costs sha be used in determining when th dollar thresholds requiring claim cert fication are met (see the example i subdivision 15.804-2(a)(1)(ii)).

(c) (1) If the contractor is an individ ual, the certification shall be execute by that individual.

(2) If the contractor is not an indi vidual, the certification shall be exe cuted by—

(i) A senior company official i charge at the contractor's plant or lo cation involved; or

(ii) An officer or general partner o the contractor having overall respons bility for the conduct of the contractor's affairs.

33.208 Interest on claims.

The Government shall pay interest on a contractor's claim on the amount found due and unpaid from (a) the date the contracting officer receives the claim (properly certified if required by 33.207(a)), or (b) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. See 32.614 for the right of the Government to collect interest on its claims against a contractor.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985]

33.209 Suspected fraudulent claims.

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

33.210 Contracting officer's authority.

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or settle all claims arising under or relating to a contract subject to the Act. This authorization does not extend to—

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment or adjustment of any claim involving fraud.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 51 FR 36972, Oct. 16, 1986]

33.211 Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

(1) Review the facts pertinent to the claim;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration office or contracting office, as appropriate; and

(4) Prepare a written decision that shall include a—

(i) Description of the claim or dispute;

(ii) Reference to the pertinent contract terms;

(iii) Statement of the factual areas of agreement and disagreement;

(iv) Statement of the contracting officer's decision, with supporting rationale;

(v) Paragraph substantially as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims Court (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision. If you appeal to the Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of $10,000 or less or its accelerated procedure for claims of $50,000 or less; and

(vi) Demand for payment prepared in accordance with 32.610(b) in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of $50,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over $50,000, 60 days after receiving a certified claim; *provided, however,* that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account—

(1) The size and complexity of the claim;

(2) The adequacy of the contractor's supporting data; and

(3) Any other relevant factors.

(e) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the agency BCA to direct the contracting officer to issue a decision in a specified time period determined by the BCA.

(f) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(g) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

[48 FR 42349, Sept. 19, 1983. Redesignated at 50 FR 2270, Jan. 15, 1985, and amended at 54 FR 34755, Aug. 21, 1989]

33.212 Contracting officer's duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.

33.213 Obligation to continue performance.

(a) In general, before passage of the Act, the obligation to continue performance applied only to claims arising under a contract. However, Section 6(b) of the Act authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending final decision on a claim relating to the contract. In recognition of this fact, an alternate paragraph is provided for paragraph (h) of the clause at 52.233-1, Disputes. This paragraph shall be used only as authorized by agency procedures.

(b) In all contracts that include the clause at 52.233-1, Disputes, with its Alternate I, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance; *provided,* that the Government's interest is properly secured.

33.214 Contract clause.

The contracting officer shall insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.203 apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its Alternate I.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985]

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 34—MAJOR SYSTEM ACQUISITION

Sec.

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42351, Sept. 19, 1983, unless otherwise noted.

34.000 Scope of part.

This part describes acquisition policies and procedures for use in acquiring major systems consistent with OMB Circular No. A-109, Major System Acquisitions (A-109) (see 34.003).

34.001 Definition.

Effective competition, as used in this part, is a market condition which exists when two or more contractors, acting independently, actively contend for the Government's business in a manner which ensures that the Government will be offered the lowest cost or price alternative or best technical design meeting its minimum needs.

Major system means that combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software or any combination thereof, but exclude construction or other improvements to real property. A system shall be considered a major system if—

(a) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than $75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for the acquisition exceeds $300,000,000 (based on fiscal year 1980 constant dollars);

(b) A civilian agency is responsible for the system and total expenditures for the system are estimated to exceed $750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a *major system* established by the agency pursuant to Office of Management and Budget Circular A-109, entitled *Major Systems Acquisition*, whichever is greater; or

(c) The system is designated a *major system* by the head of the agency responsible for the system.

[50 FR 27562, July 3, 1985, as amended at 51 FR 52434, Dec. 23, 1985; 51 FR 27116, July 29, 1986]

34.002 Policy.

The policies of this part are designed to ensure that agencies acquire major systems in the most effective, economical, and timely manner. Agencies acquiring major systems shall—

(a) Promote innovation and full and open competition as required by part 6 in the development of major system concepts by (1) expressing agency needs and major system acquisition program objectives in terms of the agency's mission and not in terms of specified systems to satisfy needs, and (2) focusing agency resources and special management attention on activities conducted in the initial stage of major programs; and

(b) Sustain effective competition between alternative system concepts and sources for as long as it is beneficial.

[48 FR 42351, Sept. 19, 1983, as amended at 50 FR 52434, Dec. 23, 1985]

34.003 Responsibilities.

(a) As required by A-109, the agency head or designee shall establish written procedures for its implementation.

(b) The agency procedures shall identify the key decision points of each major system acquisition and the agency official(s) for making those decisions.

(c) Systems acquisitions normally designated as major are those programs that, as determined by the agency head, (1) are directed at and critical to fulfilling an agency mission need, (2) entail allocating relatively large resources for the particular agency, and (3) warrant special management attention, including specific agency-head decisions. The agency procedures may establish additional criteria, as specified in A-109, for designating major programs system acquisitions.

34.004 Acquisition strategy.

The program manager, as specified in agency procedures, shall develop an acquisition strategy tailored to the particular major system acquisition program. This strategy is the program manager's overall plan for satisfying the mission need in the most effective, economical, and timely manner. The strategy shall be in writing and prepared in accordance with the requirements of subpart 7.1, except where inconsistent with this part, and shall qualify as the acquisition plan for the major system acquisition, as required by that subpart.

34.005 General requirements.

34.005-1 Competition.

(a) The program manager shall, throughout the acquisition process, promote full and open competition and sustain effective competition between alternative major system concepts and sources, as long as it is economically beneficial and practicable to do so. Notice of the proposed acquisition shall be given the broadest and most effective circulation practicable throughout the business, academic, and Government communities. Foreign contractors, technology, and equipment may be considered when it is feasible and permissible to do so.

(b) The contracting officer should time solicitation issuance and contract award to maintain continuity of concept development during the transition from withdrawing concept proposer to new contractor.

[48 FR 42351, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

34.005-2 Mission-oriented solicitation.

(a) Before issuing the solicitation, whenever practicable and consistent with agency procedures, the contracting officer should take the actions outlined in subparagraphs (1) and (2):

(1) Advance notification of the acquisition should be given the widest practicable dissemination, including publication in the Commerce Business Daily (see subpart 5.2) and should be sent to as wide a selection of potential sources as practicable, including smaller and newer firms, Government laboratories, federally funded research and development centers, educational institutions and other not-for-profit organizations, and, if it would be beneficial and is not prohibited, foreign sources.

(2) If appropriate, hold a presolicitation conference (see 15.404) and/or send copies of the proposed solicitation to all prospective offerors for their comments. After evaluation of these comments, the solicitation should be revised, if appropriate.

(b) The contracting officer shall send the final solicitation to all prospective offerors. It shall—

(1) Describe the nature of the need in terms of mission capabilities required, without reference to any specific systems to satisfy the need;

(2) Indicate, and explain when appropriate, the schedule, capability, and cost objectives and any known constraints in the acquisition;

(3) Provide, or indicate how access can be obtained to, all Government data related to the acquisition;

(4) Include selection requirements consistent with the acquisition strategy; and

(5) Clearly state that each offeror is free to propose its own technical approach, main design features, subsystems, and alternatives to schedule, cost, and capability goals.

(c) To the extent practicable, the solicitation shall not reference or mandate Government specifications or standards, unless the agency is mandating a subsystem or other component as approved under agency procedure.

48 FR 42351, Sept. 19, 1983, as amended at 0 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 3, 1985]

4.005-3 Concept exploration contracts.

Whenever practicable, contracts to e performed during the concept exploration phase shall be for relatively hort periods, at planned dollar levels. hese contracts are to refine the proosed concept and to reduce the conept's technical uncertainties. The cope of work for this phase of the rogram shall be consistent with the Government's planned budget for the hase. Follow-on contracts for such asks in the exploration phase shall be warded as long as the concept aproach remains promising, the conractor's progress is acceptable, and it s economically practicable to do so.

4.005-4 Demonstration contracts.

Whenever practicable, contracts for he demonstration phase should proide for contractors to submit, by the nd of the phase, priced proposals, toally funded by the Government, for ull-scale development. The contracting officer should provide contractors with operational test conditions, perormance criteria, life cycle cost facors, and any other selection criteria ecessary for the contractors to preare their proposals.

4.005-5 Full-scale development contracts.

Whenever practicable, the full-scale evelopment contracts should provide or the contractors to submit priced roposals for production that are ased on the latest quantity, schedule, nd logistics requirements and other onsiderations that will be used in aking the production decision.

4.005-6 Full production.

Contracts for full production of sucessfully tested major systems selected rom the full-scale development phase ay be awarded if the agency head (a) eaffirms the mission need and proram objectives and (b) grants approvl to proceed with production.

PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42352, Sept. 19, 1983, unless otherwise noted.

35.000 Scope of part.

(a) This part prescribes policies and procedures of special application to research and development (R&D) contracting.

(b) R&D integral to acquisition of major systems is covered in part 34. Independent research and development (IR&D) is covered at 31.205-18.

(c) This part also implements OFPP Policy Letter 84-1, Federally Funded Research and Development enters (FFRDC's), by prescribing the procedures for establishment, use, review, and termination of FFRDC's.

[48 FR 42352, Sept. 19, 1983, as amended at 55 FR 3884, Feb. 5, 1990]

35.001 Definitions.

Applied research means the effort that (a) normally follows basic research, but may not be severable from the related basic research; (b) attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques; and (c) attempts to advance the state of the art. When being used by contractors in cost principle applications, this term does not include efforts whose principal aim is the design, development, or testing of specific items or services to be considered for sale; these efforts are within the definition of *development*, given below.

Basic research means research directed toward increasing knowledge in science. The primary aim of basic research is a fuller knowledge or understanding of the subject under study, rather than any practical application of that knowledge.

Broad agency announcement means a general announcement of an agency's research interest including criteria for selecting proposals and soliciting the participation of all offerors capable of satisfying the Government's needs (see 6.102(d)(2)).

Cost sharing, as used in this part, means an explicit arrangement under which the contractor bears some of the burden of reasonable, allocable, and allowable contract cost.

Development, as used in this part, means the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of a potential new product or service (or of an improvement in an existing product or service) to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing; it excludes subcontracted technical effort that is for the sole purpose of developing an additional source for an existing product.

Federally Funded Research and Development Centers (FFRDC's), means activities that are sponsored under a broad charter by a Government agency (or agencies) for the purpose of performing, analyzing, integrating, supporting, and/or managing basic or applied research and/or development, and which receive 70 percent or more of their financial support from the Government; a long-term relationship is contemplated; most or all of the facilities are owned or funded by the Government; and the FFRDC has access to Government and supplier data, employees, and facilities beyond that which is common in a normal contractual relationship. The National Science Foundation maintains the master list of FFRDC's.

Recoupment, as used in this part, means the recovery by the Government of Government-funded nonrecurring costs from contractors that sell, lease, or license the resulting products or technology to buyers other than the Federal Government.

[48 FR 42352, Sept. 19, 1983, as amended at 53 FR 27467, July 20, 1988; 55 FR 3884, Feb. 5, 1990]

35.002 General.

The primary purpose of contracted R&D programs is to advance scientific and technical knowledge and apply that knowledge to the extent necessary to achieve agency and national goals. Unlike contracts for supplies and services, most R&D contracts are directed toward objectives for which the work or methods cannot be precisely described in advance. It is difficult to judge the probabilities of success or required effort for technical approaches, some of which offer little or no early assurance of full success. The contracting process shall be used to encourage the best sources from the scientific and industrial community to become involved in the program and must provide an environment in which the work can be pursued with reasonable flexibility and minimum administrative burden.

35.003 Policy.

(a) *Use of contracts*. Contracts shall be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government. Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose.

(b) *Cost sharing.* Cost sharing policies (which are not otherwise required by law) under Government contracts shall be in accordance with 16.303, 42.707(a) and agency procedures.

(c) *Recoupment.* Recoupment not otherwise required by law shall be in accordance with agency procedures.

35.004 Publicizing requirements and expanding research and development sources.

(a) In order to obtain a broad base of the best contractor sources from the the scientific and industrial community, agencies shall, in addition to following the requirements of part 5, continually search for and develop information on sources (including small business concerns) competent to perform R&D work. These efforts should include—

(1) Early identification and publication of agency R&D needs and requirements, including publication in the *Commerce Business Daily* (see part 5);

(2) Cooperation among technical personnel, contracting officers, and Government small business personnel early in the acquisition process; and

(3) Providing agency R&D points of contact for potential sources.

(b) See subpart 9.7 for information regarding R&D pools and subpart 9.6 for teaming arrangements.

35.005 Work statement.

(a) A clear and complete work statement concerning the area of exploration (for basic research) or the end objectives (for development and applied research) is essential. The work statement should allow contractors freedom to exercise innovation and creativity. Work statements must be individually tailored by technical and contracting personnel to attain the deired degree of flexibility for contractor creativity and the objectives of the R&D.

(b) In basic research the emphasis is on achieving specified objectives and knowledge rather than on achieving predetermined end results prescribed in a statement of specific performance haracteristics. This emphasis applies particularly during the early or conceptual phases of the R&D effort.

(c) In reviewing work statements, contracting officers should ensure that language suitable for a level-of-effort approach, which requires the furnishing of technical effort and a report on the results, is not intermingled with language suitable for a task-completion approach, which often requires the development of a tangible end item designed to achieve specific performance characteristics. The wording of the work statement should also be consistent with the type and form of contract to be negotiated (see 16.207 and 16.306(d)). For example, the work statement for a cost-reimbursement contract promising the contractor's best efforts for a fixed term would be phrased differently than a work statement for a cost-reimbursement completion contract promising the contractor's best efforts for a defined task. Differences between work statements for fixed-price contracts and cost-reimbursement contracts should be even clearer.

(d) In preparing work statements, technical and contracting personnel shall consider and, as appropriate, provide in the solicitation—

(1) A statement of the area of exploration, tasks to be performed, and objectives of the research or development effort;

(2) Background information helpful to a clear understanding of the objective or requirement (e.g., any known phenomena, techniques, methodology, or results of related work);

(3) Information on factors such as personnel, environment, and interfaces that may constrain the results of the effort;

(4) Reporting requirements and information on any additional items that the contractor is required to furnish (at specified intervals) as the work progresses;

(5) The type and form of contract contemplated by the Government and, for level-of-effort work statements, an estimate of applicable professional and technical effort involved; and

(6) Any other considerations peculiar to the work to be performed; for example, any design-to-cost requirements.

35.006 Contracting methods and contract type.

(a) In R&D acquisitions, the precise specifications necessary for sealed bidding are generally not available, thus making negotiation necessary. However, the use of negotiation in R&D contracting does not change the obligation to comply with part 6.

(b) Selecting the appropriate contract type is the responsibility of the contracting officer. However, because of the importance of technical considerations in R&D, the choice of contract type should be made after obtaining the recommendations of technical personnel. Although the Government ordinarily prefers fixed-price arrangements in contracting, this preference applies in R&D contracting only to the extent that goals, objectives, specifications, and cost estimates are sufficient to permit such a preference. The precision with which the goals, performance objectives, and specifications for the work can be defined will largely determine the type of contract employed. The contract type must be selected to fit the work required.

(c) Because the absence of precise specifications and difficulties in estimating costs with accuracy (resulting in a lack of confidence in cost estimates) normally precludes using fixed-price contracting for R&D, the use of cost-reimbursement contracts is usually appropriate (see subpart 16.3). The nature of development work often requires a cost-reimbursement completion arrangement (see 16.306(d)). When the use of cost and performance incentives is desirable and practicable, fixed-price incentive and cost-plus-incentive-fee contracts should be considered in that order of preference.

(d) When levels of effort *can* be specified in advance, a short-duration fixed-price contract *may* be useful for developing system design concepts, resolving potential problems, and reducing Government risks. Fixed-price contracting may also be used in minor projects when the objectives of the research are well defined and there is sufficient confidence in the cost estimate for price negotiations. (See 16.207.)

(e) Projects having production requirements as a follow-on to R&D efforts normally should progress from cost-reimbursement contracts to fixed-price contracts as designs become more firmly established, risks are reduced, and production tooling, equipment, and processes are developed and proven. When possible, a final commitment to undertake specific product development and testing should be avoided until (1) preliminary exploration and studies have indicated a high degree of probability that development is feasible and (2) the Government has determined both its minimum requirements and desired objectives for product performance and schedule completion.

[48 FR 42352, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

35.007 Solicitations.

(a) The submission and subsequent evaluation of an inordinate number of R&D proposals from sources lacking appropriate qualifications is costly and time-consuming to both industry and the Government. Therefore, contracting officers should initially distribute solicitations only to sources technically qualified to perform research or development in the specific field of science or technology involved. Cognizant technical personnel should recommend potential sources that appear qualified, as a result of—

(1) Present and past performance of similar work;

(2) Professional stature and reputation;

(3) Relative position in a particular field of endeavor;

(4) Ability to acquire and retain the professional and technical capability, including facilities, required to perform the work; and

(5) Other relevant factors.

(b) Proposals generally shall be solicited from technically qualified sources, including sources that become known as a result of synopses or other means of publicizing requirements. If it is not practicable to initially solicit all apparently qualified sources, only a reasonable number need be solicited. In the interest of competition, contracting officers shall furnish copies of the solicitation to other apparently qualified sources.

(c) Solicitations shall require offerors to describe their technical and management approach, identify technical uncertainties, and make specific proposals for the resolution of any uncertainties. The solicitation should require offerors to include in the proposal any planned subcontracting of scientific or technical work (see 35.009).

(d) Solicitations may require that proposals be organized so that the technical portions can be efficiently evaluated by technical personnel (see 15.406-5(b)). Solicitation and evaluation of proposals should be planned to minimize offerors' and Government expense.

(e) R&D solicitations should contain evaluation factors to be used to determine the most technically competent (see 15.605(e)), such as—

(1) The offeror's understanding of the scope of the work;

(2) The approach proposed to accomplish the scientific and technical objectives of the contract or the merit of the ideas or concepts proposed;

(3) The availability and competence of experienced engineering, scientific, or other technical personnel;

(4) The offeror's experience;

(5) Pertinent novel ideas in the specific branch of science and technology involved; and

(6) The availability, from any source, of necessary research, test, laboratory, or shop facilities.

(f) In addition to evaluation factors for technical competence, the contracting officer shall consider, as appropriate, management capability (including cost management techniques), experience and past performance, subcontracting practices, and any other significant evaluation criteria (e.g., unrealistically low cost estimates in proposals for cost-reimbursement or fixed-price incentive contracts). Although cost or price is not normally the controlling factor in selecting a contractor to perform R&D, it should not be disregarded in arriving at a selection that best satisfies the Government's requirement at a fair and reasonable cost.

(g) The contracting officer should ensure that each prospective offeror fully understands the details of the work, especially the Government interpretation of the work statement. If the effort is complex, the contracting officer should provide prospective offerors an opportunity to comment on the details of the requirements as contained in the work statement, the contract Schedule, and any related specifications. This may be done through the use of preproposal conferences (see 15.409).

(h) If it is appropriate to do so, solicitations should permit offerors to propose an alternative contract type (see 16.103).

(i) In circumstances when a concern has a new idea or product to discuss that incorporates the results of independent R&D work funded by the concern in the private sector and is of interest to the Government, there should be no hesitancy to discuss it; however, the concern should be warned that the Government will not be obligated by the discussion. Under such circumstances, it may be appropriate to negotiate directly with the concern without competition. Also see subpart 15.5 concerning unsolicited proposals.

(j) The Government may issue an exploratory request to determine the existence of ideas or prior work in a specific field of research. Any such request shall clearly state that it does not impose any obligation on the Government or signify a firm intention to enter into a contract.

35.008 Evaluation for award.

(a) Generally, an R&D contract should be awarded to that organization, including any educational institution, that proposes the best ideas or concepts and has the highest competence in the specific field of science or technology involved. However, an award should not be made to obtain capabilities that exceed those needed for successful performance of the work.

(b) In R&D contracting, precise specifications are ordinarily not available. The contracting officer should therefore take special care in reviewing the solicitation evaluation factors to assure that they are properly presented and consistent with the solicitation.

(c) When a small business concern would otherwise be selected for award but is considered not responsible, the SBA Certificate of Competency procedure shall be followed (see subpart 19.6).

(d) The contracting officer should use the procedures in subpart 15.10 to notify and debrief offerors.

(e) It is important to evaluate a proposed contractor's cost or price estimate, not only to determine whether the estimate is reasonable but also to provide valuable insight into the offeror's understanding of the project, perception of risks, and ability to organize and perform the work. Cost or price analysis, as appropriate (see 15.805), is a useful tool.

35.009 Subcontracting research and development effort.

Since the selection of R&D contractors is substantially based on the best scientific and technological sources, it is important that the contractor not subcontract technical or scientific work without the contracting officer's advance knowledge. During the negotiation of a cost-reimbursement R&D contract, the contracting officer shall obtain complete information concerning the contractor's plans for subcontracting any portion of the experimental, research, or development effort (see also 35.007(c)). Also when negotiating a fixed-price contract, the contracting officer should evaluate this information and may obtain an agreement that protects the Government's interests. The clause at 52.244-2, Subcontracts Under Cost-Reimbursement and Letter Contracts, prescribed for cost-reimbursement contracts at 44.204(c), requires the contracting officer's prior approval for the placement of a substantial cost-reimbursement subcontract that has experimental, developmental, or research work as one of its purposes.

35.010 Scientific and technical reports.

(a) R&D contracts shall require contractors to furnish scientific and technical reports, consistent with the objectives of the effort involved, as a permanent record of the work accomplished under the contract.

(b) Agencies should make R&D contract results available to other Government activities and the private sector. Contracting officers shall follow agency regulations regarding such matters as national security, protection of data, and new technology dissemination policy. The contract should require that contractors send copies of scientific and technical reports resulting from DoD contracts to the Defense Technical Information Center (DTIC), Attn: DTIC-FDAC, Cameron Station, Alexandria, VA 22304-6145. DTIC provides a central service for the interchange of scientific and technical information of value to the Department of Defense and its contractors. Reports resulting from non-DoD contracts should be sent to the National Technical Information Service (NTIS), 5235 Port Royal Road, Springfield, VA 22164. When agencies require that completed reports be covered by a report documentation page, Standard Form (SF) 298, Report Documentation Page, the contractor should submit a copy with the report.

[48 FR 42352, Sept. 19, 1983, as amended at 55 FR 3884, Feb. 5, 1990]

35.011 Data.

(a) R&D contracts shall specify the technical data to be delivered under the contract, since the data clauses required by part 27 do not require the *delivery* of any such data.

(b) In planning a developmental program when subsequent production contracts are contemplated, consideration should be given to the need and time required to obtain a technical package (plans, drawings, specifications, and other descriptive information) that can be used to achieve competition in production contracts. In some situations, the developmental contractor may be in the best position to produce such a technical package.

35.012 Patent rights.

For a discussion of patent rights, see agency regulations and part 27.

35.013 Insurance.

Nonprofit, educational, or State institutions performing cost-reimbursement contracts often do not carry insurance. They may claim immunity from liability for torts, or, as State institutions, they may be prohibited by State law from expending funds for insurance. When this is the case, see 28.311 for appropriate clause coverage.

35.014 Government property and title.

(a) The requirements in part 45 for establishing and maintaining control over Government property apply to all R&D contracts.

(b) In implementing 31 U.S.C. 6306, and unless an agency head provides otherwise, the policies in subparagraphs (1) through (4) following, regarding title to equipment (and other tangible personal property) purchased by the contractor using Government funds provided for the conduct of basic or applied scientific research, apply to contracts with nonprofit institutions of higher education and nonprofit organizations whose primary purpose is the conduct of scientific research:

(1) If the contractor obtains the contracting officer's advance approval, the contractor shall automatically acquire and retain title to any item of equipment costing less than $5,000 (or a lesser amount established by agency regulations) acquired on a reimbursable basis.

(2) If purchased equipment costs $5,000 (or a lesser amount established by agency regulations) or more, and as the parties specifically agree in the contract, title may—

(i) Vest in the contractor upon acquisition without further obligation to the Government;

(ii) Vest in the contractor, subject to the Government's right to direct transfer of the title to the Government or to a third party within 12 months after the contract's completion or termination (transfer of title to the Government or third party shall not be the basis for any claim by the contractor); or

(iii) Vest in the Government, if the contracting officer determines that vesting of title in the contractor would not further the objectives of the agency's research program.

(3) If title to equipment is vested in the contractor, depreciation, amortization, or use charges are not allowable with respect to that equipment under any existing or future Government contract or subcontract.

(4) If the contract is performed at a Government installation and there is a continuing need for the equipment following contract completion, title need not be transferred to the contractor.

(c) The absence of an agreement covering title to equipment acquired by the contractor with Government funds that cost $1,000 or more does not limit an agency's right to act to vest title in a contractor as authorized by 31 U.S.C. 6306.

(d)(1) Vesting title under paragraph (b) above is subject to civil rights legislation, 42 U.S.C. 2000d. Before title is vested, the contractor must agree that—

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this contemplated financial assistance (title to equipment)."

(2) By signing the contract, the contractor accepts and agrees to comply with this requirement.

(e) The policies in subparagraphs (b)(1) through (b)(3) and paragraph (d) above are implemented in the Government property clauses (Alternate II of the clause at 52.245-2, Government Property (Fixed-Price); Alternate I of the clause at 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts); Alternate I of the clause at 52.245-11, Government Property (Facilities Use); and the clause at 52.245-15, Transfer of Title to the Facilities), which are prescribed in part 45 (at 45.106 for fixed-price and cost-reimbursement contracts and at 45.302-6 and 45.302-7 for facilities contracts).

[48 FR 42352, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

35.015 Contracts for research with educational institutions and nonprofit organizations.

(a) *General.* (1) When the R&D work is not defined precisely and the contract states only a period during which work is conducted (that is, a specific time for achievement of results is not required), research contracts with educational institutions and nonprofit organizations shall—

(i) State that the contractor bears primary responsibility for the research;

(ii) Give (A) the name of the principal investigator (or project leader), if the decision to contract is based on that particular individual's research effort and management capabilities, and (B) the contractor's estimate of the amount of time that individual will devote to the work;

(iii) Provide that the named individual shall be closely involved and continuously responsible for the conduct of the work;

(iv) Provide that the contractor must obtain the contracting officer's approval to change the principal investigator (or project leader);

(v) Require that the contractor advise the contracting officer if the principal investigator (or project leader) will, or plans to, devote substantially less effort to the work than anticipated; and

(vi) Require that the contractor obtain the contracting officer's approval to change the phenomenon under study, the stated objectives of the research, or the methodology.

(2) If a research contract *does* provide precise objectives or a specific date for achievement of results, the contracting officer may include in the contract the requirements set forth in subparagraph (1) above, if it is necessary for the Government to exercise oversight and approval over the avenues of approach, methods, or schedule of work.

(b) *Basic agreements.* (1) A basic agreement should be negotiated if the number of contracts warrants such an agreement (see 16.702). Basic agreements should be reviewed and updated at least annually.

(2) To promote uniformity and consistency in dealing with educational institutions and nonprofit organizations, agencies are encouraged to use basic agreements of other agencies.

(3) Each year as of September 30, each agency shall furnish to the FAR Secretariat a list of its basic agreements pertaining to R&D. The FAR Secretariat shall be responsible for preparing and publishing a list of all these agreements.

35.016 Broad agency announcement.

(a) *General.* This paragraph prescribes procedures for the use of the broad agency announcement (BAA) with Peer or Scientific Review (see 6.102(d)(2)) for the acquisition of basic and applied research and that part of development not related to the development of a specific system or hardware procurement. BAA's may be used by agencies to fulfill their requirements for scientific study and experimentation directed toward advancing the state-of-the-art or increasing knowledge or understanding rather than focusing on a specific system or hardware solution. The BAA technique shall only be used when meaningful proposals with varying technical/scientific approaches can be reasonably anticipated.

(b) The BAA, together with any supporting documents, shall—

(1) Describe the agency's research interest, either for an individual program requirement or for broadly defined areas of interest covering the full range of the agency's requirements;

(2) Describe the criteria for selecting the proposals, their relative importance and the method of evaluation;

(3) Specify the period of time during which proposals submitted in response to the BAA will be accepted; and

(4) Contain instructions for the preparation and submission of proposals.

(c) The availability of the BAA shall be published in the Commerce Business Daily and, if authorized pursuant to subpart 5.5, may also be published in noted scientific, technical, or engineering periodicals. The notice shall be published no less frequently than annually.

(d) Proposals received as a result of the BAA shall be evaluated in accordance with evaluation criteria specified therein through a peer or scientific review process. Written evaluation reports on individual proposals will be necessary but proposals need not be evaluated against each other since they are not submitted in accordance with a common work statement.

(e) The primary basis for selecting proposals for acceptance shall be technical, importance to agency programs, and fund availability. Cost realism and reasonableness shall also be considered to the extent appropriate.

(f) Synopsis under subpart 5.2, Synopses of Proposed Contract Actions, of individual contract actions based upon proposals received under the BAA is not required. The notice published pursuant to subparagraph (c), of this section, fulfills the synopsis requirement.

[53 FR 27467, July 20, 1988]

35.017 Federally Funded Research and Development Centers.

(a) *Policy.*

(1) This section sets forth Federal policy regarding the establishment, use, review, and termination of Federally Funded Research and Development Centers (FFRDC's) and related sponsoring agreements.

(2) An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources. FFRDC's enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency. An FFRDC, in order to discharge its responsibilities to the sponsoring agency, has access, beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to employees and facilities. The FFRDC is required to conduct its business in a manner befitting its special relationship with the Government, to operate in the public interest with objectivity and independence, to be free from organizational conflicts of interest, and to have full disclosure of its affairs to the sponsoring agency. It is not the Government's intent that an FFRDC use its privileged information or access to facilities to compete with the private sector. However, an FFRDC may perform work for other than the sponsoring agency under the Economy Act, or other applicable legislation, when the work is not otherwise available from the private sector.

(3) FFRDC's are operated, managed, and/or administered by either a university or consortium of universities, other not-for-profit or nonprofit organization, or an industrial firm, as an autonomous organization or as an identifiable separate operating unit of a parent organization.

(4) Long-term relationships between the Government and FFRDC's are encouraged in order to provide the continuity that will attract high-quality personnel to the FFRDC. This relationship should be of a type to encourage the FFRDC to maintain currency in its field(s) of expertise, maintain its objectivity and independence, preserve its familiarity with the needs of its sponsor(s), and provide a quick response capability.

(b) *Definitions.*

Nonsponsor, as used in this section, means any other organization, in or outside of the Federal Government, which funds specific work to be performed by the FFRDC and is not a party to the sponsoring agreement.

Primary sponsor, as used in this section, means the lead agency responsible for managing, administering, or monitoring overall use of the FFRDC under a multiple sponsorship agreement.

Special competency, as used in this section, means a special or unique capability, including qualitative aspects, developed incidental to the primary functions of the FFRDC to meet some special need.

Sponsor means the executive agency which manages, administers, monitors, funds, and is responsible for the overall use of an FFRDC. Multiple agency sponsorship is possible as long a one agency agrees to act as the "primary sponsor." In the event of multiple sponsors, "sponsor" refers to the primary sponsor.

[55 FR 3885, Feb. 5, 1990]

35.017-1 Sponsoring agreements.

(a) In order to facilitate a long-term relationship between the Government and an FFRDC, establish the FFRDC's mission, and ensure a periodic reevaluation of the FFRDC, a written agreement of sponsorship between the Government and the FFRDC shall be prepared when the FFRDC is established. The sponsoring agreement may take various forms; it may be included in a contract between the Government and the FFRDC, or in another legal instrument under which an FFRDC accomplishes effort, or it may be in a separate written agreement. Notwithstanding its form, the sponsoring agreement shall be clearly designated as such by the sponsor.

(b) While the specific content of any sponsoring agreement will vary depending on the situation, the agreement shall contain, as a minimum, the requirements of paragraph (c) of this subsection. The requirements for, and the contents of, sponsoring agreements may be as further specified in sponsoring agencies' policies and procedures.

(c) As a minimum, the following requirements must be addressed in either a sponsoring agreement or sponsoring agencies' policies and procedures:

(1) A statement of the purpose and mission of the FFRDC.

(2) Provisions for the orderly termination or nonrenewal of the agreement, disposal of assets, and settlement of liabilities. The responsibility for capitalization of an FFRDC must be defined in such a manner that ownership of assets may be readily and equitably determined upon termination of the FFRDC's relationship with its sponsor(s).

(3) A provision for the identification of retained earnings (reserves) and the development of a plan for their use and disposition.

(4) A prohibition against the FFRDC competing with any non-FFRDC concern in response to a Federal agency request for proposal for other than the operation of an FFRDC. This prohibition is not required to be applied to any parent organization or other subsidiary of the parent organization in its non-FFRDC operations. Requests for information, qualifications or capabilities can be answered unless otherwise restricted by the sponsor.

(5) A delineation of whether or not the FFRDC may accept work from other than the sponsor(s). If nonsponsor work can be accepted, a delineation of the procedures to be followed, along with any limitations as to the nonsponsors form which work can be accepted (other Federal agencies, State or local governments, nonprofit or profit organizations, etc.).

(d) The sponsoring agreement or sponsoring agencies' policies and procedures may also contain, as appropriate, other provisions, such as identification of—(1) Any cost elements which will require advance agreement if cost-type contracts are used; and (2) Considerations which will affect negotiation of fees where payment of fees is determined by the sponsor(s) to be appropriate.

(e) The term of the agreement will not exceed 5 years, but can be renewed, as a result of periodic review, in increments not to exceed 5 years.

[55 FR 3885, Feb. 5, 1990]

35.017-2 Establishing or changing an FFRDC.

To establish an FFRDC, or change its basic purpose and mission, the sponsor shall ensure the following:

(a) Existing alternative sources for satisfying agency requirements cannot effectively meet the special research or development needs.

(b) The notices required for publication (see 5.205(b)) are placed as required.

(c) There is sufficient Government expertise available to adequately and objectively evaluate the work to be performed by the FFRDC.

(d) The Executive Office of the President, Office of Science and Technology Policy, Washington, DC 20506, is notified.

(e) Controls are established to ensure that the costs of the services being provided to the Government are reasonable.

(f) The basic purpose and mission of the FFRDC is stated clearly enough to enable differentiation between work which should be performed by the FFRDC and that which should be performed by non-FFRDC's.

(g) A reasonable continuity in the level of support to the FFRDC is maintained, consistent with the agency's need for the FFRDC and the terms of the sponsoring agreement.

(h) The FFRDC is operated, managed, or administered by an autonomous organization or as an identifiably separate operating unit of a parent organization, and is required to operate in the public interest, free from organizational conflict of interest, and to disclose its affairs (as an FFRDC) to the primary sponsor.

(i) OMB Circular A-120 is complied with when applicable and quantity production or manufacturing is not performed unless authorized by legislation.

(j) Approval is received from the head of the sponsoring agency.

[55 FR 3885, Feb. 5, 1990]

35.017-3 Using an FFRDC.

(a) All work placed with the FFRDC must be within the purpose, mission, general scope of effort, or special competency of the FFRDC.

(b) Where the use of the FFRDC by a nonsponsor is permitted by the sponsor, the sponsor shall be responsible for compliance with paragraph (a) of this subsection. The nonsponsoring agency is responsible for making the determination required by 17.504 and providing the documentation required by 17.504(e). When permitted by the sponsor, a Federal agency may contract directly with the FFRDC in which case that Federal agency is responsible for compliance with part 6.

[55 FR 3886, Feb. 5, 1990]

35.017-4 Reviewing FFRDC's.

(a) The sponsor, prior to extending the contract or agreement with an FFRDC, shall conduct a comprehensive review of the use and need for the FFRDC. The review will be coordinated with any co-sponsors and may be performed in conjunction with the budget process. If the sponsor determines that its sponsorship is no longer appropriate, it shall apprise other agencies which use the FFRDC of the determination and afford them an opportunity to assume sponsorship.

(b) Approval to continue or terminate the sponsorship shall rest with the head of the sponsoring agency. This determination shall be based upon the results of the review conducted in accordance with paragraph (c) of this subsection.

(c) An FFRDC review should include the following:

(1) An examination of the sponsor's special technical needs and mission requirements that are performed by the FFRDC to determine if and at what level they continue to exist.

(2) Consideration of alternative sources to meet the sponsor's needs.

(3) An assessment of the efficiency and effectiveness of the FFRDC in meeting the sponsor's needs, including the FFRDC's ability to maintain its objectivity, independence, quick response capability, currency in its field(s) of expertise, and familiarity with the needs of its sponsor.

(4) An assessment of the adequacy of the FFRDC management in ensuring a cost-effective operation.

(5) A determination that the criteria for establishing the FFRDC continue to be satisfied and that the sponsoring agreement is in compliance with 35.017-1.

[55 FR 3886, Feb. 5, 1990]

35.017-5 Terminating an FFRDC.

When a sponsor's need for the FFRDC no longer exists, the sponsorship may be transferred to one or more Government agencies, if appropriately justified. If the FFRDC is not transferred to another Government agency, it shall be phased out.

[55 FR 3886, Feb. 5, 1990]

35.017-6 Master list of FFRDC's.

The National Science Foundation (NSF) maintains a master Government list of FFRDC's. Primary sponsors will provide information on each FFRDC, including sponsoring agreements, mission statements, funding data, and type of R&D being performed, to the NSF upon its request for such information.

[55 FR 3886, Feb. 5, 1990]

35.017-7 Limitation on the creation of new FFRDC's.

Pursuant to 10 U.S.C. 2367, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration may not obligate or expend amounts appropriated to the Department of Defense for purposes of operating an FFRDC that was not in existence before June 2, 1986, until (a) the head of the agency submits to Congress a report with respect to such center that describes the purpose, mission, and general scope of effort of the center; and (b) a period of 60 days, beginning on the date such report is received by Congress, has elapsed.

[55 FR 3886, Feb. 5, 1990]

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

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36.700 Scope of subpart.
36.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.
36.702 Forms for use in contracting for architect-engineer services.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42356, Sept. 19, 1983, unless otherwise noted.

36.000 Scope of part.

This part prescribes policies and procedures peculiar to contracting for construction and architect-engineer services. It includes requirements for using certain clauses and standard forms that apply also to contracts for dismantling, demolition, or removal of improvements.

Subpart 36.1—General

36.101 Applicability.

(a) Construction and architect-engineer contracts are subject to the requirements in other parts of this regulation, which shall be followed when applicable.

(b) When a requirement in this part is inconsistent with a requirement in another part of this regulation, this part 36 shall take precedence if the acquisition of construction or architect-engineer services is involved.

(c) A contract for both construction and supplies or services shall include (1) clauses applicable to the predominant part of the work (see subpart 22.4), or (2) if the contract is divided into parts, the clauses applicable to each portion.

36.102 Definitions.

Architect-Engineer Services means—

(a) Professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services;

(b) Other professional services associated with research, planning, development, design, construction, alteration, or repair of real property that the contracting officer determines are of an architectural or engineering nature;

(c) Other professional services of an architectural or engineering nature (including surveying and mapping, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that the contracting officer determines should logically or justifiably be performed by members of the architectural and engineering professions (and individuals in their employ); and

(d) Other incidental services (including studies, investigations, tests, evaluations, consultations, comprehensive planning, program management, and conceptual design) that the Contracting Officer determines should logically or justifiably be performed by members of the architectural and engineering professions (and individuals in their employ) in conjunction with professional architect-engineer services acquired by Pub. L. 92-582 procedures.

As-built drawings, see record drawings.

Construction means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms *buildings, structures, or other real property* include but are not limited to improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property.

Contract, as used in this part, is intended to refer to a contract for construction or a contract for architect-engineer services, unless another meaning is clearly intended.

Firm, as used in this part in conjunction with architect-engineer services, means any individual, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

Plans and specifications, as used in this part, means drawings, specifications, and other data for and preliminary to the construction.

Record drawings, as used in this part, means drawings submitted by a contractor or subcontractor at any tier to show the construction of a particular structure or work as actually completed under the contract.

Shop drawings, as used in this part, means drawings submitted by the construction contractor or a subcontractor at any tier or required under a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements, (2) the installation (i.e., form, fit, and attachment details) of materials or equipment, or (3) both.

[48 FR 42356, Sept. 19, 1983, as amended at 51 FR 36972, Oct. 16, 1986; 54 FR 13336, Mar. 31, 1989; 54 FR 19827, May 8, 1989]

36.103 Methods of contracting.

(a) Contracting officers shall acquire construction using sealed bid procedures if the conditions in 6.401(a) apply, except that sealed bidding need not be used for construction contracts to be performed outside the United States, its possessions, or Puerto Rico. (See 6.401(b)(2).)

(b) Contracting officers shall acquire architect-engineer services by negotiation, and select sources in accordance with applicable law, subpart 36.6, and agency regulations.

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

Subpart 36.2—Special Aspects of Contracting for Construction

36.201 Evaluation of contractor performance.

(a) *Preparation of performance evaluation reports.* (1) The contracting activity shall evaluate contractor performance and prepare a performance report using the SF 1420, Performance Evaluation (Construction Contracts), for each construction contract of—

(i) $500,000 or more; or

(ii) More than $10,000, if the contract was terminated for default.

(2) The report shall be prepared at the time of final acceptance of the work, at the time of contract termination, or at other times, as appropriate, in accordance with agency procedures. Ordinarily, the evaluating official who prepares the report should be the person responsible for monitoring contract performance.

(3) If the evaluating official concludes that a contractor's overall performance was unsatisfactory, the contractor shall be advised in writing that a report of unsatisfactory performance is being prepared and the basis for the report. If the contractor submits any written comments, the evaluating official shall include them in the report, resolve any alleged factual discrepancies, and make appropriate changes in the report.

(4) The head of the contracting activity shall establish procedures which ensure that fully qualified personnel prepare and review performance reports.

(b) *Review of performance reports.* Each performance report shall be reviewed to ensure that it is accurate and fair. The reviewing official should have knowledge of the contractor's performance and should normally be at an organizational level above that of the evaluating official.

(c) *Distribution and use of performance reports.* (1) Each performance report shall be distributed in accordance with agency procedures. One copy shall be included in the contract file. The contracting activity shall retain the report for at least six years after the date of the report.

(2) Before making a determination of responsibility in accordance with subpart 9.1, the contracting officer may consider performance reports in accordance with agency instructions.

[48 FR 42356, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986; 54 FR 48989, Nov. 28, 1989]

36.202 Specifications.

(a) Construction specifications shall conform to the requirements in part 10 of this regulation.

(b) Whenever possible, contracting officers shall ensure that references in specifications are to widely recognized standards or specifications promulgated by governments, industries, or technical societies.

(c) When *brand name or equal* descriptions are necessary, specifications must clearly identify and describe the particular physical, functional, or other characteristics of the brand-name items which are considered essential to satisfying the requirement.

36.203 Government estimate of construction costs.

(a) An independent Government estimate of construction costs shall be prepared and furnished to the contracting officer at the earliest practicable time for each proposed contract and for each contract modification anticipated to cost $25,000 or more. The contracting officer may require an estimate when the cost of required work is anticipated to be less than $25,000. The estimate shall be prepared in as much detail as though the Government were competing for award.

(b) When two-step sealed bidding is used, the independent Government estimate shall be prepared when the contract requirements are definitized.

(c) Access to information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations to allow the contracting officer to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price. The overall amount of the Government's estimate shall not be disclosed except as permitted by agency regulations.

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

36.204 Disclosure of the magnitude of construction projects.

Advance notices and solicitations shall state the magnitude of the requirement in terms of physical characteristics and estimated price range. In no event shall the statement of magnitude disclose the Government's estimate. Therefore, the estimated price should be described in terms of one of the following price ranges:

(a) Less than $25,000.

(b) Between $25,000 and $100,000.

(c) Between $100,000 and $250,000.

(d) Between $250,000 and $500,000.

(e) Between $500,000 and $1,000,000.

(f) Between $1,000,000 and $5,000,000.

(g) Between $5,000,000 and $10,000,000.

(h) More than $10,000,000.

36.205 Statutory cost limitations.

(a) Contracts for construction shall not be awarded at a cost to the Government—

(1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or

(2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.

(b) Solicitations containing one or more items subject to statutory cost limitations shall state (1) the applicable cost limitation for each affected item in a separate schedule; (2) that an offer which does not contain separately-priced schedules will not be considered; and (3) that offers must contain a certification that the price on each schedule includes an approximate apportionment of all estimated direct costs, allocable indirect costs, and profit.

(c) The Government shall reject an offer if its prices exceed applicable statutory limitations, unless laws or agency procedures provide pertinent exemptions. However, if it is in the Government's interest, the contracting officer may include a provision in the solicitation which permits the award of separate contracts for individual items whose prices are within or not subject to applicable statutory limitations.

(d) The Government shall also reject an offer if its prices are within statutory limitations only because it is materially unbalanced. An offer is unbalanced if its prices are significantly less than cost for some work, and overstated for other work.

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

36.206 Liquidated damages.

The contracting officer shall evaluate the need for liquidated damages in a construction contract in accordance with 12.202 and agency regulations.

36.207 Pricing fixed-price construction contracts.

(a) Generally, firm-fixed-price contracts shall be used to acquire construction. They may be priced (1) on a lump-sum basis (when a lump sum is paid for the total work or defined parts of the work), (2) on a unit-price basis (when a unit price is paid for a specified quantity of work units), or (3) using a combination of the two methods.

(b) Lump-sum pricing shall be used in preference to unit pricing except when—

(1) Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;

(2) Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency;

(3) Estimated quantities of work required may change significantly during construction; or

(4) Offerors would have to expend unusual effort to develop adequate estimates.

(c) Fixed-price contracts with economic price adjustment may be used if such a provision is customary in contracts for the type of work being acquired, or when omission of an adjustment provision would preclude a significant number of firms from submitting offers or would result in offerors including unwarranted contingencies in proposed prices.

36.208 Concurrent performance of firm-fixed-price and other types of construction contracts.

In view of potential labor and administrative problems, cost-plus-fixed-fee, price-incentive, or other types of contracts with cost variation or cost adjustment features shall not be permitted concurrently, at the same work site, with firm-fixed-price, lump sum, or unit price contracts except with the prior approval of the head of the contracting activity.

36.209 Construction contracts with architect-engineer firms.

No contract for the construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates, except with the approval of the head of the agency or authorized representative.

36.210 Inspection of site and examination of data.

The contracting officer should make appropriate arrangements for prospective offerors to inspect the work site and to have the opportunity to examine data available to the Government which may provide information concerning the performance of the work, such as boring samples, original boring logs, and records and plans of previous construction. The data should be assembled in one place and made available for examination. The solicitation should notify offerors of the time and place for the site inspection and data examination. If it is not feasible for offerors to inspect the site or examine the data on their own, the solicitation should also designate an individual who will show the site or data to the

fferors. Significant site information
nd the data should be made available
o all offerors in the same manner, in-
luding information regarding any
tilities to be furnished during con-
truction. A record should be kept of
he identity and affiliation of all offer-
rs' representatives who inspect the
ite or examine the data.

6.211 Distribution of advance notices and solicitations.

Advance notices and solicitations
hould be distributed to reach as many
rospective offerors as practicable.
ontracting officers may send notices
nd solicitations to organizations that
aintain, without charge to the
ublic, display rooms for the benefit
f prospective offerors, subcontrac-
ors, and material suppliers. If re-
uested by such organizations, this
ay be done for all or a stated class of
onstruction projects on an annual or
emiannual basis. Contracting officers
ay determine the geographical
xtent of distribution of advance no-
ices and solicitations on a case-by-case
asis.

ubpart 36.3—Special Aspects of Sealed Bidding in Construction Contracting

.301 General.

Contracting officers shall follow the
rocedures for sealed bidding in part
4, as modified and supplemented by
e requirements in this subpart.

8 FR 42356, Sept. 19, 1983, as amended at
FR 1744, Jan. 11, 1985; 50 FR 52429, Dec.
, 1985]

.302 Presolicitation notices.

(a) Unless the requirement is waived
the head of the contracting activity
a designee, the contracting officer
all send presolicitation notices to
rospective bidders on any construc-
on requirement when the proposed
ntract is expected to equal or exceed
00,000. Presolicitation notices may
so be used when the proposed con-
act is expected to be less than
00,000. These notices shall be issued
fficiently in advance of the invita-
n for bids to stimulate the interest of the greatest number of prospective bidders.

(b) Presolicitation notices shall—

(1) Describe the proposed work in sufficient detail to disclose the nature and volume of work (in terms of physical characteristics and estimated price range)(see 36.204);

(2) State the location of the work;

(3) Include tentative dates for issuing invitations, opening bids, and completing contract performance;

(4) State where plans will be available for inspection without charge;

(5) Specify a date by which requests for the invitation for bids should be submitted;

(6) Notify recipients that if they do not submit a bid they should advise the issuing office as to whether they want to receive future presolicitation notices;

(7) State whether award is restricted to small businesses; and

(8) Specify any amount to be charged for solicitation documents.

(9) Be publicized in the Commerce Business Daily in accordance with 5.204.

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 19716, May 30, 1986]

36.303 Invitations for bids.

(a) Invitations for bids for construction shall allow sufficient time for bid preparation (i.e., the period of time between the date invitations are distributed and the date set for opening of bids) (but see 5.203 and 14.202-1) to allow bidders an adequate opportunity to prepare and submit their bids, giving due regard to the construction season and the time necessary for bidders to inspect the site, obtain subcontract bids, examine data concerning the work, and prepare estimates based on plans and specifications.

(b) Invitations for bids shall be prepared in accordance with subpart 14.2 and this section using the forms prescribed in part 53.

(c) Contracting officers should assure that each invitation for bids includes the following information, when applicable:

(1) The appropriate wage determination of the Secretary of Labor (see

subpart 22.4), or, if the invitation for bids must be issued before the wage determination is received, a notice that the schedule of minimum wage rates to be paid under the contract will be issued as an amendment to the invitation for bids before the opening date for bids (see 14.208 and 22.404-3(b)).

(2) The Performance of Work by the Contractor clause (see 36.501 and 52.236-1).

(3) The magnitude of the proposed construction project (see 36.204).

(4) The period of performance (see subpart 12.1).

(5) Arrangements made for bidders to inspect the site and examine the data concerning performance of the work (see 36.210).

(6) Information concerning any facilities, such as utilities, office space, and warehouse space, to be furnished during construction.

(7) Information concerning the prebid conference (see 14.207).

(8) Any special qualifications or experience requirements that will be considered in determining the responsibility of bidders (see subpart 9.1).

(9) Any special instructions concerning bids, alternate bids, and award.

(10) Any instructions concerning reporting requirements.

(d) The contracting officer shall send invitations for bids to prospective bidders who requested them in response to the presolicitation notice, and should send them to other prospective bidders upon their specific request (see 14.205 and 5.102(a)).

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

36.304 Notice of award.

When a notice of award is issued, it shall contain information required by 14.407 and shall—

(a) Identify the invitation for bids;

(b) Identify the contractor's bid;

(c) State the award price;

(d) Advise the contractor that any required payment and performance bonds must be promptly executed and returned to the contracting officer;

(e) Specify the date of commencement of work, or advise that a notice to proceed will be issued.

36.305 Preconstruction conference.

The contracting officer shall conduct a preconstruction conference to inform the contractor concerning the labor standards clauses of the contract, when appropriate in accordance with 22.405-1(b).

Subpart 36.4—Special Procedures for Negotiation of Construction Contracts

36.401 [Reserved]

36.402 Price negotiation.

(a) Agencies shall follow the policies and procedures in part 15 when negotiating prices for construction.

(b) The contracting officer shall evaluate proposals and associated cost or pricing data and shall compare them to the Government estimate.

(1) When the submission of certified cost or pricing data is not required (see 15.804-2 and 15.804-3), and any element of a proposal differs significantly from the Government estimate, the contracting officer should request the offeror to submit cost data concerning that element (e.g., wage rates or fringe benefits, significant materials, equipment allowances, and subcontractor costs).

(2) When a proposed price is significantly lower than the Government estimate, the contracting officer shall make sure both the offeror and the Government estimator completely understand the scope of the work. If negotiations reveal errors in the Government estimate, the estimate shall be corrected and the changes shall be documented in the contract file.

(c) When appropriate, additional pricing tools may be used. For example, proposed prices may be compared to current prices for similar types of work, adjusted for differences in the work site and the specifications. Also, rough yardsticks may be developed and used, such as cost per cubic foot for structures, cost per linear foot for utilities, and cost per cubic yard for excavation or concrete.

[48 FR 42356, Sept. 19, 1983, as amended at 53 FR 34228, Sept. 2, 1988]

36.403 Cost-reimbursement contracts.

Contracting officers may use a cost-reimbursement contract to acquire construction only when its use is consistent with subpart 16.3 and part 15 (see 15.903(d)(1)(iii) for fee limitation on cost-reimbursement contracts).

Subpart 36.5—Contract Clauses

36.500 Scope of subpart.

This subpart prescribes clauses for insertion in solicitations and contracts for (a) construction and (b) dismantling, demolition, or removal of improvements contracts. Provisions and clauses prescribed elsewhere in the Federal Acquisition Regulation (FAR) shall also be used in such solicitations and contracts when the conditions specified in the prescriptions for the provisions and clauses are applicable.

36.501 Performance of work by the contractor.

(a) To assure adequate interest in and supervision of all work involved in larger projects, the contractor shall be required to perform a significant part of the contract work with its own forces. The contract shall express this requirement in terms of a percentage that reflects the minimum amount of work the contractor must perform with its own forces. This percentage is (1) as high as the contracting officer considers appropriate for the project, consistent with customary or necessary specialty subcontracting and the complexity and magnitude of the work, and (2) ordinarily not less than 12 percent unless a greater percentage is required by law or agency regulation. Specialties such as plumbing, heating, and electrical work are usually subcontracted, and should not normally be considered in establishing the amount of work required to be performed by the contractor.

(b) The contracting officer shall insert the clause at 52.236-1, Performance of Work by the Contractor, in solicitations and contracts, except those awarded pursuant to subparts 19.5 or 19.8, when a fixed-price construction contract is contemplated and the contract amount is expected to exceed $1,000,000. The contracting officer may insert the clause on solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to be $1,000,000 or less.

[48 FR 42356, Sept. 19, 1983, as amended at 53 FR 43392, Oct. 26, 1988]

36.502 Differing site conditions.

The contracting officer shall insert the clause at 52.236-2, Differing Site Conditions, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

36.503 Site investigation and conditions affecting the work.

The contracting officer shall insert the clause at 52.236-3, Site Investigation and Conditions Affecting the Work, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

36.504 Physical data.

The contracting officer shall insert the clause at 52.236-4, Physical Data, in solicitations and contracts when a fixed-price construction contract is contemplated and physical data (e.g., test borings, hydrographic data, weather conditions data) will be furnished or made available to offerors.

36.505 Material and workmanship.

The contracting officer shall insert the clause at 52.236-5, Material and Workmanship, in solicitations and contracts for construction contracts.

[54 FR 48989, Nov. 28, 1989]

36.506 Superintendence by the contractor.

The contracting officer shall insert the clause at 52.236-6, Superintendence by the Contractor, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

36.507 Permits and responsibilities.

The contracting officer shall insert the clause at 52.236-7, Permits and Responsibilities, in solicitations and contracts when a fixed-price or cost-reimbursement construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated.

[54 FR 48989, Nov. 28, 1989]

36.508 Other contracts.

The contracting officer shall insert the clause at 52.236-8, Other Contracts, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

36.509 Protection of existing vegetatio structures, equipment, utilities, and improvements.

The contracting officer shall inser the clause at 52.236-9, Protection o Existing Vegetation, Structure Equipment, Utilities, and Improvements, in solicitations and contract when a fixed-price construction contract or a fixed-price dismantling demolition, or removal of improvements contract is contemplated and the contract amount is expected t exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

36.510 Operations and storage areas.

The contracting officer shall insert the clause at 52.236-10, Operations ald Storage Areas, in solicitations ald contracts whel a fixed-price construction contract or a fixed-price dismantlilg, demmlitiol, or remmval mf improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitatio. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

36.511 Use and possession prior to completion.

The contracting officer shall insert the clause at 52.236-11, Use and Possession Prior to Completion, in solicitations and contracts when a fixed-price construction contract is contemplated and the contract award amount is expected to exceed the small purchase limitations. This clause may be inserted in solicitations and contracts when the contract amount is expected to be within the small purchase limitations.

36.512 Cleaning up.

The contracting officer shall insert the clause at 52.236-12, Cleaning Up, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

36.513 Accident prevention.

The contracting officer shall insert the clause at 52.236-13, Accident Prevention, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation. If the contract will involve work of a long duration or hazardous nature, the contracting officer shall use the clause with its Alternate I.

36.514 Availability and use of utility services.

The contracting officer shall insert the clause at 52.236-14, Availability and Use of Utility Services, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated, the contract is to be performed on Government sites, and the contracting officer decides (a) that the existing utility system(s) is adequate for the needs of both the Government and the contractor, and (b) furnishing it is in the Government's interest. When this clause is used, the contracting officer shall list the available utilities in the contract.

36.515 Schedules for construction contracts.

The contracting officer may insert the clause at 52.236-15, Schedules for Construction Contracts, in solicitations and contracts when a fixed-price construction contract is contemplated, the contract amount is expected to exceed the small purchase limitation, and the period of actual work performance exceeds 60 days. This clause may also be inserted in such solicitations and contracts when work performance is expected to last less than 60 days and an unusual situation exists that warrants imposition of the requirements. This clause should not be used in the same contract with clauses covering other management approaches for ensuring that a contractor makes adequate progress.

36.516 Quantity surveys.

The contracting officer may insert the clause at 52.236-16, Quantity Surveys, in solicitations and contracts when a fixed-price construction contract providing for unit pricing of items and for payment based on quantity surveys is contemplated. If it is determined at a level above that of the contracting officer that it is impracticable for Government personnel to perform the original and final surveys, and the Government wishes the contractor to perform these surveys, the clause shall be used with its Alternate.

36.517 Layout of work.

The contracting officer shall insert the clause at 52.236-17, Layout of Work, in solicitations and contracts when a fixed-price construction contract is contemplated and use of this clause is appropriate due to a need for accurate work layout and for siting verification during work performance.

36.518 Work oversight in cost-reimbursement construction contracts.

The contracting officer shall insert the clause at 52.236-18, Work Oversight in Cost-Reimbursement Construction Contracts, in solicitations and contracts when a cost-reimbursement construction contract is contemplated.

36.519 Organization and direction of the work.

The contracting officer shall insert the clause at 52.236-19, Organization and Direction of the Work, in solicitations and contracts when a cost-reimbursement construction contract is contemplated.

36.520 [Reserved]

36.521 Specifications and drawings for construction.

The contracting officer shall insert the clause at 52.236-21, Specifications and Drawings for Construction, in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation. When the Government needs record drawings, the contracting officer shall (a) use the clause with its Alternate I, if reproducible shop drawings are needed, or (b) use the clause with its Alternate II, if reproducible shop drawings are not needed.

[48 FR 42356, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986]

Subpart 36.6—Architect-Engineer Services

36.600 Scope of subpart.

This subpart prescribes policies and procedures applicable to the acquisition of architect-engineer services.

36.601 Policy.

(a) The Government shall publicly announce all requirements for architect-engineer services, and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices. (See Pub. L. 92-582, 40 U.S.C. 541 et seq.) Sources for architect-engineer contracts shall be selected in accordance with the procedures in this subpart, rather than the solicitation or source selection procedures prescribed in parts 14 and 15 of this regulation. Compliance with the procedures in this subpart will constitute a competitive procedure in the acquisition of architect-engineer services (see 6.102(d)(1)).

(b) The Government shall publicly announce all requirements for surveying and mapping services that are associated with research, planning, development, design, construction, alteration, or repair of real property and negotiate contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services required at fair and reasonable prices. (See 40 U.S.C. 541, et seq.) Sources for surveying and mapping contracts shall be selected in accordance with the procedures in this subpart, rather than the solicitation or source selection procedures prescribed in parts 14 and 15 of this regulation. Compliance with the procedures in this subpart will constitute a competitive procedure in the acquisition of surveying and mapping services (see 6.102(d)(1)).

(c) Other than *incidental services* as specified in the definition of architect-engineer services in 36.102, services that do not require performance by a registered or licensed architect or engineer, notwithstanding the fact that architect-engineers also may perform those services, should be acquired pursuant to parts 13, 14, and 15.

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 1744, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 36972, Oct. 16, 1986; 54 FR 13337, Mar. 31, 1989]

36.602 Selection of firms for architect-engineer contracts.

36.602-1 Selection criteria.

(a) Agencies shall evaluate each potential contractor in terms of its—

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(1) Professional qualifications necessary for satisfactory performance of required services;

(2) Specialized experience and technical competence in the type of work required;

(3) Capacity to accomplish the work in the required time;

(4) Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules;

(5) Location in the general geographical area of the project and knowledge of the locality of the project; *provided*, that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project; and

(6) Acceptability under other appropriate evaluation criteria.

(b) When the use of design competition is approved by the agency head or a designee, agencies may evaluate firms on the basis of their conceptual design of the project. Design competition may be used when—

(1) Unique situations exist involving prestige projects, such as the design of memorials and structures of unusual national significance;

(2) Sufficient time is available for the production and evaluation of conceptual designs; and

(3) The design competition, with its costs, will substantially benefit the project.

36.602-2 Evaluation boards.

(a) When acquiring architect-engineer services, an agency shall provide for one or more permanent or ad hoc architect-engineer evaluation boards (which may include preselection boards when authorized by agency regulations) to be composed of members who, collectively, have experience in architecture, engineering, construction, and Government and related acquisition matters. Members shall be appointed from among highly qualified professional employees of the agency or other agencies, and if authorized by agency procedure, private practitioners of architecture, engineering, or related professions. One Government member of each board shall be designated as the chairperson.

(b) No firm shall be eligible for award of an architect-engineer contract during the period in which any of its principals or associates are participating as members of the awarding agency's evaluation board.

36.602-3 Evaluation board functions.

Under the general direction of the head of the contracting activity, an evaluation board shall perform the following functions:

(a) Review the current data files on eligible firms and responses to a public notice concerning the particular project (see 36.604).

(b) Evaluate the firms in accordance with the criteria in 36.602-1.

(c) Hold discussions with at least three of the most highly qualified firms regarding concepts and the relative utility of alternative methods of furnishing the required services. Architect-engineer fees shall not be considered in these discussions.

(d) Prepare a selection report for the agency head or other designated selection authority recommending, in order of preference, at least three firms that are considered to be the most highly qualified to perform the required services. The report shall include a description of the discussions and evaluation conducted by the board to allow the selection authority to review the considerations upon which the recommendations are based.

[48 FR 42356, Sept. 19, 1983, as amended at 54 FR 48989, Nov. 28, 1989]

36.602-4 Selection authority.

(a) The final selection decision shall be made by the agency head or a designated selection authority.

(b) The selection authority shall review the recommendations of the evaluation board and shall, with the advice of appropriate technical and staff representatives, make the final selection. This final selection shall be a listing, in order of preference, of the firms considered most highly qualified to perform the work. If the firm listed as the most preferred is not the firm recommended as the most highly qualified by the evaluation board, the selection authority shall provide for the contract file a written explanation of the reason for the preference. All firms on the final selection list are considered *selected firms* with which the contracting officer may negotiate in accordance with 36.606.

(c) The selection authority shall not add firms to the selection report. If the firms recommended in the report are not deemed to be qualified or the report is considered inadequate for any reason, the selection authority shall record the reasons and return the report through channels to the evaluation board for appropriate revision.

(d) The board shall be promptly informed of the final selection.

36.602-5 Short selection processes for contracts not to exceed the small purchase limitation.

When authorized by the agency, either or both of the short processes described in this subsection may be used to select firms for contracts not expected to exceed the small purchase limitation. Otherwise, the procedures prescribed in 36.602-3 and 36.602-4 shall be followed.

(a) *Selection by the board.* The board shall review and evaluate architect-engineer firms in accordance with 36.602-3, except that the selection report shall serve as the final selection list and shall be provided directly to the contracting officer. The report shall serve as an authorization for the contracting officer to commence negotiations in accordance with 36.606.

(b) *Selection by the chairperson of the board.* When the board decides that formal action by the board is not necessary in connection with a particular selection, the following procedures shall be followed:

(1) The chairperson of the board shall perform the functions required in 36.602-3.

(2) The agency head or designated selection authority shall review the report and approve it or return it to the chairperson for appropriate revision.

(3) Upon receipt of an approved report, the chairperson of the board shall furnish the contracting officer a copy of the report which will serve as an authorization for the contracting officer to commence negotiations in accordance with 36.606.

[48 FR 42356, Sept. 19, 1983, as amended at 54 FR 48989, Nov. 28, 1989]

36.603 Collecting data on and appraising firms' qualifications.

(a) *Establishing offices.* Agencies shall maintain offices or permanent evaluation boards, or arrange to use the offices or boards of other agencies, to receive and maintain data on firms wishing to be considered for Government contracts. Each office or board shall be assigned a jurisdiction by its parent agency, making it responsible for a geographical region or area, or a specialized type of construction.

(b) *Qualifications data.* To be considered for architect-engineer contracts, a firm must file with the appropriate office or board the Standard Form 254 (SF 254), *Architect-Engineer and Related Services Questionnaire,* and when applicable, the Standard Form 255 (SF 255), *Architect-Engineer and Related Services Questionnaire for Specific Project.*

(c) *Data files and the classification of firms.* Under the direction of the parent agency, offices or permanent evaluation boards shall maintain an architect-engineer qualifications data file. These offices or boards shall review the SF's 254 and 255 filed, and shall classify each firm with respect to:

(1) Location;

(2) Specialized experience;

(3) Professional capabilities; and

(4) Capacity, with respect to the scope of work that can be undertaken. A firm's ability and experience in computer-assisted design should be considered, when appropriate.

(d) *Currency of files.* Any office or board maintaining qualifications data files shall review and update each file at least once a year. This process should include:

(1) Encouraging firms to submit annually an updated statement of qualifications and performance data on a SF 254.

(2) Reviewing the SF's 254 and 255 and, if necessary, updating the firm's classification (see 36.603(c)).

3) Recording any contract awards
ıde to the firm in the past year.
4) Assuring that the file contains a
py of each pertinent performance
port (see 36.604).
5) Discarding any material that has
t been updated within the past
ree years, if it is no longer pertinent,
e 36.604(c).
6) Posting the date of the review in
e file.
e) *Use of data files.* Evaluation
ards and other appropriate Govern-
ent employees, including contracting
ficers, shall use data files on firms.

604 Performance evaluation.

a) *Preparation of performance re-*
rts. (1) For each contract of more
an $25,000, a performance evalua-
n report shall be prepared by the
gnizant contracting activity, using
e SF 1421, Performance Evaluation
rchitect-Engineer). Performance
aluation reports may also be pre-
red for contracts of $25,000 or less.
2) The report shall be prepared
er final acceptance of the work or
er contract termination, as appro-
iate. Ordinarily, the evaluating offi-
l who prepares the report should be
e person responsible for monitoring
ntract performance.
3) If the evaluating official con-
ıdes that a contractor's overall per-
rmance was unsatisfactory, the con-
ctor shall be advised in writing that
eport of unsatisfactory performance
being prepared and the basis for the
port. If the contractor submits any
itten comments, the evaluating offi-
l shall include them in the report,
solve any alleged factual discrepan-
s, and make appropriate changes in
e report.
4) The head of the contracting ac-
ity shall establish procedures which
sure that fully qualified personnel
epare and review performance re-
rts.
b) *Review of performance reports.*
ch performance report shall be re-
wed to ensure that it is accurate
l fair. The reviewing official should
ve knowledge of the contractor's
formance and should normally be
an organizational level above that
the evaluating official.

(c) *Distribution and use of performance reports.* Each performance report shall be distributed in accordance with agency procedures. The report shall be included in the contract file, and copies shall be sent to offices or boards for filing with the firm's qualifications data (see 36.603(d)(4)). The contracting activity shall retain the report for at least six years after the date of the report.

36.605 Government cost estimate for architect-engineer work.

(a) An independent Government estimate of the cost of architect-engineer services shall be prepared and furnished to the contracting officer before commencing negotiations for each proposed contract or contract modification expected to exceed $25,000. The estimate shall be prepared on the basis of a detailed analysis of the required work as though the Government were submitting a proposal.

(b) Access to information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations to allow the contracting officer to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price. The overall amount of the Government's estimate shall not be disclosed except as permitted by agency regulations.

36.606 Negotiations.

(a) Unless otherwise specified by the selection authority, the final selection authorizes the contracting officer to begin negotiations. Negotiations shall be conducted in accordance with part 15 of this regulation, beginning with the most preferred firm in the final selection (see 15.903(d)(1)(ii) on fee limitation).

(b) The contracting officer should ordinarily request a proposal from the firm, ensuring that the solicitation does not inadvertently preclude the firm from proposing the use of modern design methods.

(c) The contracting officer shall inform the firm that no construction contract may be awarded to the firm that designed the project, except as provided in 36.209.

(d) During negotiations, the contracting officer should seek advance agreement (see 31.109) on any charges for computer-assisted design. When the firm's proposal does not cover appropriate modern and cost-effective design methods (e.g., computer-assisted design), the contracting officer should discuss this topic with the firm.

(e) Because selection of firms is based upon qualifications, the extent of any subcontracting is an important negotiation topic. The clause prescribed at 44.204(d), *Subcontractors and Outside Associates and Consultants* (see 52.244-4), limits a firm's subcontracting to firms agreed upon during negotiations.

(f) If a mutually satisfactory contract cannot be negotiated, the contracting officer shall obtain a written best and final offer from the firm, and notify the firm that negotiations have been terminated. The contracting officer shall then initiate negotiations with the next firm on the final selection list. This procedure shall be continued until a mutually satisfactory contract has been negotiated. If negotiations fail with all selected firms, the contracting officer shall refer the matter to the selection authority who, after consulting with the contracting officer as to why a contract cannot be negotiated, may direct the evaluation board to recommend additional firms in accordance with 36.602.

36.607 Release of information on firm selection.

After final selection has taken place, the contracting officer may release information identifying only the architect-engineer firm with which a contract will be negotiated for certain work. The work should be described in any release only in general terms, unless information relating to the work is classified. If negotiations are terminated without awarding a contract to the highest rated firm, the contracting officer may release that information and state that negot tions will be undertaken with anoth (named) architect-engineer fir When an award has been made, t contracting officer may release awa information, (see 5.401).

36.608 Liability for Government costs r sulting from design errors or deficie cies.

Architect-engineer contractors shal be responsible for the professiona quality, technical accuracy, and coordination of all services required under their contracts. A firm may be liable for Government costs resulting from errors or deficiencies in designs furnished under its contract. Therefore, when a modification to a construction contract is required because of an error or deficiency in the services provided under an architect-engineer contract, the contracting officer (with the advice of technical personnel and legal counsel) shall consider the extent to which the architect-engineer contractor may be reasonably liable. The contracting officer shall enforce the liability and collect the amount due, if the recoverable cost will exceed the administrative cost involved or is otherwise in the Government's interest. The contracting officer shall include in the contract file a written statement of the reasons for the decision to recover or not to recover the costs from the firm.

36.609 Contract clauses.

36.609-1 Design within funding limitations.

(a) The Government may require the architect-engineer contractor to design the project so that construction costs will not exceed a contractually specified dollar limit (funding limitation). If the price of construction proposed in response to a Government solicitation exceeds the construction funding limitation in the architect-engineer contract, the firm shall be solely responsible for redesigning the project within the funding limitation. These additional services shall be performed at no increase in the price of this contract. However, if the cost of proposed construction is affected by events beyond the firm's reasonable control (e.g., if there is an increase in material costs which could not have been anticipated, or an undue delay by the Government in issuing a construction solicitation), the firm shall not be obligated to redesign at no cost to the Government. If a firm's design fails to meet the contractual limitation on construction cost and the Government determines that the firm should not redesign the project, a written statement of the reasons for that determination shall be placed in the contract file.

(b) The amount of the construction funding limitation (to be inserted in paragraph (c) of the clause at 52.236-22) is to be established during negotiations between the contractor and the Government. This estimated construction contract price shall take into account any statutory or other limitations and exclude any allowances for Government supervision and overhead and any amounts set aside by the Government for contingencies. In negotiating the amount, the contracting officer should make available to the contractor the information upon which the Government has based its initial construction estimate and any subsequently acquired information that may affect the construction costs.

(c) The contracting officer shall insert the clause at 52.236-22, Design Within Funding Limitations, in fixed-price architect-engineer contracts except when (1) the head of the contracting activity or a designee determines in writing that cost limitations are secondary to performance considerations and additional project funding can be expected, if necessary, (2) the design is for a standard structure and is not intended for a specific location, or (3) there is little or no design effort involved.

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

36.609-2 Redesign responsibility for design errors or deficiencies.

(a) Under architect-engineer contracts, contractors shall be required to make necessary corrections at no cost to the Government when the designs, drawings, specifications, or other items or services furnished contain any errors, deficiencies, or inadequacies. If, in a given situation, the Government does not require a firm to correct such errors, the contracting officer shall include a written statement of the reasons for that decision in the contract file.

(b) The contracting officer shall insert the clause at 52.236-23, Responsibility of the Architect-Engineer Contractor, in fixed-price architect-engineer contracts.

[48 FR 42356, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

36.609-3 Work oversight in architect-engineer contracts.

The contracting officer shall insert the clause at 52.236-24, Work Oversight in Architect-Engineer Contracts, in fixed-price architect-engineer contracts.

[50 FR 26903, June 28, 1985]

36.609-4 Requirements for registration of designers.

The contracting officer shall insert the clause at 52.236-25, Requirements for Registration of Designers, in fixed-price architect-engineer contracts, except that it may be omitted from a contract when the design is to be performed (a) outside the United States, its possessions, or Puerto Rico, or (b) in a State or possession that does not have registration requirements for the particular field involved.

Subpart 36.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

36.700 Scope of subpart.

This subpart sets forth requirements for the use of standard and optional forms, prescribed in part 53, for contracting for construction, architect-engineer services, or dismantling, demolition, or removal of improvements. These standard and optional forms are illustrated in part 53.

[54 FR 29282, July 11, 1989]

36.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

(a) Contracting officers shall use Standard Form 1417, Presolicitation Notice (Construction Contract), to inform prospective offerors that a solicitation will be released for a proposed construction or dismantling, demolition, or removal of improvements contract estimated to be $100,000 or more. This form may also be used if the proposed contract is estimated to be less than $100,000.

(b) Standard Form 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair), shall be used to solicit and submit offers, and award construction or dismantling, demolition, or removal of improvements contracts expected to exceed the small purchase limitations, and may be used for contracts within the small purchase limitations. In all sealed bid solicitations, or when the Government otherwise requires a noncancellable offer acceptance period, the contracting officer shall insert in the blank provided in Block 13D the number of calendar days that the offer must be available for acceptance after the date offers are due.

(c) Optional Form 347, Order for Supplies or Services, may be used for construction or dismantling, demolition, or removal of improvements contracts that are within the small purchase limitation *provided*, that the contracting officer includes the clauses required (see subpart 36.5) in the small purchases documents (see part 13, Small Purchases and Other Simplified Purchase Procedures).

(d) Contracting officers may use Optional Form 1419, Abstract of Offers—Construction, and Optional Form 1419A, Abstract of Offers—Construction, Continuation Sheet, or the automated equivalents to record offers submitted in response to a sealed bid solicitation (see 14.403) and may also use them to record offers submitted in response to negotiated solicitations.

(e) Contracting activities shall use Standard Form 1420, Performance Evaluation (Construction), in evaluating and reporting on the performance of construction contractors as required in 36.201.

[48 FR 42356, Sept. 19, 1983, as amended at 52 FR 19805, May 27, 1987; 54 FR 29282, July 11, 1989]

36.702 Forms for use in contracting for architect-engineer services.

(a) Contracting officers shall use Standard Form 252, Architect-Engineer Contract, to award fixed-price contracts for architect-engineer services when the services are to be performed in the United States, its possessions, or Puerto Rico.

(b) The following standard forms shall be used preliminary to award of a contract for architect-engineer services relating to the construction, alteration, or repair of real property:

(1) Standard Form 254, Architect-Engineer and Related Services Questionnaire, shall be used to obtain information from architect-engineer firms regarding their professional qualifications.

(2) Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project, shall be used to supplement the SF 254 with additional, specific information on the firms' qualifications for a particular project when the contract amount is expected to exceed the small purchase limitation. This form may be used when the contract amount is expected to be within the small purchase limitations, if the contracting officer determines that its use is appropriate.

(c) Standard Form 1421, Performance Evaluation (Architect-Engineer), shall be used in evaluating and reporting on the performance of architect-engineer contractors as required in 36.604.

PART 37—SERVICE CONTRACTING

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42365, Sept. 19, 1983, unless otherwise noted.

37.000 Scope of part.

This part prescribes general policy and procedures for acquiring services by contract, and includes but does not limit coverage to only those services to which the Service Contract Act of 1965 applies (see 37.107). It distinguishes between contracts for personal services and those for nonpersonal services and includes special conditions to be observed in acquiring advisory and assistance services. Dismantling, demolition, or removal of improvements is covered in subpart 37.3. This part does not regulate the obtaining of services by direct appointment, under normal civil service employment procedures, or by cooperative agreement.

[48 FR 42365, Sept. 19, 1983, as amended at 53 FR 43392, Oct. 26, 1988]

Subpart 37.1—Service Contracts—General

37.101 Definitions.

Nonpersonal services contract means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

Personal services contract means a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees (see 37.104).

Service contract means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. Some of the areas in which service contracts are found include the following:

(a) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.

(b) Routine recurring maintenance of real property.

(c) Housekeeping and base services.

(d) Advisory and assistance services.

(e) Operation of Government-owned equipment, facilities, and systems.

(f) Communications services.

(g) Architect-Engineering (see subpart 36.6).

(h) Transportation and related services (see part 47).

(i) Research and development (see part 35).

[48 FR 42365, Sept. 19, 1983, as amended at 53 FR 43392, Oct. 26, 1988]

37.102 Policy.

(a) Agencies shall generally rely on the private sector for commercial services (see OMB Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government).

(b) In no event may a contract be awarded for the performance of an inherently governmental function.

(c) The relative costs of Government and contract performance require appropriate consideration where Government performance is practicable (see subpart 7.3).

(d) Nonpersonal service contracts are proper under general contracting authority.

37.103 Contracting officer responsibility.

(a) The contracting officer is responsible for ensuring that a proposed contract for services is proper. For this purpose the contracting officer shall—

(1) Determine whether the proposed service is for a personal or nonpersonal services contract using the definitions in 37.101 and the guidelines in 37.104;

(2) In doubtful cases, obtain the review of legal counsel; and

(3) Document the file (except as provided in paragraph (b) below) with (i) the opinion of legal counsel, if any, (ii) a memorandum of the facts and rationale supporting the conclusion that the contract does not violate the provisions in 37.104(b), and (iii) any further documentation that the contracting agency may require.

(b) Nonpersonal services contracts are exempt from the requirements of subparagraph (a)(3) above.

(c) Verify that the contract file contains the certifications required of contractor employees serving as Government procurement officials (see 3.104-9).

[48 FR 42365, Sept. 19, 1983, as amended at 55 FR 36796, Sept. 6, 1990]

37.104 Personal services contracts.

(a) As indicated in 37.101, a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

(b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so.

(c) (1) An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

(2) Each contract arrangement must be judged in the light of its own facts and circumstances, the key question always being: Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract? The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account (see (d) below).

(d) The following descriptive elements should be used as a guide in assessing whether or not a proposed contract is personal in nature:

(1) Performance on site.

(2) Principal tools and equipment furnished by the Government.

(3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

(5) The need for the type of service rovided can reasonably be expected o last beyond one year.

(6) The inherent nature of the servce, or the manner in which it is proided reasonably requires directly or ndirectly, Government direction or upervision of contractor employees in rder to—

(i) Adequately protect the Governnent's interest;

(ii) Retain control of the function inolved; or

(iii) Retain full personal responsibilty for the function supported in a luly authorized Federal officer or emloyee.

(e) When specific statutory authorty for a personal service contract is ited, obtain the review and opinion of egal counsel.

(f) Personal services contracts for he services of individual experts or onsultants are limited by the Classifiation Act. In addition, the Office of ersonnel Management has established requirements which apply in acuiring the personal services of exerts or consultants in this manner e.g., benefits, taxes, conflicts of interst). Therefore, the contracting officer hall effect necessary coordination vith the cognizant civilian personnel ffice.

7.105 Competition in service contracting.

(a) Unless otherwise provided by tatute, contracts for services shall be warded through sealed bidding whenver the conditions in 6.401(a) are met except see 6.401(b)).

(b) The provisions of statute and art 6 of this regulation requiring ompetition apply fully to service conracts. The method of contracting sed to provide for competition may ary with the type of service being acuired and may not necessarily be limted to price competition.

50 FR 1744, Jan. 11, 1985, and 50 FR 52429, Dec. 23, 1985]

7.106 Funding and term of service contracts.

When contracts for services are unded by annual appropriations, the erm of contracts so funded shall not xtend beyond the end of the fiscal ear of the appropriation except when authorized by law (see 32.703-2 for contracts conditioned upon availability of funds and 32.703-3 for contracts crossing fiscal years).

37.107 Service Contract Act of 1965.

The Service Contract Act of 1965 (41 U.S.C. 351-357) (the Act) provides for minimum wages and fringe benefits as well as other conditions of work under certain types of service contracts (see subpart 22.10). Whether or not the Act applies to a specific service contract will be determined by the definitions and exceptions given in the Act, or implementing regulations.

37.108 Small business Certificate of Competency.

In those service contracts for which the Government requires the highest competence obtainable, as evidenced in a solicitation by a request for a technical/management proposal and a resultant technical evaluation and source selection, the small business Certificate of Competency procedures may not apply (see subpart 19.6).

37.109 Services of quasi-military armed forces

Contracts with *Pinkerton Detective Agencies or similar organizations* are prohibited by 5 U.S.C. 3108. This prohibition applies only to contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract's character. An organization providing guard or protective services does not thereby become a *quasi-military armed force,* even though the guards are armed or the organization provides general investigative or detective services. (See 57 Comp. Gen. 524).

37.110 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.237-1, Site Visit, in solicitations for services to be performed on Government installations, unless the solicitation is for construction.

(b) The contracting officer shall insert the clause at 52.237-2, Protection of Government Buildings, Equipment, and Vegetation, in solicitations and contracts for services to be performed on Government installations, unless a construction contract is contemplated.

(c) The contracting officer may insert the clause at 52.237-3, Continuity of Services, in solicitations and contracts for services, when the Government anticipates difficulties during the transition from one contractor to another or to the Government.

(d) See 9.508 regarding the use of an appropriate provision and clause concerning the subject of conflict-of-interest, which may at times be significant in solicitations and contracts for services.

(e) The contracting officer shall also insert in solicitations and contracts for services the provisions and clauses prescribed elsewhere in the FAR, as appropriate for each acquisition, depending on the conditions that are applicable.

(f) For the Department of Defense, the contracting officer shall insert the clause at 52.237-8, Severance Payments to Foreign Nationals Employed Under a Service Contract Performed Outside the United States, in solicitations and contracts for services which may be performed in whole or in part outside the United States. Use of the clause by other Government agencies is optional.

[48 FR 42365, Sept. 19, 1983, as amended at 54 FR 13025, Mar. 29, 1989]

37.111 Extension of services.

Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the contracting officer may include an option clause (see 17.208(f)) in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract. However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

[54 FR 29282, July 11, 1989]

Subpart 37.2—Advisory and Assistance Services

Source: 53 FR 43392, Oct. 26, 1988, unles otherwise noted.

37.200 Scope of subpart.

This subpart prescribes policies and procedures for acquiring advisory and assistance services by contract. The subpart regulates these contracts with individuals and organizations for both personal and nonpersonal services.

37.201 Definition.

Advisory and assistance services means services, other than those excluded or exempted in this subpart, to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of management systems.

37.202 Policy.

(a) The acquisition of advisory and assistance services is a legitimate way to improve Government services and operations. Accordingly, advisory and assistance services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.

(b) Subject to 37.205, agencies may contract for advisory and assistance services, when essential to the agency's mission, to—

(1) Obtain outside points of view to avoid too limited judgment on critical issues;

(2) Obtain advice regarding developments in industry, university, or foundation research;

(3) Obtain the opinions, special knowledge, or skills of noted experts;

(4) Enhance the understanding or, and develop alternative solutions to, complex issues;

(5) Support and improve the operation of organizations;

(6) Ensure the more efficient or effective operation of managerial or hardware systems.

(c) Advisory and assistance services shall not be—

(1) Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;

(2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;

(3) Contracted for on a preferential basis to former Government employees;

(4) Used under any circumstances specifically to aid in influencing or enacing legislation;

(5) Used to obtain professional or technical advice which is readily available within the agency or another Federal agency.

37.203 Types of advisory and assistance services.

Advisory and assistance services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance. These services consist of—

(a) *Individual experts and consultants.* Individual experts and consultants are persons possessing special, current knowledge or skill that may be combined with extensive operational experience. This enables them to provide information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decision-making.

(b) *Studies, analyses, and evaluations.* Studies, analyses, and evaluations are organized, analytic assessments needed to provide the insights necessary for understanding complex issues or improving policy development or decision-making. These analytic efforts result in formal, structured documents containing data or leading to conclusions and/or recommendations. This summary description is operationally defined by the following criteria:

(1) *Objective.* To enhance understanding of complex issues or to improve the quality and timeliness of agency policy development or decision-making by providing new insights into, understanding of, alternative solutions to, or recommendations on agency policy and program issues, through the applications of fact finding, analysis, and evaluation.

(2) *Areas of application.* All subjects, issues, or problems involving policy development of decision-making in the agency. These may involve concepts, organization, programs and other systems, and the application of such systems.

(3) *Outputs.* Outputs are formal structured documents containing or leading to conclusions and/or recommendations. Data bases, models, methodologies, and related software created in support of a study, analysis, or evaluation are to be considered part of the overall study effort.

(c) *Management and professional support services.* Management and professional support services take the form of advice, training, or direct assistance for organizations to ensure more efficient or effective operations of managerial, administrative, or related systems. This summary description is operationally defined in terms of the following criteria:

(1) *Objective.* To ensure more efficient or effective operation of management support or related systems by providing advice, training, or direct assistance associated with the design or operation of such systems.

(2) *Areas of application.* Management support or related systems such as program management, project monitoring and reporting, data collection, logisitics management, budgeting, accounting, auditing, personnel management, paperwork management, records management, space management, and public relations.

(3) *Outputs.* Services in the form of information, opinions, advice, training, or direct assistance that lead to the improved design or operation of managerial, administrative, or related systems. This does not include training which maintains skills necessary for normal operations. Written reports are normally incidental to the performance of the service.

(d) *Engineering and technical service.* Engineering and technical services (technical representatives) take the form of advice, training, or, under unusual circumstances, direct assistance to ensure more efficient or effective operation or maintenance of existing platforms, weapon systems, related systems, and associated software. All engineering and technical services provided prior to final Government acceptance of a complete hardware system are part of the normal development, production, and procurement processes and do not fall in this category. Engineering and technical services provided after final Government acceptance of a complete hardware system are in this category except where they are procured to increase the original design performance capabilities of existing or new systems or where they are integral to the operational support of a deployed system and have been formally reviewed and approved in the acquisition planning process.

37.204 Exclusions.

The following activities and programs are excluded or exempted from the definition of advisory or assistance services:

(a) Activities that are reviewed in accordance with the OMB Circular A-76, Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government.

(b) Architectural and engineering services as defined in part 36.

(c) ADP/Telecommunications functions and related services that are controlled in accordance with 41 CFR part 201, the Federal Information Resources Management Regulation.

(d) Research on theoretical mathematics and basic medical, biological, physical, social, psychological, or other phenomena.

(e) Engineering studies related to specific physical or performance characteristics of existing or proposed systems.

(f) The day-to-day operation of facilities (e.g., the Johnson Space Center and related facilities) and functions (e.g., ADP operations and building maintenance).

(g) Government-owned, contractor-operated (GOCO) facilities. However, any contract for advisory and assistance services other than the basic contract for operation and management of a GOCO shall come under the definition of advisory or assistance ser ices.

(h) Clinical medicine.

(i) Those support services of a managerial or administrative nature performed as a simultaneous part of, and nonseparable from specific development, production, or operational support activities. In this context, nonseparable means that the managerial or administrative systems in question (e.g., subcontractor monitoring or configuration control) cannot reasonably be operated by anyone other than the designer or producer of the end-item hardware.

(j) Contracts entered into in furtherance of statutorily mandated advisory committees.

(k) Initial training, training aids, and technical documentation acquired as an integral part of the lease or purchase of equipment.

(l) Routine maintenance of equipment, routine administrative services (e.g., mail, reproduction, telephone) printing services, and direct advertising (media) costs.

(m) Auctioneers, realty-brokers, appraisers, and surveyors.

(n) The National Foreign Intelligence Program (NFIP).

(o) The General Defense Intelligence Program (GDIP).

(p) Tactical Intelligence and Related Activities (TIARA).

(q) Foreign Military Sales.

(r) Engineering and technical services as set forth in 37.203(d).

37.205 Management controls.

OMB Circular A-120 requires each agency to establish procedures for a written evaluation at the conclusion of the contract to assess the utility of the deliverables to the agency and the performance of the contractor.

37.206 Requesting activity responsibilities.

Requests for advisory and assistance services shall include—

(a) A statement certifying that the requirement is for advisory and assistance services as defined in this subpart.

(b) Written justification of need and certification that such services do not unnecessarily duplicate and previously performed work or services.

(c) Written approval for such services by an official at a level above the requesting office. However, in the case of requirements received by the contracting officer during the fourth quarter of the fiscal year, for award during the same fiscal year, the approval at the second level, or higher level if required by agency procedures, above the requesting office shall accompany the request for contract action.

(d) Properly chargeable funds certified by the cognizant fiscal/budget office.

37.207 Contracting officer responsibilities.

The contracting officer is responsible for determining whether any requested contractual action, regardless of dollar value, constitutes advisory and assistance services as described in this subpart. The contracting officer's determination shall be final. Before processing any contractual action for advisory and assistance services, the contracting officer shall verify that—

(a) Action is taken to avoid conflicts of interest in accordance with subpart 9.5.

(b) The applicable requirements of this subpart and 37.103 and 37.104 are met;

(c) The services being contracted for consist only of the types of services defined as 37.203;

(d) The request includes a statement of need and certification by the requesting official (see 37.206(a) and (b)); and

(e) Written approval for the requirement, including requests for contract modifications beyond the scope of the acquisition originally approved, has been obtained from the appropriate level(s) (see 37.206(c)).

[53 FR 43392, Oct. 26, 1988, as amended at 54 FR 20497, May 11, 1989; 55 FR 36796, Sept. 6, 1990]

Subpart 37.3—Dismantling, Demolition, or Removal of Improvements

37.300 Scope of subpart.

This subpart prescribes procedures for contracting for dismantling or demolition of buildings, ground improvements, and other real property structures and for the removal of such structures or portions of them (hereafter referred to as *dismantling, demolition, or removal of improvements*).

37.301 Labor standards.

Contracts for dismantling, demolition, or removal of improvements are subject to either the Service Contract Act (41 U.S.C. 351-358) or the Davis-Bacon Act (40 U.S.C. 276a—276a-7). If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Act applies unless further work which will result in the construction, alteration, or repair of a public building or public work at that location is contemplated. If such further construction work is intended, even though by separate contract, then the Davis-Bacon Act applies to the contract for dismantling, demolition, or removal.

37.302 Bonds or other security.

When a contract is solely for dismantling, demolition, or removal of improvements, the Miller Act (40 U.S.C. 270a-270f) (see 28.102) does not apply. However, the contracting officer may require the contractor to furnish a performance bond or other security (see 28.103) in an amount that the contracting officer considers adequate to (a) ensure completion of the work, (b) protect property to be retained by the Government, (c) protect property to be provided as compensation to the contractor, and (d) protect the Government against damage to adjoining property.

37.303 Payments.

(a) The contract may provide that the (1) Government pay the contractor for the dismantling or demolition of structures or (2) contractor pay the Government for the right to salvage and remove the materials resulting from the dismantling or demolition operation.

(b) The contracting officer shall consider the usefulness to the Government of all salvageable property. Any of the property that is more useful to the Government than its value as salvage to the contractor should be expressly designated in the contract for retention by the Government. The contracting officer shall determine the fair market value of any property not so designated, since the contractor will get title to this property, and its value will therefore be important in determining what payment, if any, shall be made to the contractor and whether additional compensation will be made if the contract is terminated.

37.304 Contract clauses.

(a) The contracting officer shall insert the clause at 52.237-4, Payment by Government to Contractor, in solicitations and contracts solely for dismantling, demolition, or removal of improvements whenever the contracting officer determines that the Government shall make payment to the contractor in addition to any title to property that the contractor may receive under the contract. If the contracting officer determines that all material resulting from the dismantling or demolition work is to be retained by the Government, use the basic clause with its Alternate I.

(b) The contracting officer shall insert the clause at 52.237-5, Payment by Contractor to Government in solicitations and contracts for dismantling, demolition, or removal of improvements whenever the contractor is to receive title to dismantled or demolished property and a net amount of compensation is due to the Government, except if the contracting officer determines that it would be advantageous to the Government for the contractor to pay in increments and the government to transfer title to the contractor for increments of property only upon receipt of those payments.

(c) The contracting officer shall insert the clause at 52.237-6, Incremental Payment by Contractor to Government, in solicitations and contracts for dismantling, demolition, or removal of improvements if (1) the
contractor is to receive title to
tled or demolished property an
amount of compensation is
Government, and (2) the cont
officer determines that it woul
vantageous to the Government
contractor to pay in incremen
for the Government to transfer
the contractor for increments
erty only upon receipt of tho
ments. This determination may
propriate, for example, if it
ages greater competition or pa
tion of small business concerns.

Subpart 37.4—Nonpersonal H
Care Services

SOURCE: 54 FR 5056, Jan. 31, 198
otherwise noted.

37.400 Scope of subpart.

This subpart prescribes polic
procedures for obtaining healt
services of physicians, dentis
other health care providers by
sonal services contracts, as defi
37.101.

37.401 Policy.

Agencies may enter into nonpe
health care services contract
physicians, dentists and other
care providers under authority
U.S.C. 2304 and 41 U.S.C. 253
contract shall—

(a) State that the contract is
personal health care services co
as defined in 37.101, under whi
contractor is an independent c
tor;

(b) State that the Governme
evaluate the quality of profe
and administrative services pr
but retains no control over the
cal, professional aspects of s
rendered (e.g., professional judg
diagnosis for specific medical
ment);

(c) Require that the contrac
demnify the Government for
ability producing act or omiss
the contractor, its employee
agents occurring during contra
formance;

(d) Require that the cont
maintain medical liability insu
in a coverage amount accepta

the contracting officer, which is not less than the amount normally prevailing within the local community for the medical specialty concerned; and

(e) State that the contractor is required to ensure that its subcontracts for provisions of health care services, contain the requirements of the clause at 52.237-7, including the maintenance of medical liability insurance.

37.402 Contracting officer responsibilities.

Contracting officers shall obtain evidence of insurability concerning medical liability insurance from the apparently successful offeror prior to contract award and shall obtain a certificate of insurance evidencing the required coverage prior to commencement of performance.

37.403 Contract clause.

The contracting officer shall insert the clause at 52.237-7, Indemnification and Medical Liability Insurance, in solicitations and contracts for nonpersonal health care services. The contracting officer may include the clause in bilateral purchase orders for nonpersonal health care services awarded under the procedures in part 13.

PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

Sec.
38.000 Scope of part.

Subpart 38.1—Federal Supply Schedule Program

38.101 General.
38.102 Types of Federal Supply Schedules.
38.102-1 Single-award schedules.
38.102-2 Multiple-award schedules.
38.102-3 New Item Introductory Schedule.
38.102-4 International Federal Supply Schedule.

Subpart 38.2—Establishing and Administering Federal Supply Schedules

38.201 Coordination requirements.
38.202 Criteria.
38.203 Solicitation preparation.
38.204 Schedule preparation.
38.205 Schedule contract administration.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42368, Sept. 19, 1983, unless otherwise noted.

38.000 Scope of part.

This part prescribes policies and procedures for contracting for supplies and services under the Federal Supply Schedule program, which is directed and managed by the General Services Administration. Procedures for ordering from Federal Supply Schedules are covered in subpart 8.4. See part 39 for automatic data processing and telecommunications equipment and services coverage. The Department of Defense uses a similar system of schedule contracting for military items that are also not a part of the Federal Supply Schedule program.

Subpart 38.1—Federal Supply Schedule Program

38.101 General.

(a) The Federal Supply Schedule program provides Federal agencies with a simplified process of acquiring commonly used supplies and services in varying quantities at lower prices while obtaining discounts associated with volume buying. Indefinite delivery contracts including requirements contracts are awarded, using competitive procedures, to commercial firms to provide supplies and services at stated prices for given periods of time. The schedule contracting office issues publications, titled Federal Supply Schedules, containing the information needed for placing delivery orders with the contractors.

(b) Each schedule identifies specific agencies in designated geographic areas that are required to use the contracts as primary sources of supply. Except as specified in 8.404-1, agencies included as mandatory users must order needed supplies and services from the schedule if the consignee is located within the geographic area of coverage. Geographic areas of coverage are determined on the basis of the location of the consignee, not the ordering office.

(c) Federal agencies not identified in the schedules as mandatory users (see 8.404-2) may issue orders under the schedules, and the contractors are encouraged to accept the orders.

(d) Under the schedule program, ordering agencies—

(1) Issue orders directly to the contractors;

(2) Receive shipments;

(3) Pay the contractors; and

(4) Administer individual orders.

(e) Although GSA awards most Federal Supply Schedule contracts, it may authorize other agencies to award schedule contracts and publish schedules; e.g., the Department of Veterans Affairs awards schedule contracts for certain medical and nonperishable subsistence items.

[48 FR 42368, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 29282, July 11, 1989]

38.102 Types of Federal Supply Schedules.

38.102-1 Single-award schedules.

(a) Single-award schedules cover contracts made with one supplier at a stated price for delivery to a geographic area as defined in the schedule. All responsible firms may submit offers in response to a solicitation for a single-award schedule contract. A single-award schedule is appropriate if there are adequate commercial descriptions or specifications to permit competitive offers.

(b) Each single-award schedule lists the supplies or services covered and the prices. Unit prices are normally established on a zonal basis to provide for differences in transportation. The schedules contain the necessary information for placing orders. Some single-award schedules specify that contractors have prepared brochures containing additional information, usually fabric or color selections or similar variables.

[48 FR 42368, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

38.102-2 Multiple-award schedules.

(a) Multiple-award schedules are based on negotiated contracts established with more than one supplier for delivery of comparable commercial supplies or services. All responsible firms may submit offers in response to a solicitation for multiple award schedule contracts. Contracts are awarded to firms supplying the same generic types of items or services at
varying prices for delivery within
same geographic areas.

(b) These contracts are appropri
when—

(1) It is not practical to draft spec
cations or other descriptions for
required supplies or services and th
are multiple suppliers able to furni
similar commercial supplies or servi
(either established catalogs or mar
prices, or cost or pricing data will
used as a basis for determining pri
reasonableness); or

(2) Selectivity is necessary for ord
ing offices to meet their varying nee

(c) Prices under the multiple-awa
schedule program are based on di
counts from commercial pricelist
Contracts are awarded after the sche
ules contracting officer determin
that the prices, terms, and conditio
offered are fair and reasonable. Orde
placed by ordering offices in accor
ance with 8.405-1 will result in th
lowest overall cost alternative to mee
the needs of the Government (se
6.102(d)(3).)

(d) Multiple-award schedule contra
tors are required to prepare and di
tribute pricelists and catalogs tha
must be used with the schedule to pr
pare orders.

[48 FR 42368, Sept. 19, 1983, as amended
50 FR 1745, Jan. 11, 1985; 50 FR 52429, De
23, 1985]

38.102-3 New Item Introductory Schedul

(a) The New Item Introductor
Schedule (NIIS) is used to introduc
new or improved products into th
Federal supply system. Potential sup
pliers submit applications, on GS
Form 1171, Application for Presentin
New Articles, through any GSA Bus
ness Service Center (BSC). These cen
ters are listed in the provision a
52.210-1, Availability of Specificatio
Listed in the GSA Index of Feder
Specifications, Standards and Com-
mercial Item Descriptions. The BS
screens the applications and forward
them to the GSA, Federal Suppl
Service (FSS), for review and accept-
ance or rejection. This review consid-
ers such factors as possible duplicatio
of present supply support items, an-
ticipated demand, and health, safety,
and legal requirements.

(b) The NIIS is published approximately four times a year and is cumulative. The user must obtain the contractors' catalogs and pricelists to use the schedule effectively. A contractor is required to make those documents available upon request.

(c) Agencies receiving applications from suppliers for consideration under the NIIS program shall forward them to the nearest GSA Business Service Center.

[48 FR 42368, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 53 FR 17859, May 18, 1988]

38.102-4 International Federal Supply Schedule.

(a) The International Federal Supply Schedule (IFSS) has been established to provide sources of supply (supplies and services) at reasonable prices to U.S. Government activities located overseas. The use of the schedule is mandatory only on GSA.

(b) The IFSS is divided into two sections. The items included in Section A are awarded under a solicitation using sealed bid procedures, as covered in part 14, while the items listed in Section B are awarded under a solicitation using negotiated procedures, as described in part 15.

[51 FR 19716, May 30, 1986]

Subpart 38.2—Establishing and Administering Federal Supply Schedules

38.201 Coordination requirements.

(a) Subject to current or future interagency agreements, contracting officers having responsibility for awarding Federal Supply Schedule contracts shall coordinate with the General Services Administration (GSA) before—

(1) Establishing new schedules;

(2) Discontinuing existing schedules;

(3) Changing the scope of agency or geographical coverage of existing schedules; or

(4) Adding or deleting special item numbers, national stock numbers, or revising their description.

(b) The coordination shall be accomplished by using GSA Form 1649, Recommendation for Improvement of Federal Supply Schedules. This form shall be submitted to GSA, Federal Supply Service (FSS), FCO, Washington, DC 20406, in duplicate, well in advance of solicitation preparation. A leadtime of 90 days is required by GSA to coordinate and obtain concurrences from the various agencies.

[48 FR 42368, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

38.202 Criteria.

(a) To justify establishing or continuing a Federal Supply Schedule, the annual business volume expected from a particular Federal Supply Schedule should be as follows: National scope multiple-award schedule—$1,000,000; national scope single-award schedule—$500,000; regional service schedules—$250,000.

(b) Items included in schedules shall be such that—

(1) It is not feasible to forecast definite quantity requirements for delivery to specific consignees or no advantage accrues for doing so;

(2) Industry distribution facilities are adequate to serve the consignees; and

(3) Price advantages are sufficient to warrant the cost of maintaining the schedules.

(c) A special item number (SIN) should not be retained in a future multiple-award schedule when the anticipated purchases of the SIN will be less than $25,000 for a 1-year period. A new contract should not be awarded to a current supplier whose sales were less than $25,000 for the most recent 1-year period. An item (product or service) should not be retained in a future schedule when the anticipated purchases of the item will be less than $2,000 for a 1-year period. (For the purpose of these criteria, an item is defined as a product on a multiple-award schedule; or a National Stock Number (NSN) or SIN on a single-award schedule.) This policy does not apply to service contracts or to the following:

(1) A part or accessory for a basic item.

(2) A component of a unit assembly.

(3) An item needed to fill out a range of colors, sizes, or other characteristics.

(4) A service related to an item that is being retained on a schedule.

(5) An item that is determined by the contracting officer to be economically advantageous to retain even though the expected demand is less than $2,000 for a 1-year period. A justification must be included in the case file explaining the reasons for retaining the item.

(d) In addition, an item should be removed from a schedule when the item is—

(1) Discontinued by the manufacturer;

(2) Obsolete;

(3) Transferred to another schedule;

(4) To be provided through another method of supply;

(5) Similar to an item available from stock; or

(6) Not to be acquired because it is unsafe, requires a special license, or it is a luxury (see 41 CFR 101-26.103-2).

[48 FR 42368, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

38.203 Solicitation preparation.

(a) Schedule contracting officers shall comply with the policies and procedures of part 5 and part 6. All responsible sources shall be allowed to submit offers in response to solicitations for Federal Supply Schedule contracts. Solicitations for Federal Supply Schedule contracts shall contain the solicitation provisions and contract clauses prescribed elsewhere in this regulation (e.g., see the clause matrix for indefinite delivery contracts in subpart 52.3). The schedule contracting officer may include additional provisions and clauses which apply to the particular commodity or service to be acquired. Also, GSA shall prescribe, at the time of assignment of a schedule to a contracting office, special clauses for inclusion in the solicitations and contracts.

(b) Small Business set-aside programs apply to both single and multiple-award schedule contracting (see part 19).

[48 FR 42368, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

38.204 Schedule preparation.

The schedule contracting office shall publish schedules by commodity or service classification. Depending upon the type of schedule used, information provided may include the names of the contractors, their addresses, the contract periods, contract numbers, geographical areas of coverage, mandatory and optional users, minimum and maximum order limitations, prices, and any other information essential to placing orders. When schedule formats are provided by GSA, schedule contracting offices shall adhere to them so as to facilitate the use of the schedules by using agencies.

38.205 Schedule contract administration.

The schedule contracting officer shall—

(a) Exercise general supervision of schedule contracts;

(b) Issue final decisions on all disputes which relate to schedule contracts, or arise under orders which cannot be resolved by the ordering office and the contractor;

(c) When necessary, terminate schedule contracts for default or for the convenience of the Government (see part 49); and

(d) Make necessary changes to the schedule. The following documents may be used to make changes to Federal Supply Schedules:

(1) *Cumulative schedule.* The preferred document to transmit changes is a complete schedule reprint containing all the information in the prior issuance with the new information added.

(2) *Amendment.* An amendment may be used to transmit changes to a schedule when the new information does not justify a complete reprint. Generally, if more than one page is needed, a cumulative schedule should be issued.

(3) *Notice to Ordering Offices.* A Notice to Ordering Offices may be used to transmit changes to a schedule when time will not permit the use of a cumulative schedule or amendment.

PART 39—ACQUISITION OF INFORMATION RESOURCES

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

NOTE: Until more comprehensive coverage is included in the FAR, this part serves as a means of referring acquisition personnel to the Federal Information Resources Management Regulation (FIRMR) for those special policies and procedures applicable to acquisition of certain automatic data processing (ADP), telecommunications, and related resources.

39.001 Policy.

In acquiring information resources, acquisition personnel shall follow the policies and procedures contained in the FAR except in those areas where the FIRMR (41 CFR Ch. 201) prescribes special policies, procedures, provisions, or clauses.

[53 FR 17859, May 18, 1988]

39.002 Delegations of procurement authority.

The Administrator of General Services has certain exclusive authorities regarding acquisition of information resources which may be delegated to agencies. The FIRMR contains blanket delegations and rules for requesting specific delegations. In addition, the FIRMR contains rules regarding other delegations that may be granted to meet specific information resources needs. Provisions for requesting these delegations are provided in the FIRMR (see particularly FIRMR part 201-23).

[53 FR 17859, May 18, 1988]

PARTS 40—41 [RESERVED]

SUBCHAPTER G—CONTRACT MANAGEMENT

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42370, Sept. 19, 1983, unless otherwise noted.

42.000 Scope of part.

This part prescribes general policies and procedures for performing contract administration functions and related audit services.

Subpart 42.1—Interagency Contract Administration and Audit Services

42.100 Scope of subpart.

This subpart prescribes policies and procedures for obtaining and providing interagency contract administration and audit services in order to (a) provide specialized assistance through field offices located at or near contractors' establishments, (b) avoid or eliminate overlapping and duplication of Government effort, and (c) provide more consistent treatment of contractors.

42.101 Policy.

(a) Agencies requiring field contract administration or audit services are encouraged to use cross-servicing arrangements with existing contract administration and contract audit components to preclude duplicate demands being made upon contractors (see 42.102(a) for the directories of cognizant offices). The customer agency and the servicing agency shall enter into a formal cross-servicing arrangement when the volume of work or other circumstances warrants a formal understanding.

(b) Multiple reviews, inspections, and examinations of a contractor or subcontractor by several agencies involving the same practices, operations, or functions shall be eliminated to the maximum practicable extent through the use of cross-servicing arrangements.

(c) OMB Circular No. A-73, Audit of Federal Operations and Programs, states executive branch policy on audit cross-servicing arrangements. As further provided in OFPP Policy Letter 78-4, Field Contract Support Cross-Servicing Program, (1) agencies shall use cross-servicing arrangements for the audit of costs incurred under contracts of two or more agencies being performed at the same business entity, and (2) the responsible auditor or contracting officer shall coordinate with concerned agencies the establishment of indirect cost rates at such entities and shall convey the finally established rates to those agencies for application to their contracts to the extent allocable and allowable (see subpart 42.7).

(d) Subject to the fiscal regulations of the agencies concerned, agencies (1) may be reimbursed in accordance with the Economy Act of 1932 (31 U.S.C. 1535) for services rendered under formal or informal cross-servicing arrangements, (2) normally should refrain from seeking reimbursement for cross-servicing accomplished incidental to their own needs or Government-wide responsibilities, and (3) may use the hourly rate established under the cross-servicing arrangement between the Department of Defense and the National Aeronautics and Space Administration to facilitate reimbursement arrangements.

(e) Agencies are not expected to enter into cross-servicing arrangements that would unduly burden agency resources or otherwise obstruct an agency in fulfilling its responsibilities.

[48 FR 42370, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986; 53 FR 662, Jan. 11, 1988]

42.102 Procedures.

(a) In locating available field contract administration or audit services, contracting offices shall consult the Department of Defense Directory of Contract Administration Services Components or the Directory of Federal Contract Audit Offices. Questions regarding contract administration offices may be referred to the Defense Logistics Agency, Attn: DLA-AO, Cameron Station, Alexandria, VA 22304-6100. Questions regarding audit offices may be referred to the Defense Contract Audit Agency, Attn: OTD, Cameron Station, Alexandria, VA 22304-6178. Agencies having a field contract administration or audit cross-servicing capability shall arrange for identification of this capability (including changes as they occur) in the appropriate directory by contacting one of these offices.

(b) Services may be obtained by direct request to the cognizant contract administration or audit component indicated in the applicable directory or as specified in a formal cross-servicing arrangement (see 42.101(a)).

(c) Except for requests submitted under formal cross-servicing arrangements, requests for services from Government agencies may be declined on a case-by-case basis if resources are inadequate to accomplish delegated tasks, provided the decision is made by an official above the level of the contract administration office, or as otherwise provided in agency regulations.

(d) Contract administration and audit services will be performed using the procedures of the servicing agency unless formal agreements between agencies provide otherwise.

(e) Both the requesting and servicing activities are responsible for prudent use of the services provided under either formal or informal interagency cross-servicing arrangements. When it is appropriate, servicing activities shall counsel requesting agencies or contracting offices concerning the desirability and practicality of relaxing or waiving controls and surveillance that may not be necessary to ensure satisfactory contract performance.

[48 FR 42370, Sept. 19, 1983, as amended at 55 FR 38517, Sept. 18, 1990]

Subpart 42.2—Assignment of Contract Administration

42.200 Scope of subpart.

This subpart prescribes policies and procedures for (a) assigning, retaining, or reassigning contract administration responsibility, (b) withholding normal functions or delegating additional functions when assigning contracts for administration, and (c) requesting and performing supporting contract administration. Subpart 42.3 lists both the normal contract administration functions and those requiring specific authorization by the contracting office.

42.201 Definition.

Supporting contract administration means performance of specific contract administration functions by another contract administration office (CAO) as required by (a) the CAO to which a contract is assigned for administration or (b) the contracting office retaining a contract for administration.

42.202 Assignment of contract administration.

(a) *Authority*. Except as provided in paragraph (b) below, assignment of a contract to a CAO for administration automatically carries with it the authority to perform all of the normal functions listed in 42.302(a) to the extent that those functions apply to the contract. The CAO has authority to perform the functions requiring specific authorizations, listed in 42.302(b), only to the extent specified by the contracting office. No other function shall be performed by the CAO unless delegated as provided under 42.202(c).

(b) *Withholding normal functions*. In assigning a contract for administration by a CAO, the contracting office may withhold individual functions among those listed in 42.302(a) if—

(1) Their retention by the contracting office is required by (i) the contracting agency's agency-level acquisition regulations or (ii) a formal interagency cross-servicing arrangement (see 42.101(a) and 42.102(b)); or

(2) It is clear, after consultation with the CAO when appropriate, that they can best be performed by the contracting office and the decision to withhold them is approved above the contracting officer's level.

(c) *Delegating additional functions.* For individual contracts or groups of contracts, the contracting office may delegate to the CAO functions not listed in 42.302; *provided,* that—

(1) Prior coordination with the CAO ensures the availability of required resources;

(2) In the case of authority to issue orders under provisioning procedures in existing contracts and under basic ordering agreements for items and services identified in the schedule, the head of the contracting activity or designee approves the delegation; and

(3) The delegation does not require the CAO to undertake new or follow-on acquisitions.

(d) *Transmittal and documentation.* When assigning a contract for administration by a CAO, the contracting officer shall—

(1) Enter on the contract the name and address of the CAO designated to administer it;

(2) Provide any special instructions, including any specific authorization to perform functions listed in 42.302(b), in an accompanying letter to the CAO;

(3) Include, along with the contract furnished to the CAO, copies of all contracting agency regulations or directives that are (i) incorporated into the contract by reference or (ii) otherwise necessary to administer the contract, unless copies have been previously provided; and

(4) Advise the contractor (and other activities as appropriate) of any functions withheld or additional functions delegated in the special instructions under subparagraph (2) above.

(e) *Contract administration office responsibilities.* For each contract assigned for administration, the CAO shall—

(1) Perform the functions listed in 42.302(a) to the extent that they apply to the contract, except for any functions specifically withheld under paragraph (b) above;

(2) Perform the functions listed in 42.302(b) to the extent that they apply and are specifically authorized by the contracting office;

(3) Serve as a focal point for inquiries and keep the contracting office and other interested activities advised concerning all pertinent matters related to administration of the contract;

(4) Request supporting contract administration under 42.204 when it is required; and

(5) Reassign contract administration under 42.206(a) if reassignment is required.

42.203 Retention of contract administration.

(a) Contracting offices shall retain for administration any contract (1) not requiring the performance of contract administration functions (see 42.302) at or near contractor facilities, or (2) for which retention by the contracting office is prescribed by agency acquisition regulations. However, 30.401 requires that retained contracts to which Cost Accounting Standards (CAS) apply be assigned for CAS administration only. Instructions for marking and distributing these contracts are provided in 4.201(c).

(b) Contracting offices or CAO's may request supporting contract administration under 42.204 for contracts for which they have contract administration responsibility. However, if a substantial proportion of the normal contract administration functions listed in 42.302(a) are to be requested, an official above the contracting officer's level shall review the validity of retaining administration while requesting extensive supporting contract administration.

42.204 Supporting contract administration.

(a) A CAO assigned a contract for administration under 42.202 or a contracting office retaining administration under 42.203 may request supporting contract administration from the CAO cognizant of the contractor location where performance of specific contract administration functions is required. The request shall (1) be in writing, (2) clearly state the specific functions to be performed, and (3) be accompanied by a copy of pertinent contractual and other necessary documents.

(b) The prime contractor is responsible for managing its subcontracts. The CAO's concern with subcontracts is normally limited to evaluating the prime contractor's management of them (see part 44). Therefore, supporting contract administration shall not be used for subcontracts unless (1) the Government would otherwise incur undue cost, (2) successful completion of the prime contract is threatened, or (3) it is authorized under paragraph (c) below or elsewhere in this regulation.

(c) For major system acquisitions (see part 34), the contracting officer may designate certain high-risk or critical subsystems or components for special surveillance (see 44.205) in addition to requesting supporting contract administration. This surveillance shall be conducted in a manner fully consistent with the policy of calling upon the cognizant CAO to perform contract administration functions at a contractor's facility (see subpart 42.1).

42.205 Designation of the paying office.

If the information is available, the contracting officer shall enter on the contract the name and address of the office designated under agency procedures to make payments on the contract. Unless agency acquisition regulations otherwise provide, the assignment of contract administration to a CAO does not affect the designation of the paying office.

42.206 Reassignment of contract administration.

(a) The administrative contracting officer at the CAO of initial assignment shall reassign a contract for administration when the need for reassignment results from (1) an incorrect initial assignment, (2) organizational transfer of the cognizant CAO, (3) establishment or disestablishment of a CAO, or (4) a change in a CAO's geographical responsibility.

(b) The contracting officer at the contracting office shall reassign a contract for administration when reasons other than those in paragraph (a) above make reassignment appropriate.

(c) To reassign a contract, the responsible contracting officer shall use a unilateral contract modification. The CAO of initial assignment shall transfer the contract file and necessary supporting documents to the successor CAO.

(d) When warranted by a change in circumstances and approved at a higher level, a contracting officer may recall a contract or function previously assigned for administration.

Subpart 42.3—Contract Administration Office Functions

42.301 General.

When a contract is assigned for administration under subpart 42.2, the contract administration office (CAO) shall perform contract administration functions in accordance with this regulation, the contract terms, and, unless otherwise agreed upon in formal cross-servicing arrangements (see 42.101(a)), the applicable regulations of the servicing agency.

42.302 Contract administration functions.

(a) The following are the normal contract administration functions to be performed by the cognizant CAO, to the extent they apply, as prescribed in 42.202:

(1) Review the contractor's compensation structure.

(2) Review the contractor's insurance plans.

(3) Conduct post-award orientation conferences.

(4) Review and evaluate contractors' proposals under subpart 15.8 and, when negotiation will be accomplished by the contracting officer, furnish comments and recommendations to that officer.

(5) Negotiate forward pricing rate agreements (see 15.809).

(6) Negotiate advance agreements applicable to treatment of costs under

contracts currently assigned for administration (see 31.109).

(7) Determine the allowability of costs suspended or disapproved as required (see subpart 42.8), direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final vouchers.

(8) Issue Notices of Intent to Disallow or not Recognize Costs (see subpart 42.8).

(9) Establish final indirect cost rates and billing rates for those contractors meeting the criteria for contracting officer determination in subpart 42.7.

(10) Prepare findings of fact and issue decisions under the Disputes clause on matters in which the administrative contracting officer (ACO) has the authority to take definitive action.

(11) In connection with Cost Accounting Standards (see part 30)—

(i) Determine the adequacy of the contractor's disclosure statements;

(ii) Determine whether disclosure statements are in compliance with Cost Accounting Standards and part 31;

(iii) Determine the contractor's compliance with Cost Accounting Standards and disclosure statements, if applicable; and

(iv) Negotiate price adjustments and execute supplemental agreements under the Cost Accounting Standards clauses at 52.230-3, 52.230-4, and 52.230-5.

(12) Review and approve or disapprove the contractor's requests for payments under the progress payments clause.

(13) Make payments on assigned contracts when prescribed in agency acquisition regulations (see 42.205).

(14) Manage special bank accounts.

(15) Ensure timely notification by the contractor of any anticipated overrun or underrun of the estimated cost under cost-reimbursement contracts.

(16) Monitor the contractor's financial condition and advise the contracting officer when it jeopardizes contract performance.

(17) Analyze quarterly limitation on payments statements and recover overpayments from the contractor.

(18) Issue tax exemption certificates.

(19) Ensure processing and execution of duty-free entry certificates.

(20) For classified contracts, administer those portions of the applicable industrial security program designated as ACO responsibilities (see subpart 4.4).

(21) Issue work requests under maintenance, overhaul, and modification contracts.

(22) Negotiate prices and execute supplemental agreements for spare parts and other items selected through provisioning procedures when prescribed by agency acquisition regulations.

(23) Negotiate and execute contractual documents for settlement of partial and complete contract terminations for convenience, except as otherwise prescribed by part 49.

(24) Negotiate and execute contractual documents settling cancellation charges under multi-year contracts.

(25) Process and execute novation and change of name agreements under subpart 42.12.

(26) Perform property administration (see part 45).

(27) Approve contractor acquisition or fabrication of special test equipment under the clause at 52.245-18, Special Test Equipment.

(28) Perform necessary screening, redistribution, and disposal of contractor inventory.

(29) Issue contract modifications requiring the contractor to provide packing, crating, and handling services on excess Government property. When the ACO determines it to be in the Government's interests, the services may be secured from a contractor other than the contractor in possession of the property.

(30) In facilities contracts—

(i) Evaluate the contractor's requests for facilities and for changes to existing facilities and provide appropriate recommendations to the contracting officer;

(ii) Ensure required screening of facility items before acquisition by the contractor;

(iii) Approve use of facilities on a noninterference basis in accordance with the clause at 52.245-9, Use and Charges;

(iv) Ensure payment by the contractor of any rental due; and

(v) Ensure reporting of items no longer needed for Government production.

(31) Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules.

(32) Perform pre-award surveys (see subpart 9.1).

(33) Advise and assist contractors regarding their priorities and allocations responsibilities and assist contracting offices in processing requests for special assistance and for priority ratings for privately owned capital equipment.

(34) Monitor contractor industrial labor relations matters under the contract; apprise the contracting officer and, if designated by the agency, the cognizant labor relations advisor, of actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plant upon instruction from, and authorization of, the contracting officer.

(35) Perform traffic management services, including issuance and control of Government bills of lading and other tran portation documents.

(36) Review the adequacy of the contractor's traffic operations.

(37) Review and evaluate preservation, packaging, and packing.

(38) Ensure contractor compliance with contractual quality assurance requirements (see part 46).

(39) Ensure contractor compliance with contractual safety requirements.

(40) Perform engineering surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production.

(41) Evaluate for adequacy and perform surveillance of contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development.

(42) Review and evaluate for techn cal adequacy the contractor's logisti support, maintenance, and modific tion programs.

(43) Report to the contracting offic any inadequacies noted in specific tions.

(44) Perform engineering analyses o contractor cost proposals.

(45) Review and analyze contractor proposed engineering and design stud ies and submit comments and recom mendations to the contracting office as required.

(46) Review engineering change proposals for proper classification, and when required, for need, technical adequacy of design, producibility, and impact on quality, reliability, schedule, and cost; submit comments to the contracting office.

(47) Assist in evaluating and make recommendations for acceptance or rejection of waivers and deviations.

(48) Evaluate and monitor the contractor's procedures for complying with procedures regarding restrictive markings on data.

(49) Monitor the contractor's value engineering program.

(50) Review, approve or disapprove, and maintain surveillance of the contractor's purchasing system (see part 44).

(51) Consent to the placement of subcontracts.

(52) Review, evaluate, and approve plant or division-wide small and small disadvantaged business master subcontracting plans.

(53) Obtain the contractor's currently approved company- or division-wide plans for small business and small disadvantaged business subcontracting for its commercial products, or, if there is no currently approved plan, assist the contracting officer in evaluating the plans for those products.

(54) Assist the contracting officer, upon request, in evaluating an offeror's proposed small business and small disadvantaged business subcontracting plans, including documentation of compliance with similar plans under prior contracts.

(55) By periodic surveillance, ensure the contractor's compliance with small business and small disadvantaged business subcontracting plans and any

labor surplus area contractual requirements; maintain documentation of the contractor's performance under and compliance with these plans and requirements; and provide advice and assistance to the firms involved, as appropriate.

(56) Maintain surveillance of flight operations.

(57) Assign and perform supporting contract administration.

(58) Ensure timely submission of required reports.

(59) Issue administrative changes, correcting errors or omissions in typing, contractor address, facility or activity code, remittance address, computations, which do not require additional contract funds, and other such changes (see 43.101).

(60) Cause release of shipments from contractor's plants according to the shipping instructions. When applicable, the order of assigned priority shall be followed; shipments within the same priority shall be determined by date of the instruction.

(61) Obtain contractor proposals for any contract price adjustments resulting from amended shipping instructions. ACO's shall review all amended shipping instructions on a periodic, consolidated basis to assure that adjustments are timely made. Except when the ACO has settlement authority, the ACO shall forward the proposal to the contracting office for contract modification. The ACO shall not delay shipments pending completion and formalization of negotiations of revised shipping instructions.

(62) Negotiate and/or execute supplemental agreements, as required, making changes in packaging subcontractors or contract shipping points.

(63) Cancel unilateral purchase orders when notified of nonacceptance by the contractor. The ACO shall notify the contracting officer when the purchase order is canceled.

(64) Negotiated and execute one-time supplemental agreements providing for the extension of contract delivery schedules up to 90 days on contracts with an assigned Critically Designator of C (see 42.1105). Notification that the contract delivery schedule is being extended shall be provided to the contracting office. Subsequent extensions on any individual contract shall be authorized only upon concurrence of the contracting office.

(65) Accomplish administrative closeout procedures (see 4.804-5).

(66) Determine that the contractor has a drug-free workplace program and drug free awareness program (see subpart 23.5).

(b) The CAO shall perform the following functions only when and to the the extent specifically authorized by the contracting office:

(1) Negotiate or negotiate and execute supplemental agreements incorporating contractor proposals resulting from change orders issued under the Changes clause. Before completing negotiations, coordinate any delivery schedule change with the contracting office.

(2) Negotiate prices and execute priced exhibits for unpriced orders issued by the contracting officer under basic ordering agreements.

(3) Negotiate or negotiate and execute supplemental agreements changing contract delivery schedules.

(4) Negotiate or negotiate and execute supplemental agreements providing for the deobligation of unexpended dollar balances considered excess to known contract requirements.

(5) Issue amended shipping instructions and, when necessary, negotiate and execute supplemental agreements incorporating contractor proposals resulting from these instructions.

(6) Negotiate changes to interim billing prices.

(7) Negotiate and definitize adjustments to contract prices resulting from exercise of an economic price adjustment clause (see subpart 16.2).

(8) Issue change orders and negotiate and execute resulting supplemental agreements under contracts for ship construction, conversion, and repair.

(9) Execute supplemental agreements on firm-fixed price supply contracts to reduce required contract line item quantities and deobligate excess funds when notified by the contractor of an inconsequential delivery shortage, and it is determined that such action is in the best interests of the Government, notwithstanding the default provisions of the contract. Such

action will be taken only upon the written request of the contractor and, in no event shall the total downward contract price adjustment resulting from an inconsequential delivery shortage exceed $250.00 or 5 percent of the contract price, whichever is less.

(10) Execute supplemental agreements to permit a chance in place of inspection at origin specified in firm fixed-price supply contracts awarded to nonmanufacturers, as deemed necessary to protect the Government's interests.

(c) Any additional contract administration functions not listed in 42.302(a) and (b), or not otherwise delegated, remain the responsibility of the contracting office.

[48 FR 42370, Sept. 19, 1983, as amended at 54 FR 34756, Aug. 21, 1989; 54 FR 48989, Nov. 28, 1989; 55 FR 21708, May 25, 1990; 55 FR 38517, Sept. 18, 1990]

Subpart 42.4—Correspondence and Visits

42.401 Contract correspondence.

(a) The contracting officer (or other contracting agency personnel) normally shall (1) forward correspondence relating to assigned contract administration functions through the cognizant contract administration office (CAO) to the contractor and (2) provide a copy for the CAO's file. When urgency requires sending such correspondence directly to the contractor, a copy shall be sent concurrently to the CAO.

(b) The CAO shall send the contracting office a copy of pertinent correspondence conducted between the CAO and the contractor.

42.402 Visits to contractors' facilities.

(a) Government personnel planning to visit a contractor's facility in connection with one or more Government contracts shall provide prior notification to the cognizant CAO, with the following information, sufficiently in advance to permit the CAO to make necessary arrangements. Such notification is for the purpose of eliminating duplicative reviews, requests, investigations, and audits relating to the contract administration functions in subpart 42.3 delegated to CAO's and shall, as a minimum, include the following (see also paragraph (b) of this section):

(1) Visitors' names, official positions, and security clearances.

(2) Date and duration of visit.

(3) Name and address of contractor and personnel to be contacted.

(4) Contract number, program involved, and purpose of visit.

(5) If desired, visitors to a contractor's plant may request that a representative of the CAO accompany them. In any event, the CAO has final authority to decide whether a representative shall accompany a visitor.

(b) If the visit will result in reviewing, auditing, or obtaining any information from the contractor relating to contract administration functions, the prospective visitor shall identify the information in sufficient detail so as to permit the CAO, after consultation with the contractor and the cognizant audit office, to determine whether such information, adequate to fulfill the requirement, has recently been reviewed by or is available within the Government. If so, the CAO will discourage the visit and refer the prospective visitor to the Government office where such information is located. Where the office is the CAO, such information will be immediately forwarded or otherwise made available to the requestor.

(c) Visitors shall fully inform the CAO of any agreements reached with the contractor or other results of the visit that may affect the CAO.

[48 FR 42370, Sept. 19, 1983, as amended at 53 FR 662, Jan. 11, 1988; 53 FR 17859, May 18, 1988]

42.403 Evaluation of contract administration offices.

Onsite inspections or evaluations of the performance of the assigned functions of a contract administration office shall be accomplished only by or under the direction of the agency of which that office is a part.

Subpart 42.5—Postaward Orientation

42.500 Scope of subpart.

This subpart prescribes policies and procedures for the postaward orientation of contractors and subcontractors through (a) a conference or (b) a letter or other form of written communication.

42.501 General.

(a) A postaward orientation aids both Government and contractor personnel to (1) achieve a clear and mutual understanding of all contract requirements and (2) identify and resolve potential problems. However, it is not a substitute for the contractor's fully understanding the work requirements at the time offers are submitted, nor is it to be used to alter the final agreement arrived at in any negotiations leading to contract award.

(b) Postaward orientation is encouraged to assist small business and small disadvantaged business concerns (see part 19).

(c) While cognizant Government or contractor personnel may request the contracting officer to arrange for orientation, it is up to the contracting officer to decide whether a postaward orientation in any form is necessary.

(d) Maximum benefits will be realized when orientation is conducted promptly after award.

42.502 Selecting contracts for postaward orientation.

When deciding whether postaward orientation is necessary and, if so, what form it shall take, the contracting officer shall consider, as a minimum, the—

(a) Nature and extent of the preaward survey and any other prior discussions with the contractor;

(b) Type, value, and complexity of the contract;

(c) Complexity and acquisition history of the product or service;

(d) Requirements for spare parts and related equipment;

(e) Urgency of the delivery schedule and relationship of the product or service to critical programs;

(f) Length of the planned production cycle;

(g) Extent of subcontracting;

(h) Contractor's performance history and experience with the product or service;

(i) Contractor's status, if any, as a small business or small disadvantaged business concern;

(j) Contractor's performance history with small business and small disadvantaged business subcontracting programs;

(k) Safety precautions required for hazardous materials or operations; and

(l) Complex financing arrangements, such as progress payments, advance payments, or guaranteed loans.

42.503 Postaward conferences.

42.503-1 Postaward conference arrangements.

(a) The contracting officer who decides that a conference is needed is responsible for—

(1) Establishing the time and place of the conference;

(2) Preparing the agenda, when necessary;

(3) Notifying appropriate Government representatives (e.g., contracting/contract administration office) and the contractor;

(4) Designating or acting as the chairperson;

(5) Conducting a preliminary meeting of Government personnel; and

(6) Preparing a summary report of the conference.

(b) When the contracting office initiates a conference, the arrangements may be made by that office or, at its request, by the contract administration office.

42.503-2 Postaward conference procedure.

The chairperson of the conference shall conduct the meeting. Unless a contract change is contemplated, the chairperson shall emphasize that it is not the purpose of the meeting to change the contract. The contracting officer may make commitments or give directions within the scope of the contracting officer's authority and shall put in writing and sign any commitment or direction, whether or not it changes the contract. Any change to the contract that results from the postaward conference shall be made only by a contract modification (see 43.101) referencing the applicable terms of the contract. Participants without authority to bind the Government shall not take action that in any way alters the contract. The chairperson shall include in the summary report (see 42.503-3 below) all information and guidance provided to the contractor.

42.503-3 Postaward conference report.

The chairperson shall prepare and sign a report of the postaward conference. The report shall cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. The chairperson shall furnish copies of the report to the contracting office, the contract administration office, the contractor, and others who require the information.

42.504 Postaward letters.

In some circumstances, a letter or other written form of communication to the contractor may be adequate postaward orientation (in lieu of a conference). The letter should identify the Government representative responsible for administering the contract and cite any unusual or significant contract requirements. The rules on changes to the contract in 42.503-2 also apply here.

42.505 Postaward subcontractor conferences.

(a) The prime contractor is generally responsible for conducting postaward conferences with subcontractors. However, the prime contractor may invite Government representatives to a conference with subcontractors, or the Government may request that the prime contractor initiate a conference with subcontractors. The prime contractor should ensure that representatives from involved contract administration offices are invited.

(b) Government representatives (1) must recognize the lack of privity of contract between the Government and subcontractors, (2) shall not take action that is inconsistent with or alters subcontracts, and (3) shall ensure that any changes in direction or commitment affecting the prime contract or contractor resulting from a subcontractor conference are made by written direction of the contracting officer to the prime contractor in the same manner as described in 42.503-2.

Subpart 42.6—Corporate Administrative Contracting Officer

42.601 General.

Contractors with more than one operational location (e.g., division, plant, or subsidiary) often have corporate-wide policies, procedures, and activities requiring Government review and approval and affecting the work of more than one administrative contracting officer (ACO). In these circumstances, effective and consistent contract administration may require the assignment of a corporate administrative contracting officer (CACO) to deal with corporate management and to perform selected contract administration functions on a corporate-wide basis.

42.602 Assignment and location.

(a) A CACO may be assigned only when (1) the contractor has at least two locations with resident ACO's or (2) the need for a CACO is approved by the agency head or designee (for this purpose, a nonresident ACO will be considered as resident if at least 75 percent of the ACO's effort is devoted to a single contractor). One of the resident ACO's may be designated to perform the CACO functions, or a full-time CACO may be assigned. In determining the location of the CACO, the responsible agency shall take into account such factors as the location(s) of the corporate records, corporate office, major plant, cognizant government auditor, and overall cost effectiveness.

(b) A decision to initiate or discontinue a CACO assignment should be based on such factors as (1) the benefits of coordination and liaison at the corporate level, (2) the volume of Government sales, (3) the degree of control exercised by the contractor's corporate office over Government-oriented lower-tier operating elements, and (4) the impact of corporate policies and procedures on those elements.

(c) Responsibility for assigning a CACO shall be determined as follows:

(1) When all locations of a corporate entity are under the contract administration cognizance of a single agency, that agency is responsible.

(2) When the locations are under the contract administration cognizance of more than one agency, the agencies concerned shall agree on the responsible agency (normally on the basis of the agency with the largest unliquidated dollar balance of affected contracts). In such cases, agencies may sometimes also consider geographic location.

(d) The directory of contract administration components referenced in 42.102(a) includes a listing of CACO's and the contractors for which they are assigned responsibility. When the directory indicates that the services of a CACO are available, the provisions of subpart 42.1 apply to the CACO functions.

42.603 Responsibilities.

(a) The CACO shall perform, on a corporate-wide basis, the contract administration functions (see subpart 42.3) as designated by the responsible agency. Typical CACO functions include (1) the determination of final indirect cost rates for cost-reimbursement contracts, (2) establishment of advance agreements or recommendations on corporate/home office expense allocations, and (3) administration of Cost Accounting Standards (CAS) applicable to corporate-level and corporate-directed accounting practices.

(b) The CACO shall—

(1) Fully utilize the cognizant contract audit agency financial and advisory accounting services, including (i) advice regarding the acceptability of corporate-wide policies and (ii) advisory audit reports;

(2) Keep cognizant ACO's and auditors informed of important matters under consideration and determinations made; and

(3) Solicit their advice and participation as appropriate.

Subpart 42.7—Indirect Cost Rates

42.700 Scope of subpart.

This subpart prescribes policies and procedures for establishing (a) billing rates and (b) final indirect cost rates.

42.701 Definitions.

Billing rate means an indirect cost rate (a) established temporarily for interim reimbursement of incurred indirect costs and (b) adjusted as necessary pending establishment of final indirect cost rates.

Business unit (see 30.102).

Final indirect cost rate means the indirect cost rate established and agreed upon by the Government and the contractor as not subject to change. It is usually established after the close of the contractor's fiscal year (unless the parties decide upon a different period) to which it applies. In the case of cost-reimbursement research and development contracts with educational institutions, it may be predetermined; that is, established for a future period on the basis of cost experience with similar contracts, together with supporting data.

Indirect cost (see 31.001 and 31.203).

Indirect cost rate means the percentage or dollar factor that expresses the ratio of indirect expense incurred in a given period to direct labor cost, manufacturing cost, or another appropriate base for the same period.

42.702 Purpose.

(a) Establishing final indirect cost rates under this subpart provides—

(1) Uniformity of approach with a contractor when more than one contract or agency is involved;

(2) Economy of administration; and

(3) Timely settlement under cost-reimbursement contracts.

(b) Establishing billing rates provides a method for interim reimbursement of indirect costs at estimated rates subject to adjustment during contract performance and at the time the final indirect cost rates are established.

42.703 Policy.

(a) A single agency (see 42.705-1(a)) shall be responsible for establishing indirect cost rates for each business unit. These rates shall be binding on all agencies and their contracting offices, unless otherwise specifically prohibited by statute.

(b) Billing rates and final indirect cost rates shall be used in reimbursing indirect costs under cost-reimbursement contracts and in determining progress payments under fixed-price contracts.

(c) Contracting officers shall—

(1) Unless the quick-closeout procedure in 42.708 is used, use final indirect cost rates of a business unit for a given period, which shall be binding for all the cost-reimbursement contracts of the business unit for that period, subject to any specific limitation in a contract or advance agreement (when contracts of more than one agency are involved, see 42.101(c)); and

(2) Take into consideration established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established (see 31.103(b)).

42.704 Billing rates.

(a) The contracting officer or auditor responsible under 42.705 for determining the final indirect cost rate ordinarily shall also be responsible for determining the billing rate.

(b) The contracting officer or auditor shall establish a billing rate on the basis of information resulting from recent review, previous audits or experience, or similar reliable data or experience of other contracting activities. In establishing the billing rate, the contracting officer or auditor should ensure that it is as close as possible to the final indirect cost rate anticipated for the contractor's fiscal period, as adjusted for any unallowable costs. When the contracting officer or auditor determines that the dollar value of contracts requiring use of a billing rate does not warrant submission of a detailed billing rate proposal, the billing rate may be established by making appropriate adjustments from the prior year's indirect cost experience to eliminate unallowable and nonrecurring costs and to reflect new or changed conditions.

(c) Once established, billing rates may be prospectively or retroactively revised by mutual agreement of the contracting officer or auditor and the contractor at either party's request, to prevent substantial overpayment or underpayment.

(d) The elements of indirect cost and the base or bases used in computing billing rates shall not be construed as determinative of the indirect costs to be distributed or of the bases of distribution to be used in the final settlement.

42.705 Final indirect cost rates.

Final indirect cost rates shall be established on the basis of (a) contracting officer determination procedure (see 42.705-1) or (b) auditor determination procedure (see 42.705-2).

42.705-1 Contracting officer determination procedure.

(a) *Applicability and responsibility.* Contracting officer determination shall be used for the following, with the indicated cognizant contracting officer responsible for establishing the final indirect cost rates:

(1) Business units of a multidivisional corporation under the cognizance of a corporate administrative contracting officer (see subpart 42.6), with that officer responsible for the determination, assisted, as required, by the administrative contracting officers assigned to the individual business units. Negotiations may be conducted on a coordinated or centralized basis, depending upon the degree of centralization within the contractor's organization.

(2) Business units not under the cognizance of a corporate administrative contracting officer, but having a resident administrative contracting officer (see 42.602), with that officer responsible for the determination. For this purpose, a nonresident administrative contracting officer is considered as resident if at least 75 percent of the administrative contracting officer's time is devoted to a single contractor.

(3) Business units not included in subparagraph (1) or (2) above, but where the predominant interest (on the basis of unliquidated contract dollar amount) is in an agency whose procedures require contracting officer determination. In such cases, the responsible contracting officer will be as

designated under that agency's procedures.

(4) Educational institutions (see 42.705-3 for responsibility and procedures).

(5) State and local governments (see 42.705-4).

(6) Nonprofit organizations other than educational and state and local governments (see 42.705-5).

(b) *Procedures.* (1) In accordance with the Allowable Cost and Payment clause at 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer and, if required by agency procedures, to the cognizant auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

(2) The auditor shall submit to the contracting officer an advisory audit report (i) identifying any relevant advance agreements or restrictive terms of specific contracts and (ii) including the information required by 15.805-5(e).

(3) The contracting officer shall head the Government negotiating team, which includes the cognizant auditor and technical or functional personnel as required. Contracting offices having significant dollar interest shall be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position should be invited to attend.

(4) The Government negotiating team shall develop a negotiation position.

(5) The cognizant contracting officer shall—

(i) Conduct negotiations;

(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare, sign, and place in the contractor general file (see 4.801(c)(3)) a negotiation memorandum covering (A) the disposition of significant matters in the advisory audit report, (B) reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues, (C) reasons why any recommendations of the auditor or other Government advisors were not followed, and (D) identification of cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) Distribute resulting documents in accordance with 42.706.

42.705-2 Auditor determination procedure.

(a) *Applicability and responsibility.* (1) The cognizant Government auditor shall establish final indirect cost rates for business units not covered in 42.705-1(a).

(2) In addition, auditor determination may be used for business units that are covered in 42.705-1(a) when the contracting officer and auditor agree that the indirect costs can be settled with little difficulty and any of the following circumstances apply:

(i) The business unit has primarily fixed-price contracts, with only minor involvement in cost-reimbursement contracts.

(ii) The administrative cost of contracting officer determination would exceed the expected benefits.

(iii) The business unit does not have a history of disputes and there are few cost problems.

(iv) The contracting officer and auditor agree that special circumstances require auditor determination.

(b) *Procedures.* (1) The contractor shall submit to the cognizant contracting officer and auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

(2) The auditor shall—

(i) Audit the proposal and seek agreement on it with the contractor;

(ii) Obtain from the contractor a Certificate of Current Cost or Pricing Data, if required (see 15.804-4);

(iii) In coordination with the affected contracting officers, prepare an indirect cost rate agreement conforming to the requirements of the contracts;

(iv) Prepare an audit report including the information required by 15.805-5(e);

(v) If agreement with the contractor is not reached, forward the audit report to the contracting officer designated by the agency with the predominant interest (on the basis of unliquidated contract dollar amounts) or, where applicable, the contracting officer designated in 42.705-2(a)(2) above, who will then resolve the disagreement; and

(vi) Distribute resulting documents in accordance with 42.706.

42.705-3 Educational institutions.

(a) *General.* (1) Postdetermined final indirect cost rates shall be used in the settlement of indirect costs for all cost-reimbursement contracts with educational institutions, unless predetermined final indirect cost rates are authorized and used (see paragraph (b) below).

(2) OMB Circular No. A-88, Indirect Cost Rates, Audit, and Audit Followup at Educational Institutions, (i) assigns each educational institution to a single Government agency for the negotiation of indirect cost rates and (ii) provides that those rates shall be accepted by all Federal agencies. Cognizant Government agencies and educational institutions are listed in the Directory of Federal Contract Audit Offices (see 42.102(a)).

(3) The cognizant agency shall establish the billing rates and final indirect cost rates at the educational institution, consistent with the requirements of this subpart, subpart 31.3, and the OMB Circular. The agency shall follow the procedures outlined in 42.705-1(b).

(4) If the cognizant agency is unable to reach agreement with an institution, the appeals system of the cognizant agency shall be followed for resolution of the dispute.

(b) *Predetermined final indirect cost rates.* (1) Under cost-reimbursement research and development contracts with universities, colleges, or other educational institutions (41 U.S.C. 254a), payment for reimbursable indirect costs may be made on the basis of predetermined final indirect cost rates. The cognizant agency is not required to establish predetermined rates, but if they *are* established, their use must be extended to all the institution's Government contracts.

(2) In deciding whether the use of predetermined rates would be appropriate for the educational institution concerned, the agency should consider both the stability of the institution's indirect costs and bases over a period of years and any anticipated changes in the amount of the direct and indirect costs.

(3) Unless their use is approved at a level in the agency (see subparagraph (a)(2) above) higher than the contracting officer, predetermined rates shall not be used when—

(i) There has been no recent audit of the indirect costs;

(ii) There have been frequent or wide fluctuations in the indirect cost rates and the bases over a period of years; or

(iii) The estimated reimbursable costs for any individual contract are expected to exceed $1 million annually.

(4) (i) If predetermined rates are to be used and no rate has been previously established for the institution's current fiscal year, the agency shall obtain from the institution a proposal for a predetermined rate to be applied until the end of the fiscal year.

(ii) If the proposal is found to be generally acceptable, the agency shall negotiate the predetermined rates with the institution. The rates should be based on an audit of the institution's costs for the year immediately preceding the year in which the rates are being negotiated. If this is not possible, an earlier audit may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or in bases used that may have a bearing on the reasonableness of the proposed rates. However, in the case of smaller contracts (e.g., $100,000 or less), an audit made at an earlier date is acceptable if (A) there have been no significant changes in the contractor's organization and (B) it is reasonably apparent that another audit would have little effect on the rates finally agreed upon and the potential for overpayment of indirect cost is relatively insignificant.

(5) If predetermined rates are used—

(i) The contracting officer shall include the negotiated rates and bases in the contract Schedule; and

(ii) See 16.307(i), which prescribes
ne clause at 52.216-15, Predetermined
ndirect Cost Rates.

(6) Predetermined indirect cost rates
nall be applicable for a period of not
nore than 1 year. The agency shall
btain the contractor's proposal for a
ew predetermined rate sufficiently in
dvance so that the new rate, based on
urrent data, may be promptly negoti-
ted near the beginning of the new
scal year (see paragraphs (b) and (d)
f the clause at 52.216-15, Predeter-
ined Indirect Cost Rates).

(7) Contracting officers shall use
illing rates established by the agency
reimburse the contractor for work
erformed during a period not covered
y predetermined rates.

.705-4 State and local governments.

OMB Circular No. A-87 concerning
ost principles for state and local gov-
nments (see subpart 31.6) estab-
shes the cognizant agency concept
nd procedures for determining a cog-
izant agency for approving state and
cal government indirect costs associ-
ted with federally-funded programs
nd activities. The indirect cost rates
egotiated by the cognizant agency
ill be used by all Federal agencies
at also award contracts to these
me state and local governments.

.705-5 Nonprofit organizations other than educational and state and local governments.

See OMB Circular No. A-122.

.706 Distribution of documents.

(a) The contracting officer or audi-
r shall promptly distribute executed
pies of the indirect cost rate agree-
ent to the contractor and to each af-
cted contracting agency and shall
ovide copies of the agreement for
e contract files, in accordance with
e guidance for contract modifica-
ns in subpart 4.2, Contract Distribu-
n.

b) Copies of the negotiation memo-
dum prepared under contracting
icer determination or audit report
pared under auditor determination
ll be furnished, as appropriate, to
contracting offices and Govern-
nt audit offices.

42.707 Cost-sharing rates and limitations on indirect cost rates.

(a) Cost-sharing arrangements, when authorized, may call for the contractor to participate in the costs of the contract by accepting indirect cost rates lower than the anticipated actual rates. In such cases, a negotiated indirect cost rate ceiling may be incorporated into the contract for prospective application. For cost sharing under research and development contracts, see 35.003(b).

(b) (1) Other situations may make it prudent to provide a final indirect cost rate ceiling in a contract. Examples of such circumstances are when the proposed contractor—

(i) Is a new or recently reorganized company, and there is no past or recent record of incurred indirect costs;

(ii) Has a recent record of a rapidly increasing indirect cost rate due to a declining volume of sales without a commensurate decline in indirect expenses; or

(iii) Seeks to enhance its competitive position in a particular circumstance by basing its proposal on indirect cost rates lower than those that may reasonably be expected to occur during contract performance, thereby causing a cost overrun.

(2) In such cases, an equitable ceiling covering the final indirect cost rates may be negotiated and specified in the contract.

(c) When ceiling provisions are utilized, the contract shall also provide that (1) the Government will not be obligated to pay any additional amount should the final indirect cost rates exceed the negotiated ceiling rates and, (2) in the event the final indirect cost rates are less than the negotiated ceiling rates, the negotiated rates will be reduced to conform with the lower rates.

42.708 Quick-closeout procedure.

(a) The contracting officer responsible for contract closeout may negotiate the settlement of indirect costs for a specific contract, in advance of the determination of final indirect cost rates, if—

(1) The contract is physically complete;

(2) The amount of unsettled indirect cost to be allocated to the contract is relatively insignificant; and

(3) Agreement can be reached on a reasonable estimate of allocable dollars.

(b) Determinations of final indirect costs under the quick-closeout procedure provided for by the Allowable Cost and Payment clause at 52.216-7 or 52.216-13 shall be final for the contract it covers and no adjustment shall be made to other contracts for over- or under-recoveries of costs allocated or allocable to the contract covered by the agreement.

(c) Indirect cost rates used in the quick closeout of a contract shall not be considered a binding precedent when establishing the final indirect cost rates for other contracts.

Subpart 42.8—Disallowance of Costs

42.800 Scope of subpart.

This subpart prescribes policies and procedures for (a) issuing notices of intent to disallow costs and (b) disallowing costs already incurred during the course of performance.

42.801 Notice of intent to disallow costs.

(a) At any time during the performance of a contract of a type referred to in 42.802, the cognizant contracting officer responsible for administering the contract may issue the contractor a written notice of intent to disallow specified costs incurred or planned for incurrence. However, before issuing the notice, the contracting officer responsible for administering the contract shall make every reasonable effort to reach a satisfactory settlement through discussions with the contractor.

(b) A notice of intent to disallow such costs usually results from monitoring contractor costs. The purpose of the notice is to notify the contractor as early as practicable during contract performance that the cost is considered unallowable under the contract terms and to provide for timely resolution of any resulting disagreement. In the event of disagreement, the contractor may submit to the contracting officer a written response. Any such response shall be answered by withdrawal of the notice or by making a written decision within 60 days.

(c) As a minimum, the notice shall—

(1) Refer to the contract's Notice of Intent to Disallow Costs clause;

(2) State the contractor's name and list the numbers of the affected contracts;

(3) Describe the costs to be disallowed, including estimated dollar value by item and applicable time periods, and state the reasons for the intended disallowance;

(4) Describe the potential impact on billing rates and forward pricing rate agreements;

(5) State the notice's effective date and the date by which written response must be received;

(6) List the recipients of copies of the notice; and

(7) Request the contractor to acknowledge receipt of the notice.

(d) The contracting officer issuing the notice shall furnish copies to all contracting officers cognizant of any segment of the contractor's organization.

(e) If the notice involves elements of indirect cost, it shall not be issued without coordination with the contracting officer or auditor having authority for final indirect cost settlement (see 42.705).

(f) In the event the contractor submits a response that disagrees with the notice (see paragraph (b) above), the contracting officer who issued the notice shall either withdraw the notice or issue the written decision, except when elements of indirect cost are involved, in which case the contracting officer responsible under 42.705 for determining final indirect cost rates shall issue the decision.

42.802 Contract clause.

The contracting officer shall insert the clause at 52.242-1, Notice of Intent to Disallow Costs, in solicitations and contracts when a cost-reimbursement contract, a fixed-price incentive contract, or a contract providing for price redetermination is contemplated.

42.803 Disallowing costs after incurrence.

Cost-reimbursement contracts, the cost-reimbursement portion of fixed-price contracts, letter contracts that provide for reimbursement of costs, and time-and-material and labor-hour contracts provide for disallowing costs during the course of performance after the costs have been incurred. The following procedures shall apply:

(a) *Contracting officer receipt of vouchers.* When contracting officers receive vouchers directly from the contractor and, with or without auditor assistance, approve or disapprove them, the process shall be conducted in accordance with the normal procedures of the individual agency.

(b) *Auditor receipt of vouchers.* (1) When authorized by agency regulations, the contract auditor may be authorized to (i) receive reimbursement vouchers directly from contractors, (ii) approve for payment those vouchers found acceptable, and (iii) suspend payment of questionable costs. The auditor shall forward approved vouchers for payment to the cognizant contracting, finance, or disbursing officer, as appropriate under the agency's procedures.

(2) If the examination of a voucher raises a question regarding the allowability of a cost under the contract terms, the auditor, after informal discussion as appropriate, may, where authorized by agency regulations, issue a notice of contract costs suspended and/or disapproved simultaneously to the contractor and the disbursing officer, with a copy to the cognizant contracting officer, for deduction from current payments with respect to costs claimed but not considered reimbursable.

(3) If the contractor disagrees with the deduction from current payments, the contractor may—

(i) Submit a written request to the cognizant contracting officer to consider whether the unreimbursed costs should be paid and to discuss the findings with the contractor;

(ii) File a claim under the Disputes clause, which the cognizant contracting officer will process in accordance with agency procedures; or

(iii) Do both of the above.

Subpart 42.9—[Reserved]

Subpart 42.10—Negotiating Advance Agreements for Independent Research and Development/Bid and Proposal Costs

42.1001 Definitions.

See 31.205-18(a).

42.1002 Applicability.

The procedures in this subpart shall be used for negotiating advance agreements containing dollar ceilings for allowability of independent research and development (IR&D) costs and bid and proposal (B&P) costs, when these agreements are required by 31.205-18(c)(1).

42.1003 Designation of lead negotiating agency.

A single lead agency shall negotiate all required advance agreements for IR&D/B&P costs for each company required to negotiate an advance agreement under 31.205-18(c)(1). These agreements are binding on the company and on all Government agencies, unless prohibited by statute. The lead agency shall be designated as follows:

(a) To implement section 203 of Pub. L. 91-441, as amended by section 208 of Pub. L. 96-342, the Department of Defense (DOD) shall be the lead agency for each company receiving combined IR&D/B&P payments from DOD during the company's previous fiscal year exceeding the threshold in 31.205-18(c)(1).

(b) When DOD is not the lead agency as indicated in paragraph (a) preceding, and more than one agency has contracts with the company, the agency that paid the largest dollar amount of IR&D/B&P costs in the company's previous fiscal year shall (1) be the lead agency or (2) arrange for another agency having contracts with that company to be the lead agency.

(c) In the case of DOD, the term *lead negotiating agency* means the military service responsible for performing the negotiation of IR&D/B&P costs.

42.1004 Location of negotiators in a central office.

In order to facilitate participation, consistency, and interagency coordination, agencies with negotiating responsibilities shall locate at a central office(s) all personnel responsible for negotiating and executing advance agreements required under 31.205-18(c)(1). These agencies shall issue instructions on the use, by contracting officers, of estimated IR&D/B&P factors in forward pricing, interim billings, etc. Contracting officers shall obtain such factors, when applicable, from the cognizant central office.

42.1005 Lead negotiating agency responsibilities.

The lead agency shall perform the functions listed in paragraphs (a) through (h) following:

(a) Furnish contractors with guidance on the technical and financial information needed to support IR&D/B&P proposals, as well as how and when to submit the proposals.

(b) Perform, or arrange for performance of, a technical evaluation of the IR&D proposed by the contractor, to assist the contracting officer in evaluating the reasonableness and technical quality of the IR&D program. The technical evaluation shall include an opinion concerning the proposed IR&D program and any agency special rules on allowability.

(c) Provide the contractor with a contracting officer's determination concerning the proposed IR&D/B&P projects and any agency special rules on allowability.

(d) When advance agreements have not yet been negotiated, provide information regarding estimated ceilings, the allocation base, and indirect rate data, as appropriate, to contracting officers or other interested agency personnel who require information on IR&D/B&P costs for forward pricing and interim billing.

(e) Coordinate participation by affected agencies in prenegotiation meetings and in negotiations (see 31.109(f)).

(f) Prepare a prenegotiation position in coordination with the affected agencies.

(g) Negotiate advance agreements e
tablishing dollar ceilings for IR&D
B&P costs allowable during the com
pany's fiscal year for allocation to al
work of that part of the company's op
eration covered by the agreement.

(h) Prepare advance agreements an
distribute them to affected agencie
(see 31.109(g)).

(i) Prepare negotiation memoran
dums and distribute them to affecte
agencies upon request. The contract
ing officer may delete from the dis
tributed copy portions of a memoran
dum that are not pertinent to the af
fected agency. When a negotiatio
memorandum must contain compan
data subject to protection, that dat
should be so marked, and, when it i
useful and feasible to do so, it may b
separated from the body of the memo
randum.

42.1006 Conducting negotiations.

(a) Each contractor required to ne
gotiate an advance agreement unde
31.205-18(c)(1) shall submit, in accord
ance with agency guidance, technica
and financial information to suppor
its proposed IR&D/B&P program
(see 42.1005(a)). Separate dollar ceil
ings shall be negotiated for IR&D
costs and for B&P costs. In negotiat
ing the ceilings, in addition to othe
considerations, contracting officer
shall pay particular attention to—

(1) Comparison with the previous year's programs, including the level of Government participation;

(2) Changes in the company's current business activities and projected future business activities, to the extent these future activities can be determined with reasonable certainty;

(3) The results of the technical evaluation of IR&D;

(4) The extent to which the company's B&P program is well planned and managed; and

(5) The determination concerning the company's IR&D/B&P projects and any agency special rules on allowability.

(b) Negotiated ceilings must take into account the general rules of reasonableness (see 31.201-3) and the preceding considerations.

42.1007 Content of advance agreements.

Agreements negotiated in accordance with this subpart shall include the items specified in paragraphs (a) through (j) following:

(a) A dollar ceiling for total IR&D costs.

(b) A dollar ceiling for total B&P costs.

(c) A total dollar ceiling for IR&D/B&P costs equal to the sum of paragraphs (a) and (b) above.

(d) The base or other information necessary for allocating IR&D/B&P costs.

(e) A statement that a review in accordance with 42.1005 has been performed.

(f) For those companies meeting the threshold requirements, a provision that the recovery of IR&D/B&P costs under Government contracts shall not exceed the lesser of—

(1) Such contracts' allocable share of incurred costs up to the total ceiling specified in (c) above; or

(2) The amount of incurred costs as determined under any agency special rules on allowability.

(g) Any additional agreements concerning the allocability or allowability of IR&D costs or B&P costs.

(h) A provision stating whether recovery is authorized under either paragraph (a) or (b) above in excess of the established ceiling, provided the total recovery in the two categories does not exceed the total ceiling in paragraph (c) above.

(i) A requirement that the lesser of (1) the current IR&D/B&P estimates or (2) the appropriate ceiling amounts shall be used by the Government and the contractor for estimating and pricing contractual actions. (Also see (e) above.)

(j) A requirement that the lesser of (1) the actual costs incurred or (2) the appropriate ceiling amounts shall be used by the Government and the contractor for final price determinations. (Also see (f) above.)

42.1008 Administrative appeals.

If negotiations are held and an advance agreement is not reached, the contracting officer shall make a determination of a reduced amount of payment for IR&D/B&P (see 31.205-18(c)(1)(v) and (vi)). Each lead negotiating agency shall establish an administrative appeals hearing group and procedures for hearing and deciding contractor appeals of the contracting officer's decision to reduce payment. Appeal procedures under this section are separate and distinct from board or court appeals under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

Subpart 42.11—Production Surveillance and Reporting

42.1101 General.

Production surveillance is a function of contract administration used to determine contractor progress and to identify any factors that may delay performance. Production surveillance involves Government review and analysis of (a) contractor performance plans, schedules, controls, and industrial processes and (b) the contractor's actual performance under them.

42.1102 Applicability.

This subpart applies to all contracts for supplies or services other than facilities, construction contracts, and Federal Supply Schedule contracts.

42.1103 Policy.

The contractor is responsible for timely contract performance. The Government will maintain surveillance of contractor performance as necessary to protect its interests. When the contracting office retains a contract for administration, the contracting officer administering the contract shall determine the extent of surveillance.

42.1104 Surveillance requirements.

(a) The contract administration office determines the extent of production surveillance on the basis of (1) the criticality (degree of importance to the Government) assigned by the contracting officer (see 42.1105) to the supplies or services and (2) consideration of the following factors:

(i) Contract requirements for reporting production progress and performance.

(ii) The contract performance schedule.

(iii) The contractor's production plan.

(iv) The contractor's history of contract performance.

(v) The contractor's experience with the contract supplies or services.

(vi) The contractor's financial capability.

(vii) Any supplementary written instructions from the contracting office.

(b) Contracts of values less than the small purchase threshold should not normally require production surveillance.

(c) In planning and conducting surveillance, contract administration offices shall make maximum use of any reliable contractor production control or data management systems.

(d) In performing surveillance, contract administration office personnel shall avoid any action that may (1) be inconsistent with any contract requirement or (2) result in claims of waivers, of changes, or of other contract modifications.

42.1105 Assignment of criticality designator.

Contracting officers shall assign a criticality designator to each contract in the space for designating the contract administration office, as follows:

Criticality Designator	Criterion
A	Critical contracts, including DX-rated contracts (see subpart 12.3), contracts citing the authority in 6.302-2 (unusual and compelling urgency), and contracts for major systems.
B	Contracts (other than those designated "A") for items needed to maintain a Government or contractor production or repair line, to preclude out-of-stock conditions or to meet user needs for nonstock items.
C	All contracts other than those designated "A" or "B."

[48 FR 42370, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

42.1106 Reporting requirements.

(a) When information on contract performance status is needed, contracting officers may require contractors to submit production progress reports (see 42.1107(a)). Reporting requirements shall be limited to that information essential to Government needs and shall take maximum adv
tage of data output generated by c
tractor management systems.

(b) Contract administration offi
shall review and verify the accuracy
contractor reports and advise the c
tracting officer of any required acti
The accuracy of contractor-prepar
reports shall be verified either by
program of continuous surveillance
the contractor's report-preparati
system or by individual review of ea
report.

(c) The contract administrati
office may at any time initiate
report to advise the contracting offic
(and the inventory manager, if one
designated in the contract) of any p
tential or actual delay in performan
This advice shall (1) be in writing, (
be provided in sufficient time for t
contracting officer to take necessa
action, and (3) provide a definite re
ommendation, if action is appropria

42.1107 Contract clause.

(a) The contracting officer sh
insert the clause at 52.242-2, Produ
tion Progress Reports, in solicitatio
and contracts when productio
progress reporting is required; unless
facilities contract, a construction co
tract, or a Federal Supply Schedu
contract is contemplated.

(b) When the clause at 52.242-2
used, the contracting officer sh
specify appropriate reporting instru
tions in the Schedule (see 42.1106(a)

Subpart 42.12—Novation and Change-of-Name Agreements

42.1200 Scope of subpart.

This subpart prescribes policies an
procedures for—

(a) Recognition of a successor in i
terest to Government contracts whe
contractor assets are transferred;

(b) Recognition of a change in a co
tractor's name; and

(c) Execution of novation agre
ments and change-of-name agreemen
by the responsible contracting offic

42.1201 Definitions.

Change-of-name agreement means
legal instrument executed by the co
tractor and the Government that re

ognizes the legal change of name of the contractor without disturbing the original contractual rights and obligations of the parties.

Novation agreement means a legal instrument executed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) the Government by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.

42.1202 Responsibility for executing agreements.

The contracting officer responsible for processing and executing novation and change-of-name agreements shall be determined as follows:

(a) If any of the affected contracts held by the transferor have been assigned to an administrative contracting officer (ACO) (see 2.1 and 42.202), the responsible contracting officer shall be—

(1) This ACO; or

(2) The ACO responsible for the corporate office, if affected contracts are in more than one plant or division of the transferor.

(b) If none of the affected contracts held by the transferor have been assigned to an ACO, the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts shall be the responsible contracting officer.

(c) If several transferors are involved, the responsible contracting officer shall be—

(1) The ACO administering the largest unsettled dollar balance; or

(2) The contracting officer (or ACO) designated by the agency having the largest unsettled dollar balance, if none of the affected contracts have been assigned to an ACO.

42.1203 Processing agreements.

(a) When a firm performing Government contracts wishes the Government to recognize (1) a successor in interest to these contracts or (2) a name change, the contractor shall submit a written request to the responsible contracting officer (see 42.1202).

(b) The responsible contracting officer shall—

(1) Promptly notify each contract administration office and contracting office affected by a proposed agreement for recognizing a successor in interest;

(2) Provide these offices with a list of all affected contracts; and

(3) Request submission within 30 days of their comments, which shall include technical considerations, if appropriate.

(c) The responsible contracting officer shall determine whether or not it is in the Government's interest to recognize the proposed successor in interest on the basis of—

(1) The comments received from the affected contract administration offices and contracting offices (failure to comment by the specified date shall be taken as consent); and

(2) A determination that the proposed successor is responsible under subpart 9.1, Responsible Prospective Contractors.

(d) Before novation and change-of-name agreements are executed, the responsible contracting officer shall ensure that Government counsel has reviewed them for legal sufficiency.

(e) The responsible contracting officer shall (1) forward a signed copy of the executed novation or change-of-name agreement to the transferor and to the transferee and (2) retain a signed copy in the case file.

(f) Following distribution of the agreement, the responsible contracting officer shall—

(1) Prepare a Standard Form 30, Amendment of Solicitation/Modification of Contract, incorporating a summary of the agreement and attaching a complete list of contracts affected;

(2) Retain the original Standard Form 30 with the attached list in the case file;

(3) Send a signed copy of the Standard Form 30, with attached list to the transferor and to the transferee; and

(4) Send a copy of this Standard Form 30 with attached list to each contract administration office or contracting office involved, which shall be responsible for further appropriate distribution.

42.1204 Agreement to recognize a successor in interest (novation agreement).

(a) The law (41 U.S.C. 15) prohibits transfer of Government contracts. However, the Government may, in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of (1) all the contractor's assets or (2) the entire portion of the assets involved in performing the contract. (See 14.404-2(k) for the effect of novation agreements after bid opening but before award.) Examples include but are not limited to—

(i) Sale of these assets with a provision for assuming liabilities;

(ii) Transfer of these assets incident to a merger or corporate consolidation; and

(iii) Incorporation of a proprietorship or partnership, or formation of a partnership.

(b) When it is in the Government's interest not to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract may be terminated for reasons of default, should the original contractor not perform.

(c) When a contractor asks the Government to recognize a successor in interest, the responsible contracting officer shall obtain from the contractor three signed copies of the proposed novation agreement and one copy each, as applicable, of the following:

(1) An authenticated copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree.

(2) A list of all affected contracts and purchase orders remaining unsettled between the transferor and the Government, showing for each the (i) contract number and type, (ii) name and address of the contracting office, (iii) total dollar value as amended, and (iv) remaining unpaid balance.

(3) A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.

(4) A certified copy of the minutes of each corporate party's stockholder
meeting necessary to approve
transfer of assets.

(5) An authenticated copy of
transferee's certificate and article
incorporation, if a corporation
formed for the purpose of receiv
the assets involved in performing
Government contracts.

(6) The opinion of legal counsel
the transferor and transferee stat
that the transfer was properly eff
ed under applicable law and the ef
tive date of transfer.

(7) Evidence of the transferee's ca
bility to perform the contracts.

(8) Balance sheets of the transfe
and transferee as of the dates imm
ately before and after the transfer
assets, certified for accuracy by in
pendent accountants.

(9) Evidence that any security cle
ance requirements have been met.

(10) The consent of sureties on
contracts listed under subparagra
(2) above if bonds are required, o
statement from the transferor t
none are required.

(d) When recognizing a successor
interest to a Government contract
consistent with the Government's
terest, the responsible contracting
ficer shall execute a novation agr
ment with the transferor and
transferee. It shall ordinarily prov
in part that—

(1) The transferee assumes all
transferor's obligations under the c
tract;

(2) The transferor waives all rig
under the contract against the G
ernment;

(3) The transferor guarantees p
formance of the contract by the tra
feree (a satisfactory performance bo
may be accepted instead of the gu
antee); and

(4) Nothing in the agreement sh
relieve the transferor or transfer
from compliance with any Federal l

(e) The responsible contracting o
cer shall use the following format
agreements when the transferor a
transferee are corporations and all
transferor's assets are transferr
This format may be adapted to fit sp
cific cases and may be used as a gui
in preparing similar agreements
other situations.

NOVATION AGREEMENT

The ABC CORPORATION (Transferor), a corporation duly organized and existing under the laws of ——— [*insert State*] with its principal office in ——— [*insert city*]; the XYZ CORPORATION (Transferee), [*if appropriate add "formerly known as the EFG Corporation"*] a corporation duly organized and existing under the laws of ——— [*insert State*] with its principal office in ——— [*insert city*]; and the UNITED STATES OF AMERICA (Government) enter into this Agreement as of ——— [*insert the date transfer of assets became effective under applicable State law*].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the ——— [*insert name(s) of agency(ies)*], has entered into certain contracts with the Transferor, namely: ——— [*insert contract or purchase order identifications*]; [*or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."*]. The term *the contracts*, as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made between the Government and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and purchase orders). Included in the term *the contracts* are also all modifications made under the terms and conditions of these contracts and purchase orders between the Government and the Transferee, on or after the effective date of this Agreement.

(2) As of ———, 19—, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a ——— [*insert term descriptive of the legal transaction involved*] between the Transferor and the Transferee.

(3) The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.

(5) The Transferee is in a position to fully perform all obligations that may exist under the contracts.

(6) It is consistent with the Government's interest to recognize the Transferee as the successor party to the contracts.

(7) Evidence of the above transfer has been filed with the Government.

[*When a change of name is also involved; e.g., a prior or concurrent change of the Transferee's name, an appropriate statement shall be inserted (see example in paragraph (8) below)*].

(8) A certificate dated ———, 19—, signed by the Secretary of State of ——— [*insert State*], to the effect that the corporate name of EFG CORPORATION was changed to XYZ CORPORATION on ———, 19—, has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT BY THIS AGREEMENT—

(1) The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the Government that it now has or may have in the future in connection with the contracts.

(2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contracts as if the Transferee were the original party to the contracts.

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.

(4) The Government recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term *Contractor*, as used in the contracts, shall refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of the Governmelt against the Transferor.

(6) All payments and reimbursements previously made by the Governmelt to the Transferor, and all other previous actions taken by the Government under the contracts, shall be considered to have discharged those parts of the Government's obligations under the contracts. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to the Transferee, and shall constitute a complete discharge of the Government's obligations under the contracts, to the extent of the amounts paid or reimbursed.

(7) The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or

other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(8) The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee (i) assumes under this Agreement or (ii) may undertake in the future should these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.

(9) The contracts shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,
By ————————————————
Title ———————————————

ABC CORPORATION,
By ————————————————
Title ———————————————
[CORPORATE SEAL]

XYZ CORPORATION,
By ————————————————
Title ———————————————
[CORPORATE SEAL]

CERTIFICATE

I, ————, certify that I am the Secretary of ABC CORPORATION; that ————, who signed this Agreement for this corporation, was then ——— of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this ——— day of ——— 19—.

By ————————————————
[CORPORATE SEAL]

CERTIFICATE

I, ————, certify that I am the Secretary of XYZ CORPORATION; that ————, who signed this Agreement for this corporation, was then ———— of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this ——— day of ——— 19—.

By ————————————————
[CORPORATE SEAL]

**42.1205 Agreement to recognize co
tor's change of name.**

(a) If only a change of the cor
tor's name is involved and the Go
ment's and contractor's rights an
ligations remain unaffected, the
ties shall execute an agreement
flect the name change. The contr
shall forward to the responsible
tracting officer three signed copi
the Change-of-Name Agreement,
one copy each of the following:

(1) The document effecting
name change, authenticated
proper official of the State havin
risdiction.

(2) The opinion of the contrac
legal counsel stating that the ch
of name was properly effected u
applicable law and showing the
tive date.

(3) A list of all affected cont
and purchase orders remaining u
tled between the contractor and
Government, showing for each th
contract number and type, (ii)
and address of the contracting o
(iii) total dollar value as amended
(iv) remaining unpaid balance.

(b) The following suggested fo
for an agreement may be adapte
specific cases:

CHANGE-OF-NAME AGREEMEN

The ABC CORPORATION (Contra
a corporation duly organized and ex
under the laws of ——— [*insert State*
the UNITED STATES OF AMERICA
ernment), enter into this Agreement
——— [*insert date when the chan
name became effective under appli
State law*].

(a) THE PARTIES AGREE TO
FOLLOWING FACTS:

(1) The Government, represented by
ous Contracting Officers of the —
[*insert name(s) of agency(ies)*], has en
into certain contracts and purchase o
with the XYZ CORPORATION, na
——— [*insert contract or purchase
identifications*]; [*or delete "namely"
insert "as shown in the attached list m
'Exhibit A' and incorporated in this A
ment by reference."*]. The term *the
tracts*, as used in this Agreement, mean
above contracts and purchase orders a
other contracts and purchase orders, in
ing all modifications, made by the Go
ment and the Contractor before the
tive date of this Agreement (whether o
performance and payment have been

pleted and releases executed if the Government or the Contractor has any remaining rights, duties, or obligations under these contracts and purchase orders).

(2) The XYZ CORPORATION, by an amendment to its certificate of incorporation, dated ———, 19—, has changed its corporate name to ABC CORPORATION.

(3) This amendment accomplishes a change of corporate name only and all rights and obligations of the Government and of the Contractor under the contracts are unaffected by this change.

(4) Documentary evidence of this change of corporate name has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT—

(1) The contracts covered by this Agreement are amended by substituting the name "ABC CORPORATION" for the name "XYZ CORPORATION" wherever it appears in the contracts; and

(2) Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,
By ————————————
Title ————————————

ABC CORPORATION,
By ————————————
Title ————————————
[CORPORATE SEAL]

CERTIFICATE

I, ———, certify that I am the Secretary of ABC CORPORATION; that ———, who signed this Agreement for this corporation, was then ——— of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this —— day of ——— 19—.

By ————————————
[CORPORATE SEAL]

Subpart 42.13—[Reserved]

Subpart 42.14—Traffic and Transportation Management

42.1401 General.

(a) The contract administration office (CAO) shall ensure that instructions to contractors result in the most efficient and economical use of carrier services and equipment. If the transportation data regarding f.o.b. origin contracts is insufficient for Government transportation management purposes, the CAO shall obtain the data used in the evaluation of offers.

(b) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, are responsible for—

(1) Furnishing timely routings and releases for port shipments;

(2) Monitoring shipments to provide for carload or truckload quantities when practicable;

(3) Controlling and issuing U.S. Government bills of lading (GBL's) and determining proper freight classification descriptions;

(4) Reviewing documentation to ensure the proper distribution and validation of shipping documents;

(5) Developing, and advising on, transportation cost differentials brought on by proposed changes in contract terms; e.g., delivery schedules;

(6) Determining, for contract requirements, the size and carrying capability of carrier equipment to transport overdimensional and/or overweight supplies, hazardous mate ials, or supplies requiring special shipping arrangements;

(7) Developing information and reporting movements that may be the basis for negotiating special rates for volume movements or for rate adjustments (see 42.1402(b));

(8) Exercising control of irregularities in preservation, packing, loading, blocking and bracing, and other causes contributing to loss and damage; sealing of carrier equipment and documentation;

(9) Providing information on the use of transit arrangements;

(10) Recommending, when appropriate, prepayment by contractor for f.o.b. origin shipments or parcel post (see 42.1403-2 and 42.1404);

(11) Recommending, when appropriate, the use of commercial forms and procedures for small shipments of a recurring nature if transportation costs do not exceed $100, as authorized in 41 CFR 101-41.304-2 and, for the Department of Defense (DOD), in Chapter 214, Section XVII, paragraphs 214120 through 214124 of the Military Traffic Management Regulation (MTMR).

(12) Diverting, reconsigning, tracing, and expediting shipments; and

(13) Considering the capabilities of contractors for meeting new or emergency requirements that arise during the contract administration and using these capabilities when appropriate.

(14) Using routings through established consolidation stations when it is in the Government's interest.

(c) Civilian agencies shall consult and cooperate with the Office of Transportation of the General Services Administration (GSA) as required in 41 CFR 101-40. (See 47.105, Transportation assistance, for assistance to civilian Government activities or to military installations.)

[48 FR 42370, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986]

42.1402 Volume movements within the continental United States.

(a) (1) For purposes of contract administration, a volume movement is—

(i) In DOD, the aggregate of freight shipments amounting to or exceeding 25 carloads, 25 truckloads, or 500,000 pounds, to move during the contract period from one origin point for delivery to one destination point or area; and

(ii) In civilian agencies, 50 short tons (100,000 pounds) in the aggregate to move during the contract period from one origin point for delivery to one destination point or area.

(2) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, shall report planned and actual volume movements in accordance with agency regulations. DOD activities report to the Military Traffic Management Command (MTMC) under the Military Traffic Management Regulation (MTMR). Civilian agencies report to GSA, Office of Transportation, or other designated offices under the Federal Property Management Regulations (FPMR), specifically 41 CFR 101-40.305-2.

(b) Reporting of volume movements permits MTMC and GSA transportation personnel to determine the reasonableness of applicable current rates and, when appropriate, to negotiate adjusted or modified rates.

42.1403 Shipping documents covering f.o.b. origin shipments.

42.1403-1 U.S. Government bills of lading.

(a) Except as provided in 42.1403-2, when a contract specifies delivery of supplies f.o.b. origin with transportation costs to be paid by the Government, the contractor shall make shipments on U.S. Government bills of lading (GBL's), or on other shipping documents prescribed by MTMC in the case of seavan containers, furnished by the CAO or the appropriate agency transportation office. Each agency shall establish appropriate procedures by which the contractor shall obtain GBL's. The contracting officer shall not authorize the contractor to ship on commercial bills of lading for conversion to GBL's unless delivery is extremely urgent and GBL's are not readily available.

(b) The possible application of reduced rates under section 10721 of the Interstate Commerce Act for shipments on commercial bills of lading and the Commercial Bill of Lading Notations clause are discussed at 47.104.

(c) (1) The limited authority for the use of commercial forms and procedures to acquire freight or express transportation for small shipments of a recurring nature when transportation costs do not exceed $100, is prescribed in the Transportation Documentation and Audit Regulation, specifically 41 CFR 101-41.304-2.

(2) For DOD shipments, corresponding guidance is in Chapter 214 of the MTMR.

42.1403-2 Contractor-prepaid commercial bills of lading.

(a) If it is advantageous to the Government, the contracting officer may authorize the contractor to ship by common carriers on commercial bills of lading supplies, which have been acquired f.o.b. origin and are therefore Government property, to domestic destinations, including DOD air and water terminals. Such shipments shall not exceed 150 pounds by commercial air or 1,000 pounds by other commercial carriers and shall not have a security classification.

(b) The contracting officer may authorize the shipments under paragraph (a) above to be consolidated with the contractor's own prepaid shipments for delivery to one or more destinations, if all appropriate f.o.b. origin shipments under one or more Government contracts have been consolidated initially. The contractor may be authorized to consolidate less-than-carload or less-than-truckload Government shipments with its own shipments so that the Government can take advantage of lower carload or truckload freight costs. The Government shall assume its pro rata share of the combined shipment cost. Agency transportation personnel shall evaluate overall transportation costs before authorizing any movement to ensure savings to the Government consistent with other contract and traffic management considerations. When consolidation is authorized, a copy of the commercial bill of lading shall be mailed promptly to each consignee.

(c) Shipments under prepaid commercial bills of lading, as authorized in paragraph (a) above, do not require a contract modification. Unless otherwise provided in the contract, the supplies move for the account of, and at the risk of, the Government. The supplies become Government property when loaded on the carrier's equipment and the contractor has obtained the carrier's receipt. The contractor pays the transportation charges and is reimbursed by the Government. Loss or damage claims shall be processed in accordance with agency regulations.

(d) The contractor's invoice for reimbursement by the Government shall show the prepaid transportation charges or apportioned charges as agreed (see paragraph (b) above), as a separate item for each individual shipment. The contractor shall support the transportation charges with a copy of the carrier's receipted freight bill or other evidence of receipt, except as follows:

(1) A Government agency may determine that receipted freight bills or other evidence of receipt are not required for transportation charges of 25 or less.

(2) A Government agency may pay an invoiced but unsupported transportation charge of $100 or less per transaction (i.e., purchase, invoice, or aggregate billing or payment for multiple purchases), if—

(i) The contractor cannot reasonably provide a receipted freight bill; and

(ii) The agency has determined that the charges are reasonable. Determination of reasonableness may be based on—

(A) Past experience (authenticated transportation charges for similar shipments);

(B) Rate checks;

(C) Copies of previous freight bills submitted by the contractor; or

(D) Other information submitted by the contractor to substantiate the amount claimed.

(3) Receipted freight bills in support of invoiced transportation charges of $100 or less are not required for reimbursement by the Government, if—

(i) The underlying contract specifies retention by the contractor of all records for at least 3 years after final payment under the contract; and

(ii) The contractor certifies that payment of the transportation charges has been made and that the contractor will furnish evidence of payment when requested by the Government.

(e) Shipments and invoices shall not be split to reduce transportation charges to $100 or less per transaction as a means of avoiding the required documented support for the charges. See 42.1403-2(d)(1) for unsupported transportation charges of $25 or less.

42.1404 Shipments by parcel post or other classes of mail.

42.1404-1 Parcel post eligible shipments.

(a) (1) Use of parcel post or other classes of mail permits direct movements from source of supply to the user, without the intermediate documentation that is required when supplies are transported through depots or air or water terminals. However, the use of parcel post and other classes of mail shall be confined to deliveries of mailable matter that meet the size, weight, and distance limitations prescribed by the U.S. Postal Service. Parcel post eligible shipments for overseas destinations will not be sent via Small Package Delivery services or parcel post to CONUS military air or water terminals. These shipments will be mailed through the APO or FPO to the overseas user.

(2) When parcel post or other classes of mail are used by contractors, they shall prepay the postage costs by using their own mailing labels or stamps and include prepaid postage costs as separate items in the invoices for supplies shipped.

(b) (1) Use of indicia mail (in lieu of stamps or cancellations) is not authorized. However, deviations from this ban may be granted. A request for a deviation should be processed to the U.S. Postal Service following agency procedures. If a deviation is granted, the agency shall follow the U.S. Postal Service permit requirements.

(2) When indicia mail is authorized, the contractor will be provided with official mailing labels, envelopes, or cards printed *Postage and Fees Paid.* These must bear in every case (i) the printed return address of the agency concerned above the printed words *Official Business* and (ii) the proper permit imprint number. The name and address of a private person or firm shall not be shown.

(c) When a contractor uses the contractor's own label for making a shipment to a post office servicing military and other agency consignees outside the United States, the contractor shall stamp or imprint the parcel immediately above the label in 1/4 inch block letters with (i) the name of the agency and (ii) the words *Official Mail-Contents for Official Use-Exempt from Customs Requirements.* This permits identification and expedites handling within the postal system. Use of this marking does not eliminate the requirement for payment of postage by the contractor when so required by the contract or when the contractor is to be reimbursed for the cost of postage.

(d) Contractors may not insure shipments at Government expense for the purpose of recovery in case of loss and/or damage, except that minimum insurance required for the purposes of obtaining receipts at point of origin and upon delivery is authorized.

[48 FR 42370, Sept. 19, 1983, as amended a 53 FR 27467, July 20, 1988]

42.1404-2 Contract clauses.

(a) The contracting officer shall insert the clause at 52.242-10, F.o.b. Origin—Government Bills of Lading or Prepaid Postage, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or prepaid postage.

(b) The contracting officer shall insert the clause at 52.242-11, F.o.b. Origin—Government Bills of Lading or Indicia Mail, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or indicia mail, if indicia mail has been authorized by the U.S. Postal Service.

42.1405 Discrepancies incident to shipment of supplies.

(a) Discrepancies incident to shipment include overage, shortage, loss, damage, and other discrepancies between the quantity and/or condition of supplies received from commercial carriers and the quantity and/or condition of these supplies as shown on the covering bill of lading or other transportation document. Regulations and procedures for reporting and adjusting discrepancies in Government shipments are in subpart 40.7 of the Federal Property Management Regulations (41 CFR 101-40.7). (Military installations shall consult *Reporting of Transportation Discrepancies in Shipments,* AR 55-38, NAVSUP INST 4610.33C, AFR 75-18, MCO P4610.19, DLAR 4500.15).

(b) Generally, when the place of delivery is f.o.b. origin, the Government consignee at destination is also accountable for the supplies, and all claims or reports dealing with discrepancies shall be initiated at that point in accordance with the property accountability regulations of the agency concerned.

(c) If supplies are acquired on an f.o.b. destination basis, any claim arising from a discrepancy occurring in transit is a matter for settlement between the contractor and the carrier. However, the Government consignee shall (1) notify the carrier of the discrepancy by noting the exception on the carrier's delivery receipt and (2) furnish all available data to the CAO or appropriate agency office, which shall promptly transmit the data to the contractor.

42.1406 Report of shipment.

42.1406-1 Advance notice.

Military (and as required, civilian agency) storage and distribution points, depots, and other receiving activities require advance notice of shipments en route from contractors' plants. Generally, this notification is required only for classified material; sensitive, controlled, and certain other protected material; explosives, and some other hazardous materials; selected shipments requiring movement control; or minimum carload or truckload shipments. It facilitates arrangements for transportation control, labor, space, and use of materials handling equipment at destination. Also, timely receipt of notices by the consignee transportation office precludes the incurring of demurrage and vehicle detention charges.

[48 FR 42370, Sept. 19, 1983, as amended at 54 FR 48989, Nov. 28, 1989]

42.1406-2 Contract clause.

The contracting officer shall insert the clause at 52.242-12, Report of Shipment (REPSHIP), in solicitations and contracts when advance notice of shipment is required for safety or security reasons, or where carload or truckload shipments will be made to DoD installations or, as required, to civilian agency facilities.

[54 FR 48989, Nov. 28, 1989]

PART 43—CONTRACT MODIFICATIONS

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Subpart 43.3—Forms

43.301 Use of forms.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42386, Sept. 19, 1983, unless otherwise noted.

43.000 Scope of part.

This part prescribes policies and procedures for preparing and processing contract modifications for all types of contracts including construction and architect-engineer contracts. It does not apply to—

(a) Orders for supplies or services not otherwise changing the terms of contracts or agreements (e.g., delivery orders under indefinite-delivery contracts); or

(b) Modifications for extraordinary contractual relief (see part 50).

Subpart 43.1—General

43.101 Definitions.

Administrative change means a unilateral (see 43.103(b)) contract change, in writing, that does not affect the substantive rights of the parties (e.g., a change in the paying office or the appropriation data).

Change order means a written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause authorizes the contracting officer to order without the contractor's consent.

Contract modification means any written change in the terms of a contract (see 43.103).

Effective date has various meanings based on the circumstances in which it is used:

(a) For a solicitation amendment, change order, or administrative change, the effective date shall be the issue date of the amendment, change order, or administrative change.

(b) For a supplemental agreement, the effective date shall be the date agreed upon by the contracting parties.

(c) For a modification issued as a confirming notice of termination for the convenience of the Government, the effective date of the confirming notice shall be the same as the effective date of the initial notice.

(d) For a modification converting a termination for default to a termination for the convenience of the Government, the effective date shall be the same as the effective date of the termination for default.

(e) For a modification confirming the termination contracting officer's previous letter determination of the amount due in settlement of a contract termination for convenience, the effective date shall be the same as the effective date of the previous letter determination.

Supplemental agreement means a contract modification that is accomplished by the mutual action of the parties.

43.102 Policy.

(a) Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government. Other Government personnel shall not—

(1) Execute contract modifications;

(2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or

(3) Direct or encourage the contractor to perform work that should be the subject of a contract modification

(b) Contract modifications, including changes that could be issued unilaterally, shall be priced before their execution if this can be done without adversely affecting the interest of the Government. If a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a maximum price shall be negotiated unless impractical.

43.103 Types of contract modifications.

Contract modifications are of the following types:

(a) *Bilateral.* A bilateral modification (supplemental agreement) is a contract modification that is signed by the contractor and the contracting officer. Bilateral modifications are used to—

(1) Make negotiated equitable adjustments resulting from the issuance of a change order;

(2) Definitize letter contracts; and

(3) Reflect other agreements of the parties modifying the terms of contracts.

(b) *Unilateral.* A unilateral modification is a contract modification that is signed only by the contracting officer. Unilateral modifications are used, for example, to—

(1) Make administrative changes;

(2) Issue change orders;

(3) Make changes authorized by clauses other than a changes clause (e.g., Property clause, Options clause, Suspension of Work clause, etc.); and

(4) Issue termination notices.

43.104 Notification of contract changes.

(a) When a contractor considers that the Government has effected or may effect a change in the contract that has not been identified as such in writing and signed by the contracting officer, it is necessary that the contractor notify the Government in writing as soon as possible. This will permit the Government to evaluate the alleged change and (1) confirm that it is a change, direct the mode of further performance, and plan for its funding; (2) countermand the alleged change; or (3) notify the contractor that no change is considered to have occurred.

(b) The clause at 52.243-7, Notification of Changes, which is prescribed in 43.106, (1) incorporates the policy expressed in paragraph (a) above; (2) requires the contractor to notify the Government promptly of any Government conduct that the contractor considers a change to the contract, and (3) specifies the responsibilities of the contractor and the Government with respect to such notifications.

43.105 Availability of funds.

(a) The contracting officer shall not execute a contract modification that causes or will cause an increase in funds without having first obtained a certification of fund availability, except for modifications to contracts that—

(1) Are conditioned on availability of funds (see 32.703-2); or

(2) Contain a limitation of cost or funds clause (see 32.704).

(b) The certification required by paragraph (a) above shall be based on the negotiated price, except that modifications executed before agreement on price may be based on the best available estimate of cost.

43.106 Procurement integrity—modifications.

No modification over $100,000 as defined at 3.104-4(e) may be executed without complying with the requirements of 3.104.

[54 FR 20497, May 11, 1989]

EFFECTIVE DATE NOTE: At 54 FR 50718, Dec. 8, 1989, section 43.106 was suspended for the period December 1, 1989, through November 30, 1990.

43.107 Contract clause.

The contracting officer may insert a clause substantially the same as the clause at 52.243-7, Notification of Changes, in solicitations and contracts. The clause is available for use primarily in negotiated research and development or supply contracts for the acquisition of major weapon systems or principal subsystems. If the contract amount is expected to be less than $1,000,000, the clause shall not be used, unless the contracting officer anticipates that situations will arise that may result in a contractor alleging that the Government has effected changes other than those identified as such in writing and signed by the contracting officer.

[48 FR 42386, Sept. 19, 1983. Redesignated at 54 FR 20497, May 11, 1989]

Subpart 43.2—Change Orders

43.201 General.

(a) Generally, Government contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract. These are accomplished by issuing written change orders on Standard Form 30, Amendment of Solicitation/Modification of Contract (SF 30), unless otherwise provided (see 43.301).

(b) The contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally funded contracts the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost or Limitation of Funds clause (see 32.705-2).

(c) The contracting officer may issue a change order by telegraphic message under unusual or urgent circumstances; *provided*, that—

(1) Copies of the message are furnished promptly to the same addressees that received the basic contract;

(2) Immediate action is taken to confirm the change by issuance of a SF 30;

(3) The message contains substantially the information required by the SF 30 (except that the estimated change in price shall not be indicated), including in the body of the message the statement, "Signed by (Name), Contracting Officer"; and

(4) The contracting officer manually signs the original copy of the message.

43.202 Authority to issue change orders.

Change orders shall be issued by the contracting officer except when authority is delegated to an administrative contracting officer (see 42.202(c)).

43.203 Change order accounting procedures.

(a) Contractors' accounting systems are seldom designed to segregate the costs of performing changed work. Therefore, before prospective contractors submit offers, the contracting officer should advise them of the possible need to revise their accounting procedures to comply with the cost segregation requirements of the Change Order Accounting clause at 52.243-6.

(b) The following categories of direct costs normally are segregable and accountable under the terms of the Change Order Accounting clause:

(1) Nonrecurring costs (e.g., engineering costs and costs of obsolete or reperformed work).

(2) Costs of added distinct work caused by the change order (e.g., new subcontract work, new prototypes, or new retrofit or backfit kits).

(3) Costs of recurring work (e.g., labor and material costs).

43.204 Administration.

(a) *Change order documentation.* When change orders are not forward priced, they require two documents: the change order and a supplemental agreement reflecting the resulting equitable adjustment in contract terms. If an equitable adjustment in the contract price or delivery terms or both can be agreed upon in advance, only a supplemental agreement need be issued, but administrative changes and changes issued pursuant to a clause giving the Government a unilateral right to make a change (e.g., an option clause) initially require only one document.

(b) *Definitization.* (1) Contracting officers shall negotiate equitable adjustments resulting from change orders in the shortest practicable time.

(2) Administrative contracting officers negotiating equitable adjustments by delegation under 42.302(b)(1), shall obtain the contracting officer's concurrence before adjusting the contract delivery schedule.

(3) Contracting offices and contract administration offices, as appropriate, shall establish suspense systems adequate to ensure accurate identification and prompt definitization of unpriced change orders.

(4) The contracting officer shall ensure that a cost analysis is made, if appropriate, under 15.805 and shall consider the contractor's segregable costs of the change, if available. If additional funds are required as a result of the change, the contracting officer shall secure the funds before making any adjustment to the contract.

(c) *Complete and final equitable adjustments.* To avoid subsequent controversies that may result from a supplemental agreement containing an equitable adjustment as the result of a change order, the contracting officer should—

(1) Ensure that all elements of the equitable adjustment have been presented and resolved; and

(2) Include, in the supplemental agreement, a release similar to the following:

CONTRACTOR'S STATEMENT OF RELEASE

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's..........(describe).......... "proposal(s) for adjustment," the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for ....).

43.205 Contract clauses.

(a) (1) The contracting officer shall insert the clause at 52.243-1, Changes—Fixed-Price, in solicitations and contracts when a fixed-price contract for supplies is contemplated.

(2) If the requirement is for services, other than architect-engineer or other professional services, and no supplies are to be furnished, the contracting officer shall use the clause with its Alternate I.

(3) If the requirement is for services (other than architect-engineer services, transportation, or research and development) and supplies are to be furnished, the contracting officer shall use the clause with its Alternate II.

(4) If the requirement is for architect-engineer or other professional services, the contracting officer shall use the clause with its Alternate III.

(5) If the requirement is for transportation services, the contracting officer shall use the clause with its Alternate IV.

(6) If it is desired to include the clause in solicitations and contracts when a research and development contract is contemplated, the contracting officer shall use the clause with its Alternate V.

(b) (1) The contracting officer shall insert the clause at 52.243-2, Changes—Cost-Reimbursement, in solicitations and contracts when a cost-reimbursement contract for supplies is contemplated.

(2) If the requirement is for services and no supplies are to be furnished, the contracting officer shall use the clause with its Alternate I.

(3) If the requirement is for services and supplies are to be furnished, the contracting officer shall use the clause with its Alternate II.

(4) If the requirement is for construction, the contracting officer shall use the clause with its Alternate III.

(5) If a facilities contract is contemplated, the contracting officer shall use the clause with its Alternate IV.

(6) If it is desired to include the clause in solicitations and contracts when a research and development contract is contemplated, the contracting officer shall use the clause with its Alternate V.

(c) The contracting officer shall insert the clause at 52.243-3, Changes—Time-and-Materials or Labor-Hours, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated.

(d) The contracting officer shall insert the clause at 52.243-4, Changes, in solicitations and contracts for (1) dismantling, demolition, or removal of improvements; and (2) construction, when a fixed-price contract is contemplated and the contract amount is expected to exceed the applicable small purchase limitation in part 13.

(e) The contracting officer shall insert the clause at 52.243-5, Changes and Changed Conditions, in solicitations and contracts for construction, when the contract amount is not expected to exceed the applicable small purchase limitation in part 13.

(f) The contracting officer may insert a clause, substantially the same as the clause at 52.243-6, Change Order Accounting, in solicitations and contracts for supply and research and development contracts of significant technical complexity, if numerous changes are anticipated.

Subpart 43.3—Forms

43.301 Use of forms.

(a) (1) The Standard Form 30 (SF 30), Amendment of Solicitation/Modification of Contract, shall (except for the options stated in 43.301(a)(2)) be used for—

(i) Any amendment to a solicitation;

(ii) Change orders issued under the Changes clause of the contract;

(iii) Any other unilateral contract modification issued under a contract clause authorizing such modification without the consent of the contractor;

(iv) Administrative changes such as the correction of typographical mistakes, changes in the paying office, and changes in accounting and appropriation data;

(v) Supplemental agreements (see 43.103); and

(vi) Removal, reinstatement, or addition of funds to a contract.

(2) The SF 30 may be used for (i) modifications that change the price of contracts for the acquisition of petroleum as a result of economic price adjustment, (ii) termination notices, and (iii) purchase order modifications as specified in 13.503.

(3) If it is anticipated that a change will result in a price change, the estimated amount of the price change shall not be shown on copies of SF 30 furnished to the contractor.

(b) The Optional Form 336 (OF 336), Continuation Sheet, or a blank sheet of paper, may be used as a continuation sheet for a contract modification.

[48 FR 42386, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985; 51 FR 27120, July 29, 1986]

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42388, Sept. 19, 1983, unless otherwise noted.

44.000 Scope of part.

This part prescribes policies and procedures for consent to subcontracts and for review, evaluation, and approval of contractors' purchasing systems.

Subpart 44.1—General

44.101 Definitions.

Approved purchasing system means a contractor's purchasing system that has been reviewed and approved in accordance with this part.

Consent to subcontract means the contracting officer's written consent for the prime contractor to enter into a particular subcontract.

Contractor, as used in this part, means the total contractor organization or a separate entity of it, such as an affiliate, division, or plant, that performs its own purchasing.

Contractor purchasing system review (*CPSR*) means the complete evaluation of a contractor's purchasing of material and services, subcontracting, and subcontract management from development of the requirement through completion of subcontract performance.

Facilities (see 45.301).

Subcontract, as used in this part, means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor, as used in this part, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

[48 FR 42388, Sept. 19, 1983, as amended at 50 FR 26903, June 28, 1985]

44.102 Policy.

(a) Consent to subcontracts is required under 44.201 when the subcontract work is complex, the dollar value is substantial, or the Government's interest is not adequately protected by competition and the type of prime contract or subcontract.

(b) Consent requirements may be waived when the contractor's purchasing system has been reviewed and approved in accordance with subpart 44.3.

Subpart 44.2—Consent to Subcontracts

44.201 Consent requirements.

44.201-1 Fixed-price prime contracts.

(a) Consent to subcontracts is not required under prime contracts that are firm-fixed-price or fixed-price with economic price adjustment provisions. (See paragraph (c) below for unpriced modifications.)

(b) If the contractor has an approved purchasing system, consent to subcontracts is not required under other fixed-price prime contracts, except for any subcontracts selected for special surveillance. (See 44.205).

(c) If the contractor does not have an approved purchasing system, consent to the subcontracts specified in paragraph (d) below is required—

(1) Under fixed-price incentive and fixed-price redeterminable prime contracts; and

(2) Under prime contracts that are firm-fixed-price or fixed-price with economic price adjustment provisions, only when a new subcontract results

from an unpriced modification to the prime contract.

(d) Under prime contracts required to include the clause at 52.244-1, Subcontracts (Fixed-Price Contracts), consent is required under paragraph (c) above for any subcontract that is—

(1) To be a cost-reimbursement, time-and-materials, or labor-hour contract estimated to be over $25,000, including any fee;

(2) Estimated to be over $100,000 (or less if the contract clause has been modified as permitted by its preface); or

(3) One of a number of subcontracts, under the prime contract, with a single subcontractor for the same or related supplies or services, which in the aggregate are estimated to be over $100,000 (or less, if the contract clause has been modified as permitted by its preface).

[48 FR 42388, Sept. 19, 1983, as amended at 51 FR 36972, Oct. 16, 1986]

44.201-2 Cost-reimbursement and letter prime contracts.

(a) Consent is required under cost-reimbursement and letter prime contracts (except facilities contracts) for subcontracts (1) for fabrication, purchase, rental, installation, or other acquisition of special test equipment valued at more than $10,000 or of any items of facilities, or (2) that have experimental, developmental, or research work as one of their purposes.

(b) If the contractor does not have an approved purchasing system, consent is also required, under cost-reimbursement and letter prime contracts for (1) cost-reimbursement, time-and-materials, or labor-hour subcontracts and (2) fixed-price subcontracts that exceed either $25,000 or 5 percent of the total estimated cost of the prime contract; except that for DoD, Coast Guard, and NASA, the amounts shall be the greater of the small purchase limitation in part 13 or 5 percent of the total estimated cost of the prime contract.

(c) If the contractor has an approved purchasing system, consent is not required for the subcontracts identified in paragraph (b) above, but advance notification is still required by 10 U.S.C. 2306(e) or 41 U.S.C 254(b).

(d) In contracts for acquisition of major systems, subsystems, or their components (see part 34), consent is required for the subcontracts identified in paragraph (b) above, even though the contractor has an approved purchasing system.

[48 FR 42388, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 26903, June 28, 1985; 50 FR 52429, Dec. 23, 1985]

44.201-3 Other prime contracts.

Except for purchase of raw material or commercial stock items, consent is required for all subcontracts under time-and-material contracts. Consent is required for subcontracts under prime contracts for—

(a) Architect-engineer services; and

(b) Mortuary services, refuse service, or shipment and storage of personal property, when an agency requires prior approval of subcontractors' facilities.

44.201-4 Contractor use of Government sources.

The contracting officer's written authorization for the contractor to purchase from Government sources (see part 51) constitutes consent.

44.202 Contracting officer's evaluation.

44.202-1 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) is responsible for consent to subcontracts, except when the contracting officer retains the contract for administration or withholds the consent responsibility from delegation to the ACO. In such cases, the contract administration office should assist the contracting office in its evaluation as requested.

(b) The responsible contracting officer shall—

(1) Promptly evaluate the contractor's requests for consent to subcontract;

(2) Obtain assistance in the evaluation from subcontracting, audit, pricing, technical, or other specialists as necessary; and

(3) Notify the contractor in writing of consent or the withholding of consent, including any changes or corrections required.

44.202-2 Considerations.

(a) The contracting officer responsible for consent shall review the request and supporting data and consider the following:

(1) Is the decision to subcontract consistent with the contractor's approved make-or-buy program, if any (see subpart 15.7)?

(2) Is the subcontract for special test equipment or facilities that are available from Government sources (see subpart 45.3)?

(3) Is the selection of the particular supplies, equipment, or services technically justified?

(4) Has the contractor complied with the prime contract requirements regarding labor surplus area or small business subcontracting, including, if applicable, its plan for subcontracting with small business concerns and small disadvantaged business concerns (see part 19)?

(5) Was adequate price competition obtained or its absence properly justified?

(6) Did the contractor adequately assess and dispose of subcontractors' alternate proposals, if offered?

(7) Does the contractor have a sound basis for selecting and determining the responsibility of the particular subcontractor?

(8) Has the contractor performed adequate cost or price analysis or price comparisons and obtained accurate, complete, and current cost or pricing data, including any required certifications?

(9) Is the proposed subcontract type appropriate for the risks involved and consistent with current policy?

(10) Has adequate consideration been obtained for any proposed subcontract that will involve the use of Government-furnished facilities?

(11) Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?

(12) Does the prime contractor comply with applicable cost accounting standards for awarding the subcontract?

(13) Is the proposed subcontractor on the Consolidated List of Debarred, Suspended, and Ineligible Contractors (see subpart 9.4)?

(b) Particularly careful and thorough consideration under paragraph (a) above is necessary when—

(1) The prime contractor's purchasing system or performance is inadequate;

(2) Close working relationships or ownership affiliations between the prime and subcontractor may preclude free competition or result in higher prices;

(3) Subcontracts are proposed for award on a non-competitive basis, at prices that appear unreasonable, or at prices higher than those offered to the Government in comparable circumstances; or

(4) Subcontracts are proposed on a cost-reimbursement, time-and-materials, or labor-hour basis.

44.203 Consent limitations.

(a) The contracting officer's consent to a subcontract or approval of the contractor's purchasing system does not constitute a determination of the acceptability of the subcontract terms or price, or of the allowability of costs, unless the consent or approval specifies otherwise.

(b) Contracting officers shall not consent to—

(1) Cost-reimbursement subcontracts if the fee exceeds the fee limitations of 16.301-3;

(2) Subcontracts providing for payment on a cost-plus-a-percentage-of-cost basis;

(3) Subcontracts obligating the contracting officer to deal directly with the subcontractor;

(4) Subcontracts that make the results of arbitration, judicial determination, or voluntary settlement between the prime contractor and subcontractor binding on the Government; or

(5) Repetitive or unduly protracted use of cost-reimbursement, time-and-materials, or labor-hour subcontracts (contracting officers should follow the principles of 16.103(c)).

(c) Contracting officers should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor the right of indirect appeal to an agency board of contract appeals if the subcontractor is affected by a dispute between the Government and the prime contractor. Indirect appeal means assertion by the subcontractor of the prime contractor's right to appeal or the prosecution of an appeal by the prime contractor on the subcontractor's behalf. The clause may also provide that the prime contractor and subcontractor shall be equally bound by the contracting officer's or board's decision. The clause may not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the clause at 52.233-1, Disputes.

44.204 Contract clauses.

(a) *Fixed-price contracts.* (1) Except as specified in (a)(2) below, the contracting officer—

(i) Shall insert the clause at 52.244-1, Subcontracts (Fixed-Price Contracts), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed $500,000; and

(ii) May insert the clause in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is not expected to exceed $500,000, if the contracting officer determines that its use will be in the Government's interest.

(2) The clause shall not be used (i) in solicitations and contracts for mortuary services, refuse services, or shipment and storage of personal property, when an agency prescribed clause on approval of subcontractors' facilities is required, or (ii) in architect-engineer contracts.

(3) If the contracting officer elects to delete the requirement for advance notification of, or consent to, any subcontracts that were evaluated during negotiations (this election is not authorized for acquisition of major systems and subsystems or their components), the contracting officer shall use the clause with its Alternate I. See also 44.205.

(b) *Cost-reimbursement and letter contracts.* The contracting officer shall insert the clause at 52.244-2, Subcontracts (Cost-Reimbursement and Letter Contracts), in solicitations and contracts when a cost-reimbursement or letter contract is contemplated. If the contracting office is in DoD, the Coast Guard, or NASA, the contracting officer shall use the clause with its Alternate I. See also 44.205.

(c) *Time-and-materials and labor-hour contracts.* The contracting officer shall insert the clause at 52.244-3, Subcontracts (Time-and-Materials and Labor-Hour Contracts), in solicitations and contracts when a time-and-materials and labor-hour contract is contemplated.

(d) *Architect-engineer contracts.* The contracting officer shall insert the clause at 52.244-4, Subcontractors and Outside Associates and Consultants, in fixed-price architect-engineer contracts.

(e) *Competition in subcontracting.* The contracting officer shall, when contracting by negotiation, insert the clause at 52.244-5, Competition in Subcontracting, in solicitations and contracts when the contract amount is expected to exceed the small purchase limitation in part 13, unless—

(1) A firm-fixed-price contract, awarded on the basis of adequate price competition or whose prices are set by law or regulation, is contemplated; or

(2) A contract of the type and/or purpose identified in paragraphs (c) and (d) above is contemplated.

[48 FR 42388, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 23607, June 4, 1985; 50 FR 52429, Dec. 23, 1985]

44.205 Special surveillance.

In exceptional circumstances, contracting officers may select subcontracts requiring extraordinary Government surveillance for special surveillance, by specifying the selected subcontracts in the prime contract Schedule.

Subpart 44.3—Contractors' Purchasing Systems Reviews

44.301 Objective.

The objective of a contractor purchasing system review (CPSR) is to evaluate the efficiency and effectiveness with which the contractor spends Government funds and complies with Government policy when subcontracting. The review provides the administrative contracting officer (ACO) a basis for granting, withholding, or withdrawing approval of the contractor's purchasing system.

44.302 Requirements.

(a) Except as provided in paragraph (b) below, a CPSR shall be conducted for each contractor whose sales to the Government, using other than sealed bid procedures are expected to exceed $10 million during the next 12 months. Such sales include those represented by prime contracts, subcontracts under Government prime contracts, and modifications (except when the negotiated price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public, or is set by law or regulation). Generally, a CPSR is not performed for a specific contract. The head of the agency responsible for contract administration may raise or lower the $10 million review level if such action is considered to be in the Government's best interest.

(b) A CPSR shall be conducted by the cognizant contract administration agency (see subpart 42.3) at least every 3 years for contractors that continue to meet the requirements of paragraph (a) above. This review may be accomplished at one time or on a continuing basis. A more frequent review cycle may be established if warranted (e.g., when resident surveillance personnel are not assigned), and special reviews may be conducted when information reveals a deficiency or major change in the contractor's purchasing system.

[48 FR 42388, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

44.303 Extent of review.

A CPSR requires a complete evaluation of the contractor's purchasing system. The considerations listed in 44.202-2 for consent evaluations of particular subcontracts shall also be used to evaluate the contractor's purchasing system, including the contractor's policies, procedures, and performance under that system. Special attention shall be given to—

(a) The degree of price competition obtained;

(b) Pricing policies and techniques, including methods of obtaining accurate, complete, and current cost or pricing data and certification as required;

(c) Methods of evaluating subcontractor responsibility, including the contractor's use of the list of Parties Excluded from Procurement Programs (see 9.404) and, if the contractor has subcontracts with parties on the list, the documentation, systems, and procedures the contractor has established to protect the Government's interests (see 9.405-2).

(d) Treatment accorded affiliates and other concerns having close working arrangements with the contractor;

(e) Policies and procedures pertaining to labor surplus area concerns and small business concerns, including small disadvantaged business concerns;

(f) Planning, award, and postaward management of major subcontract programs;

(g) Compliance with Cost Accounting Standards in awarding subcontracts;

(h) Appropriateness of types of contracts used (see 16.103); and

(i) Management control systems, including internal audit procedures, to administer progress payments to subcontractors.

[48 FR 42388, Sept. 19, 1983, as amended at 52 FR 9039, Mar. 20, 1987; 54 FR 19827, May 8, 1989]

44.304 Surveillance.

(a) In the period between complete CPSR's, the ACO shall maintain a sufficient level of surveillance to assure that the contractor is effectively managing its purchasing program. The ACO shall make a determination annually to (1) continue approval based on surveillance or (2) request a CPSR or special review as a basis for continuing or withdrawing approval.

(b) Surveillance shall be accomplished in accordance with a plan developed by the ACO with the assistance of subcontracting, audit, pricing, technical, or other specialists as necessary. The plan shall cover pertinent phases of a contractor's purchasing system (preaward, postaward, performance, and contract completion) and pertinent operations that affect the contractor's purchasing and subcontracting. The plan shall also provide for reviewing the effectiveness of the contractor's corrective actions taken as a result of previous Government recommendations. Duplicative reviews of the same areas by CPSR and other surveillance monitors shall be avoided.

44.305 Granting, withholding, or withdrawing approval.

44.305-1 Responsibilities.

(a) The cognizant ACO is responsible for granting, withholding, or withdrawing approval of a contractor's purchasing system. The ACO shall—

(1) Approve a purchasing system only after a CPSR discloses that the contractor's purchasing policies and practices are efficient and provide adequate protection of the Government's interests;

(2) Between CPSR's, determine annually whether there are any significant deviations from approved policies and practices that would indicate a need for a special review or new CPSR to decide whether or not to withdraw approval; and

(3) Promptly notify the contractor in writing of the granting, withholding, or withdrawing of approval.

(b) If, upon expiration of approval of the contractor's purchasing system, the ACO has not specifically withheld, continued, or withdrawn approval, the approval shall continue for another 90 days. Any further extension requires written approval at least one level higher than the ACO.

44.305-2 Notification.

(a) The notification granting initial system approval or continuation of system approval shall include—

(1) Identification of the plant or plants where the review was conducted;

(2) The effective date of approval and period for which approval is valid;

(3) A statement that system approval—

(i) Applies to all Federal Government contracts at that plant to the extent that cross-servicing arrangements exist;

(ii) Waives the contractual requirement for advance notification in fixed-price contracts, but not for cost-reimbursement contracts;

(iii) Waives the contractual requirement for consent to subcontracts in fixed-price contracts and for specified subcontracts in cost-reimbursement contracts but not for those subcontracts, if any, selected for special surveillance and identified in the contract Schedule;

(iv) Shall automatically terminate at the end of the approval period (or approval period as extended);

(v) Shall automatically terminate when any significant change occurs in the system unless approved by the ACO; and

(vi) May be withdrawn at any time at the ACO's discretion.

(b) In exceptional circumstances, consent to certain subcontracts or classes of subcontracts may be required even though the contractor's purchasing system has been approved. The system approval notification shall identify the class or classes of subcontracts requiring consent. Reasons for selecting the subcontracts include the fact that a CPSR or continuing surveillance has revealed sufficient weaknesses in a particular area of subcontracting to warrant special attention by the ACO.

(c) When recommendations are made for improvement of an approved system, the contractor shall be requested to reply within 15 days with a position regarding the recommendations.

44.305-3 Withholding or withdrawing approval.

(a) The ACO shall withhold or withdraw approval of a contractor's purchasing system when there are major weaknesses or when the contractor is unable to provide sufficient information upon which to make an affirmative determination. The ACO may withdraw approval at any time on the basis of a determination that there has been a deterioration of the contractor's purchasing system or to protect the Government's interest. Approval shall be withheld or withdrawn when there is a recurring noncompliance with requirements, including but not limited to—

(1) Cost or pricing data (see 15.804);

(2) Implementation of cost accounting standards (see Part 30);

(3) Advance notification as required by the clauses prescribed in 44.204; or

(4) Small business subcontracting (see subpart 19.7).

(b) When approval of the contractor's purchasing system is withheld or withdrawn, the ACO shall within 10 days after completing the in-plant review (1) inform the contractor in writing, (2) specify the deficiencies that must be corrected to qualify the system for approval, and (3) request the contractor to furnish within 15 days a plan for accomplishing the necessary actions. If the plan is accepted, the ACO shall make a follow-up review as soon as the contractor notifies the ACO that the deficiencies have been corrected.

44.306 Disclosure of approval status.

Upon request, the ACO may inform a contractor that the purchasing system of a proposed subconcontractor has been approved, but shall caution that the Government will not keep the contractor advised of any changes in the approval status. If the proposed subcontractor's purchasing system has not been examined or approved, the contractor shall be so advised.

44.307 Reports.

The ACO shall distribute copies of CPSR reports; notifications granting, continuing, withholding, or withdrawing system approval; and Government recommendations for improvement of an approved system, including the contractor's response, to at least—

(a) The cognizant contract audit office;

(b) Activities prescribed by the cognizant agency; and

(c) The contractor (except that furnishing copies of the contractor's response is optional).

PART 45—GOVERNMENT PROPERTY

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42392, Sept. 19, 1983, unless otherwise noted.

45.000 Scope of part.

This part prescribes policies and procedures for providing Government property to contractors, contractors' use and management of Government property, and reporting, redistributing, and disposing of contractor inventory. It does not apply to providing property under any statutory leasing authority, except as to non-Government use of plant equipment under 45.407; to property to which the Government has acquired a lien or title solely because of partial, advance, or progress payments; or to disposal of real property.

Subpart 45.1—General

45.101 Definitions.

(a) *Contractor-acquired property,* as used in this part, means property acquired or otherwise provided by the contractor for performing a contract and to which the Government has title.

Government-furnished property, as used in this part, means property in the possession of, or directly acquired by, the Government and subsequently made available to the contractor.

Government property means all property owned by or leased to the Government or acquired by the Government under the terms of the contract. It includes both Government-furnished property and contractor-acquired property as defined in this section.

Plant equipment, as used in this part, means personal property of a capital nature (including equipment, machine tools, test equipment, furniture, vehicles, and accessory and auxiliary items) for use in manufacturing supplies, in performing services, or for any administrative or general plant purpose. It does not include special tooling or special test equipment.

Property, as used in this part, means all property, both real and personal. It includes facilities, material, special tooling, special test equipment, and agency-peculiar property.

Real property, as used in this p
means land and rights in land, grou
improvements, utility distribution s
tems, and buildings and other str
tures. It does not include foundatio
and other work necessary for insta
ing special tooling, special test equ
ment, or plant equipment.

Special test equipment, as used
this part, means either single or mul
purpose integrated test units en
neered, designed, fabricated, or mo
fied to accomplish special purpo
testing in performing a contract.
consists of items or assemblies
equipment, including standard or ge
eral purpose items or component
that are interconnected and interd
pendent so as to become a new fun
tional entity for special testing pu
poses. It does not include materia
special tooling, facilities (except fou
dations and similar improvements ne
essary for installing special test equi
ment), and plant equipment item
used for general plant testing pu
poses.

Special tooling, as used in this par
means jigs, dies, fixtures, molds, pa
terns, taps, gauges, other equipmen
and manufacturing aids, all comp
nents of these items, and replacemen
of these items, which are of such
specialized nature that without su
stantial modification or alteratio
their use is limited to the developmen
or production of particular supplies
parts thereof or to the performance
particular services. It does not inclu
material, special test equipment, faci
ties (except foundations and simila
improvements necessary for installin
special tooling), general or special m
chine tools, or similar capital items.

(b) Additional definitions also appl
ing throughout this part appear
those subparts where the terms a
most frequently used.

[48 FR 42392, Sept. 19, 1983, as amended
51 FR 19716, May 30, 1986; 51 FR 3327
Sept. 19, 1986; 53 FR 27468, July 20, 1988]

45.102 Policy.

Contractors are ordinarily require
to furnish all property necessary
perform Government contracts. Ho
ever, if contractors possess Gover
ment property, agencies shall—

(a) Eliminate to the maximum practical extent any competitive advantage that might arise from using such property;

(b) Require contractors to use Government property to the maximum practical extent in performing Government contracts;

(c) Permit the property to be used only when authorized;

(d) Charge appropriate rentals when the property is authorized for use on other than a rent-free basis;

(e) Require contractors to be responsible and accountable for, and keep the Government's official records of Government property in their possession or control (but see 45.105);

(f) Require contractors to review and provide justification for retaining Government property not currently in use; and

(g) Ensure maximum practical reutilization of contractor inventory (see 45.601) within the Government.

45.103 Responsibility and liability for Government property.

(a) Contractors are responsible and liable for Government property in their possession, unless otherwise provided by the contract.

(b) Generally, Government contracts do not hold contractors liable for loss of or damage to Government property when the property is provided under—

(1) Negotiated fixed-price contracts for which the contract price is not based upon (i) adequate price competition, (ii) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (iii) prices set by law or regulation;

(2) Cost-reimbursement contracts;

(3) Facilities contracts; or

(4) Negotiated or sealed bid service contracts performed on a Government installation where the contracting officer determines that the contractor has little direct control over the Government property because it is located on a Government installation and is subject to accessibility by personnel other than the contractor's employees and that by placing the risk on the contractor, the cost of the contract would be substantially increased.

(c) When justified by the circumstances, the contract may require the contractor to assume greater liability for loss of or damage to Government property than that contemplated by the Government property clauses or the clause at 52.245-8, Liability for the Facilities. For example, this may be the case when the contractor is using Governmment property primarily for commercial work rather than Government work.

(d) If the Government provides Government property directly to a subcontractor, the terms of paragraph (b) above shall apply to the subcontractor.

(e) Subcontractors are liable for loss of or damage to Government property furnished through a prime contractor. However, if the prime contract is of a type listed in subparagraph (b)(1) or (2) above, the prime contractor may, after obtaining the contracting officer's consent, reduce the subcontractor's liability by including in the subcontract a clause similar to paragraph (g), Limited risk of loss, as provided in Alternate I of the clause at 52.245-2, Government Property (Fixed-Price Contracts), (for fixed-price contracts) or similar to the same paragraph of the clause at 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts) (for cost-reimbursement contracts). Before consenting to a clause that reduces the subcontractor's liability, the contracting officer should ensure that the Government's interests are sufficiently protected.

(f) A prime contractor that provides Government property to a subcontractor shall not be relieved of any responsibility to the Government that the prime contractor may have under the terms of the prime contract.

[48 FR 42392, Sept. 19, 1983, as amended at 53 FR 663, Jan. 11, 1988]

45.104 Review and correction of contractors' property control systems.

(a) The review and approval of a contractor's property control system shall be accomplished by the agency responsible for contract administration at a contractor's plant or installation. The review and approval of a contractor's property control system by one agency shall be binding on all other departments and agencies based on interagency agreements.

(b) The contracting officer or the representative assigned the responsibility as property administrator shall review contractors' property control systems to assure compliance with the Government property clauses of the contract.

(c) The property administrator shall notify the contractor in writing when its property control system does not comply with subpart 45.5 or other contract requirements and shall request prompt correction of deficiencies. If the contractor does not correct the deficiencies within a reasonable period, the property administrator shall request action by the contracting officer administering the contract. The contracting officer shall—

(1) Notify the contractor in writing of any required corrections and establish a schedule for completion of actions;

(2) Caution the contractor that failure to take the required corrective actions within the time specified will result in withholding or withdrawing system approval; and

(3) Advise the contractor that its liability for loss of or damage to Government property may increase if approval is withheld or withdrawn.

45.105 Records of Government property.

(a) Contractor records of Government property established and maintained under the terms of the contract are the Government's official Government property records. Duplicate official records shall not be furnished to or maintained by Government personnel, except as provided in paragraph (b) below.

(b) Contracts may provide for the contracting office to maintain the Government's official Government property records when the contracting office retains contract administration and Government property is furnished to a contractor (1) for repair or servicing and return to the shipping organization, (2) for use on a Government installation, (3) under a local support service contract, (4) under a contract with a short performance period or involving Government property h
an acquisition cost of $50,000 or
or (5) when otherwise determine
the contracting officer to be in
Government's interest.

[48 FR 42392, Sept. 19, 1983, as amend
51 FR 2666, Jan. 17, 1986]

45.106 Government property clauses.

This section prescribes the prin
Government property clauses. O
clauses pertaining to Governn
property are prescribed in sub
45.3.

(a) The contracting officer
insert the clause at 52.245-1, Prop
Records, in solicitations and contr
when the conditions in 45.105(b)
and the Government maintains
Government's official Govern
property records.

(b) (1) The contracting officer
insert the clause at 52.245-2, Go
ment Property (Fixed-Price
tracts), in solicitations and contr
when a fixed-price contract is con
plated, except as provided in
graphs (d) and (e) below.

(2) If the contract is (i) a negot
fixed-price contract for which p
are not based on adequate price
petition, established catalog or ma
prices of commercial items sold in
stantial quantities to the ge
public, or prices set by law or re
tion, or

(ii) A fixed-price service con
which is performed primarily
Government installation, provide
contracting officer determines it
in the best interest of the Govern
(see subpart 45.103(b)(4)), the
tracting officer shall use the c
with its Alternate I.

(3) If the contract is for the con
of basic or applied research at
profit institutions of higher educ
or at nonprofit organizations w
primary purpose is the conduct o
entific research (see 35.014), the
tracting officer shall use the c
with its Alternate II.

(c) The contracting officer
insert the clause at 52.245-3, Ide
cation of Government-Furn
Property, in addition to the clau
52.245-2, Government Pro
(Fixed-Price Contracts), in sol

tions and contracts when a fixed-price construction contract is contemplated under which the Government is to furnish Government property f.o.b. railroad cars at a specified destination or f.o.b. truck at the project site. The contract Schedule shall specify the point of delivery and may include special terms and conditions covering installation, preparation for operation, or equipment testing by the Government or by another contractor.

(d) The contracting officer may insert the clause at 52.245-4, Government-Furnished Property (Short Form), in solicitations and contracts when a fixed-price, time-and-material, or labor-hour contract is contemplated and the acquisition cost of all Government-furnished property to be involved in the contract is $50,000 or less; unless a contract with an educational or nonprofit organization is contemplated.

(e) When the cost of the property furnished does not exceed $10,000, purchase orders for property repair need not include a Government property clause.

(f) (1) The contracting officer shall insert the clause at 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts), in solicitations and contracts when a cost-reimbursement, time-and-material, or labor-hour contract is contemplated, except as provided in paragraph (d) above.

(2) If the contract is for the conduct of basic or applied research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research (see 35.014), the contracting officer shall use the clause with its Alternate I.

(g) The contracting officer shall insert the clause at 52.245-6, Liability for Government Property (Demolition Services), in addition to the clauses prescribed at 37.304, in solicitations and contracts for dismantling, demolition, or removal of improvements.

[48 FR 42392, Sept. 19, 1983, as amended at 53 FR 663, Jan. 11, 1988]

Subpart 45.2—Competitive Advantage

45.201 General.

(a) The contracting officer shall, to the maximum practical extent, eliminate competitive advantage accruing to a contractor possessing Government production and research property (see 45.301). This is done by (1) adjusting the offers of those contractors by applying, for evaluation purposes only, a rental equivalent evaluation factor or, (2) when adjusting offers is not practical, by charging the contractor rent for using the property. Applying a rental equivalent factor is not appropriate in awarding negotiated contracts when the contracting officer determines that using the factor would not affect the choice of contractors.

(b) In evaluating offers, the contracting officer shall also consider any costs or savings to the Government related to providing such property, regardless of any competitive advantage that may result (see 45.202-3).

45.202 Evaluation procedures.

45.202-1 Rental equivalents.

If a rental equivalent evaluation factor is used, it shall be equal to the rent allocable to the proposed contract that would otherwise have been charged for the property, as computed in accordance with the clause at 52.245-9, Use and Charges. (See 45.205(b) for solicitation requirements.)

45.202-2 Rent.

If using a rental equivalent evaluation factor is not practical, and the competitive advantage is to be eliminated by charging rent, any offeror or subcontractor may use Government production and research property after obtaining the written approval of the contacting officer having cognizance of the property. Rent shall be charged in accordance with 45.403.

45.202-3 Other costs and savings.

(a) If furnishing Government production and research property will result in direct measurable costs that the Government must bear, additional factors shall be considered in evaluating bids or proposals. These factors shall be specified in the solicitation either as dollar amounts or as formulas and shall be limited to the cost of—

(1) Reactivation from storage;

(2) Rehabilitation and conversion; and

(3) Making the property available on an f.o.b. basis.

(b) If, under the terms of the solicitation, the contractor will bear the transportation cost of furnishing Government production and research property or the cost of making it suitable for use (such as when property is offered on an *as is* basis (see 45.308)), no additional evaluation factors related to those costs shall be used.

(c) If using Government production and research property will result in measurable savings to the Government, the dollar amount of these savings shall be specified in the solicitation and used in evaluating offers. Examples of such savings include—

(1) Savings occurring as a direct result of activating tools being maintained in idle status at known cost to the Government; and

(2) Avoiding the costs of deactivating and placing tools in layaway or storage or of maintaining them in an idle state, if the prospective costs are known. For these costs to be included in the evaluation, firm decisions must have been made that the tools will be laid away or stored if not used on the proposed contract and that such costs are not merely being deferred.

45.203 Postaward utilization requests.

When, after award, a contractor requests the use of special tooling or special test equipment, the administrative contracting officer shall obtain a fair rental or other adequate consideration if use is authorized. The value of the items, if known, and any amount included for them in the contract price shall be considered.

45.204 Residual value of special tooling and special test equipment.

(a) In awarding competitively negotiated contracts that permit the acquisition of special tooling or special test equipment, an evaluation may be made of the residual value of the
property to the Government. Th
evaluation is appropriate when th
contracting officer (1) determines th
the property will have a reasonab
foreseeable usefulness and related r
sidual value beyond the period of u
on the proposed contract and (2) a
ticipates that the cost of the propert
(as proposed by the several offeror
may be a factor in making the awar
This evaluation is not appropriate
the contract will include the speci
tooling or special test equipment as
contract line item.

(b) The purpose of evaluating the r
sidual value of special tooling or sp
cial test equipment is to apportion
each proposal only that part of th
total cost of the property that repr
sents the amount of useful life to
consumed during contract perforn
ance. Accordingly, the proposed pri
or cost may be reduced for evaluatio
purposes by an amount representin
the residual value of such property
the Government. In estimating resid
al value, the contracting officer sha
consider—

(1) The useful life of the speci
tooling and special test equipment
be acquired;

(2) Adaptability of the property f
use by other contractors or by th
Government;

(3) Reasonably foreseeable requir
ments for future use of the propert
and

(4) The scrap or salvage value of t
property.

(c) If the contacting officer decid
to consider the residual value of sp
cial tooling or special test equipmen
the solicitation shall so notify offero
and state the Government's reaso
ably foreseeable future requiremen
for the property.

45.205 Solicitation requirements.

(a) When Government productio
and research property (see 45.301)
offered for use in a competitive acqu
sition, solicitations will ordinarily r
quire the contractor to assume
costs related to making the propert
available for use (such as payment
all transportation or rehabilitatio
costs).

(b) The solicitation shall describe the evaluation procedures to be followed, including rental charges or equivalents (see 45.202) and other costs or savings to be evaluated (see 45.202-3), and shall require all offerors to submit with their offers the following information:

(1) A list or description of all Government production and research property that the offeror or its subcontractors propose to use on a rent-free basis. The list shall include property offered for use in the solicitation, as well as property already in possession of the offeror and its subcontractors under other contracts.

(2) Identification of the facilities contract or other instrument under which property already in possession of the offeror and its subontractors is held, and the written permission for its use from the contracting officer having cognizance of the property.

(3) The dates during which the property will be available for use (including the first, last, and all intervening months) and, for any property that will be used concurrently in performing two or more contracts, the amounts of the respective uses in sufficient detail to support proration of the rent.

(4) The amount of rent that would otherwise be charged, computed in accordance with 45.403.

(c) Solicitations shall provide that using Government production and research property (other than as described and permitted in the solicitation (see paragraph (b) above)) will not be authorized under the contract unless such use is approved in writing by the contracting officer cognizant of the property, and either rent calculated in accordance with the clause at 52.245-9, Use and Charges, is charged, or the contract price is reduced by an equivalent amount. (See 45.203 for postaward requests for special tooling and special test equipment and 45.204(c) for solicitation requirements for special tooling and special test equipment with residual value.)

Subpart 45.3—Providing Government Property to Contractors

45.300 Scope of subpart.

This subpart prescribes policies and procedures for providing Government property to contractors.

45.301 Definitions.

Agency-peculiar property, as used in this subpart, means Government-owned personal property that is peculiar to the mission of one agency (e.g., military or space property). It excludes Government material, special test equipment, special tooling, and facilities.

Facilities, as used in this subpart and when used in other than a facilities contract, means property used for production, maintenance, research, development, or testing. It includes plant equipment and real property (see 45.101). It does not include material, special test equipment, special tooling, or agency-peculiar property. When used in a facilities contract, the term includes all property provided under that contract.

Facilities contract, as used in this subpart, means a contract under which Government facilities are provided to a contractor or subcontractor by the Government for use in connection with performing one or more related contracts for supplies or services. It is used occasionally to provide special tooling or special test equipment. Facilities contracts may take any of the following forms:

(a) A facilities acquisition contract providing for the acquisition, construction, and installation of facilities.

(b) A facilities use contract providing for the use, maintenance, accountability, and disposition of facilities.

(c) A consolidated facilities contract, which is a combination of a facilities acquisition and a facilities use contract.

Government production and research property, as used in this subpart, means Government-owned facilities, Government-owned special test equipment, and special tooling to which the Government has title or the right to acquire title.

Material, as used in this subpart, means property that may be incorporated into or attached to a deliverable end item or that may be consumed or expended in performing a contract. It includes assemblies, components, parts, raw and processed materials, and small tools and supplies that may be consumed in normal use in performing a contract.

Nonprofit organization, as used in this subpart, means any corporation, foundation, trust, or institution operated for scientific, educational, or medical purposes, not organized for profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Nonseverable, as used in this subpart, when related to Government production and research property, means property that cannot be removed after erection or installation without substantial loss of value or damage to the property or to the premises where installed.

45.302 Providing facilities.

45.302-1 Policy.

(a) Contractors shall furnish all facilities required for performing Government contracts except as provided in this subsection. Government facilities provided to contractors shall be individually identified in the solicitation, if possible, and contract. Agencies shall not furnish facilities to contractors for any purpose, including restoration, replacement, or modernization, except as follows:

(1) For use in a Government-owned, contractor-operated plant operated on a cost-plus-fee basis.

(2) For support of industrial preparedness programs.

(3) As components of special tooling or special test equipment acquired or fabricated at Government expense.

(4) When, as a result of the prospective contractor's written statement asserting inability to obtain facilities, the agency head or designeee issues a Determination and Finding (see subpart 1.7) that the contract cannot be fulfilled by any other practical means or that it is in the public interest to provide the facilities.

(i) If the contractor's inability t provide facilities is due to insufficien lead time, the Government may provide existing facilities until the contractor's facilities can be installed.

(ii) Mere assertion by a contracto that it is unable to provide facilities i not, in itself, sufficient to justify approval. Appropriate Government officials must determine that providin Government facilities is justified.

(iii) The determination shall includ findings that private financing of th facilities was sought but not availabl or that private financing was determined not advantageous to the Government. The determination shall also state that the contract cannot be accomplished without Government facilities being provided.

(iv) The original determination shall be included in the contract file.

(v) No determination is required when the facilities are provided as components of special tooling or special test equipment acquired or fabricated at Government expense.

(5) As otherwise authorized by law or regulation.

(b) Agencies shall not—

(1) Furnish new facilities to contractors unless existing Government-owned facilities are either inadequate or cannot be economically furnished;

(2) Use research and development funds to provide contractors with new construction or improvements of general utility, unless authorized by law; or

(3) Provide facilities to contractors solely for non-Government use, unless authorized by law.

(c) Competitive solicitations shall not include an offer by the Government to provide new facilities, nor shall solicitations offer to furnish existing Government facilities that must be moved into a contractor's plant, unless adequate price competition cannot be otherwise obtained. Such solicitations shall require contractors to identify the Government-owned facilities desired to be moved into their plants.

(d) Government facilities with a unit cost of less than $10,000 shall not be provided to contractors unless—

(1) The contractor is a nonprofit institution of higher education or other

nonprofit organization whose primary purpose is the conduct of scientific research;

(2) A contractor is operating a Government-owned plant on a cost-plus-fee basis;

(3) A contractor is performing on a Government establishment or installation;

(4) A contractor is performing under a contract specifying that it may acquire or fabricate special tooling, special test equipment, and components thereof subsequent to obtaining the approval of the contracting officer; or

(5) The facilities are unavailable from other than Government sources.

[48 FR 42392, Sept. 19, 1983, as amended at 54 FR 34756, Aug. 21, 1989]

45.302-2 Facilities contracts.

(a) Facilities shall be provided to a contractor or subcontractor only under a facilities contract using the appropriate clauses required by 45.302-6, except as provided in 45.302-3.

(b) All facilities provided by a contracting activity for use by a contractor at any one plant or general location shall be governed by a single facilities contract, unless the contracting officer determines this to be impractical. Each agency should consolidate, to the maximum practical extent, its facility contracts covering specific contractor locations.

(c) No fee shall be allowed under a facilities contract. Profit or fee (plus or minus) shall be considered in awarding any related supply or service contract, consistent with the profit guidelines of subpart 15.9.

(d) Special tooling and special test equipment will normally be provided to a contractor under a supply contract, but may be provided under a facilities contract when administratively desirable.

(e) Agencies shall ensure that facility projects involving real property transactions comply with applicable laws (e.g., 10 U.S.C. 2676 and 41 U.S.C. 12 and 14).

45.302-3 Other contracts.

(a) Facilities may be provided to a contractor under a contract other than a facilities contract when—

(1) The actual or estimated cumulative acquisition cost of the facilities provided by the contracting activity to the contractor at one plant or general location does not exceed $100,000;

(2) The contract is for construction;

(3) The contract is for services and the facilities are to be used in connection with the operation of a Government-owned plant or installation; or

(4) The contract is for work within an establishment or installation operated by the Government.

(b) When a facilities contract is not used, the Government's interest shall normally be protected by using the appropriate Government property clause or, in the case of (a)(3) above, by appropriate portions of the facilities clauses.

45.302-4 Contractor use of Government-owned and -operated test facilities.

(a) Agencies may authorize onsite use by contractors of existing Government-owned and -operated test facilities in connection with Government contracts only when—

(1) No adequate commercial test capability is available;

(2) Substantial cost savings will result from using the Government-owned test facilities; or

(3) Otherwise authorized by law.

(b) When such use is authorized, the contracting officer shall obtain adequate consideration comparable to commercial rates.

45.302-5 Standby or layaway requirements.

A facilities contract may include requirements for maintenance and storage of Government production and research property in standby or layaway status. The contract shall include appropriate specifications for the care and maintenance of the property. If the Government is required to pay the contractor for maintenance and storage, the contract shall define what constitutes standby or layaway and specify when payments will begin and end. The contract may provide for reimbursing the contractor for any State or local property tax it is required to pay because of its possession of or interest in such property (see 31.205-41).

45.302-6 Required Government property clauses for facilities contracts.

(a) The contracting officer shall insert the clause at 52.245-7, Government Property (Consolidated Facilities), in solicitations and contracts when a consolidated facilities contract is contemplated (see 45.301).

(b) The contracting officer shall insert the clause at 52.245-8, Liability for the Facilities, in solicitations and contracts when a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated (see 45.301).

(c) The contracting officer shall insert the clause at 52.245-9, Use and Charges, in solicitations and contracts (1) when a consolidated facilities contract or a facilities use contract (see 45.301) or (2) when a fixed-price contract is contemplated, and Government production and research property is provided other than on a rent-free basis.

(d) The contracting officer shall insert the clause at 52.245-10, Government Property (Facilities Acquisition), in solicitations and contracts when a facilities acquisition contract is contemplated (see 45.301).

(e) (1) The contracting officer shall insert the clause at 52.245-11, Government Property (Facilities Use), in solicitations and contracts when a facilities use contract is contemplated (see 45.301).

(2) If the contract is for the conduct of basic or applied research at nonprofit institutions of higher education, or is awarded to a nonprofit organization whose primary purpose is the conduct of scientific research (see 35.014), the contracting officer shall use the clause with its Alternate I.

45.302-7 Optional property-related clauses for facilities contracts.

(a) The contracting officer may insert the clause at 52.245-12, Contract Purpose (Nonprofit Educational Institutions), in solicitations and contracts when a facilities use contract is contemplated and award may be made to a nonprofit educational institution (also see 45.302-6).

(b) The contracting officer may insert the clause at 52.245-13, Accountable Facilities (Nonprofit Educational Institutions), in solicitations and contracts when a facilities contract is contemplated and award may be made to a nonprofit educational institution (also see 45.302-6).

(c) The contracting officer may insert the clause at 52.245-14, Use of Government Facilities, in solicitations and contracts when a facilities use contract is contemplated and award may be made to a nonprofit educational institution (also see 45.302-6).

(d) The contracting officer may, under a proper delegation of authority, insert the clause at 52.245-15, Transfer of Title to the Facilities, in solicitations and contracts when a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated for the conduct of basic or applied research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research (see 35.015 and 45.302-6).

(e) The contracting officer may insert the clause at 52.245-16, Facilities Equipment Modernization, in solicitations and contracts when a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated under which the Government will provide modernized or replacement facilities.

45.303 Providing material.

45.303-1 Policy.

Contractors shall ordinarily furnish all material for performing Government contracts. However, agencies should provide material to a contractor when necessary to achieve significant economy, standardization, or expedited production, or when it is otherwise in the Government's interest.

45.303-2 Procedures.

Solicitations shall specify material that the Government will furnish in sufficient detail (including requisitioning procedures) to enable offerors to evaluate it accurately. The contracting officer shall insert the appropriate Government property clause prescribed in 45.106, in all solicitations when the Government will provide material.

45.304 Providing motor vehicles.

Contractors shall ordinarily furnish any motor vehicles needed in performing Government contracts. Agencies may provide contractors with motor vehicles only when—

(a) The number of vehicles required for use by contractor personnel is predictable and expected to remain fairly constant;

(b) The proposed contract will bear the entire cost of the vehicle program;

(c) The motor vehicles will not be used on any contract other than that for which the vehicles were provided, unless approved by the appropriate department or agency official;

(d) Prospective contractors do not have or would not be expected to have an existing and continuing capability for providing the vehicles from their own resources; and

(e) Substantial savings are expected.

45.305 [Reserved]

45.306 Providing special tooling.

45.306-1 Providing existing special tooling.

(a) The contracting officer shall offer existing Government special tooling to prospective contractors for use in Government work if it will not disrupt programs of equal or higher priority, it is otherwise advantageous to the Government, and use of the special tooling is authorized under 45.402(a). (See also 45.308 and 45.309.)

(b) Contracts authorizing the furnishing of existing special tooling shall contain a description of the special tooling, the terms and conditions of shipment, and the terms covering the cost of adapting and installing the tooling.

45.306-2 Special tooling under cost-reimbursement contracts.

Title to special tooling under cost-reimbursement contracts is acquired by the Government in all cases. The clause used for this purpose is 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts).

[54 FR 48989, Nov. 28, 1989]

45.306-3 Special tooling under fixed-price contracts.

(a) *Criteria for acquisition.* In deciding whether or not to acquire title to special tooling, or rights to title, under fixed-price contracts, the contracting officer shall consider the following factors:

(1) The current or probable future need of the Government for the items involved (including in-house use) and the estimated cost of producing them if not acquired.

(2) The estimated residual value of the items.

(3) The administrative burden and other expenses incident to reporting, recordkeeping, preparation, handling transportation, and storage.

(4) The feasibility and probable cost of making the items available to other offerors in the event of future acquisitions.

(5) The amount offered by the contractor for the right to retain the items.

(6) The affect on future competition and contract pricing.

(b) *Decision not to acquire special tooling.* In contracts in which the Government will not acquire title to special tooling, or rights to title, special requirements may be included in the Schedule of the contract (e.g., requirement governing the contractor's capitalization of special tooling costs).

[54 FR 48989, Nov. 28, 1989]

45.306-4 [Reserved]

45.306-5 Contract clause.

The contracting officer shall insert the clause at 52.245-17, Special Tooling, in solicitations and contracts when a fixed-price contract is contemplated, and either the contract will include special tooling provided by the Government or the Government will acquire title or right to title in special tooling to be acquired or fabricated by the contractor for the Government, other than special tooling to be delivered as an end item under the contract. The Special Tooling clause shall apply to all special tooling accountable to the contract.

[54 FR 48989, Nov. 28, 1989]

45.307 Providing special test equipment.

45.307-1 General.

(a) Contracting officers shall offer existing Government-owned special test equipment to contractors, consistent with the conditions in 45.306-1(a). (See also 45.308 and 45.309.)

(b) Contracting officers may also authorize contractors to acquire special test equipment for the Government when it is advantageous to the Government under the criteria in 45.306-3(a) and existing special test equipment is not available.

[48 FR 42392, Sept. 19, 1983, as amended at 54 FR 48990, Nov. 28, 1989]

45.307-2 Acquiring special test equipment.

(a) When special test equipment or components are known, the solicitation (and the contract) shall separately identify each item to be furnished by the Government or acquired or fabricated by the contractor for the Government. Individual items of less than $1,000 may be grouped by category.

(b) *Notice and approval.* Under negotiated contracts containing the clause at 52.245-18, Special Test Equipment, the contractor must notify the contracting officer if it intends to acquire or fabricate special test equipment. Within 30 days of receipt of the notice, the contracting officer shall—

(1) Review the proposed items for necessity and proper classification as *special* test equipment;

(2) Screen the availability of existing Government-owned test equipment in accordance with agency procedures; and

(3) Notify the contractor, approving or disapproving the acquisition or fabrication and, if it is disapproved, state whether the equipment will be furnished by the Government.

45.307-3 Contract clause.

The contracting officer shall insert the clause at 52.245-18, Special Test Equipment, in solicitations and contracts when contracting by negotiation and the contractor will acquire or fabricate special test equipent for the Government but the exact identification of the special test equipment to be acquired or fabricated is unknown.

[54 FR 48990, Nov. 28, 1989]

45.308 Providing Government productio and research property "as is."

45.308-1 General.

(a) The contracting officer may provide Government production and research property on an "as is" basis for performing fixed-price, time-and-material, and labor-hour contracts. It may also be furnished under a facilities contract, in which case the contract shall state that the contractor will not be reimbursed for transporting, installing, modifying, repairing, or otherwise making the property ready for use.

(b) When the property is provided under other than a facilities contract, the solicitation shall state that—

(1) Offerors may inspect the property before submitting offers and the conditions under which it may be inspected;

(2) The property is offered in its current condition, f.o.b. present location (provide specific locations);

(3) Offerors must satisfy themselves that the property is suitable for their use;

(4) The successful offeror shall bear the cost of transporting, installing, modifying, repairing, or otherwise making the property suitable for use; and

(5) Evaluations will be made in accordance with Subpart 45.2 to eliminate any competitive advantage resulting from using the property.

[54 FR 48990, Nov. 28, 1989]

45.308-2 Contract clause.

The contracting officer shall insert the clause at 52.245-19, Government Property Furnished "As Is," in solicitations and contracts when a contract other than a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated and Government production and research property is to be furnished "as is" (see 45.106 for additional clauses that may be required).

[54 FR 48990, Nov. 28, 1989]

45.309 Providing Government production and research property under special restrictions.

(a) Government production and research property, other than foundations and similar improvements necessary for installing special tooling, special test equipment, or plant equipment, shall not be installed or constructed on land not owned by the Government in such fashion as to be nonseverable, unless the head of the contracting activity determines that the location is necessary, and the contract under which the property is provided contains—

(1) A requirement for the contractor to reimburse the Government for the fair value of the property at contract completion or termination or within a reasonable time thereafter (for example, the provision may require the contractor to purchase the property at a value determined by appraisal or at a price equal to its acquisition cost less depreciation at a specified rate);

(2) An option for the Government to acquire the underlying land; or

(3) An alternative provision that the agency head considers adequate to protect the Government's interests.

(b) If patent or other proprietary rights of a contractor may restrict the disposal of Government production and research property, the condition in either paragraph (a)(1) or (a)(3) above shall be satisfied before the property is provided.

(c) If Government production and research property is not available to all offerors, the solicitation shall identify the offerors to whom the property is available.

45.310 Providing agency-peculiar property.

(a) Agency-peculiar property may be furnished to contractors when necessary for use as a standard or model, for testing the contractor's end item where suitable commercial equipment is not available, to establish equipment compatibility, or for other reasons that the contracting officer determines to be in the Government's interest.

(b) Agency-peculiar property may be furnished under a facilities contract, a supply or service contract containing the appropriate Government Property clause, or a special bailment agreement.

(c) Contracting officers shall provide special instructions for security, liability, maintenance, and/or property control, when agency-peculiar property requires special handling or safeguards.

Subpart 45.4—Contractor Use and Rental of Government Property

45.400 Scope of subpart.

This subpart prescribes policies and procedures for contractor use and rental of Government production and research property.

45.401 Policy.

In performing Government contracts or subcontracts, Government production and research property in the possession of contractors or subcontractors shall be used to the greatest possible extent, provided that a competitive advantage is not conferred on the contractor or its subcontractors (see subpart 45.2). Prior approval of the contracting officer having cognizance of Government production and research property is required for any use, whether Government or non-Government, to ensure that the Government receives adequate consideration. Government use is defined as use in support of U.S. Government contacts and non-Government use is all other use (including direct commercial sales to domestic and foreign customers). As a general rule, Government use is on a rent-free basis. Non-Government use is on a rental basis. When Government production and research property is no longer required for the performance of Government contracts or subcontracts, it shall not continue to be made available to a contractor for non-Government use.

[51 FR 19717, May 30, 1986]

45.402 Authorizing use of Government production and research property.

(a) Contracting officers who believe it to be in the Government's interest for a prospective contractor or subcontractor to use existing Government production and research property shall authorize such use in the contract. The contracting officer shall confirm the availability of the property before authorizing its use on either a rental or rent-free basis.

(b) Unless the solicitation provides for the successful offeror to use Government production and research property in the offeror's possession, the solicitation shall require any offeror desiring to use such property to request the written concurrence of the contracting officer cognizant of the property. To preclude a competitive advantage, the contracting officer's concurrence should include any information required by subpart 45.2.

(c) The contracting officer shall review the contractor's request for non-Government use of Government production and research property when the property is no longer required for performing Government contracts but is retained for spares or for mobilization and readiness requirements. (Also see 45.302-1(b)(3).)

45.403 Rental—Use and Charges clause.

(a) The contracting officer shall charge contractors rent for using Government production and research property, except as prescribed in 45.404 and 45.405. Rent shall be computed in accordance with the clause at 52.245-9, Use and Charges. If the agency head or designee determines it to be in the Government's interest, rent for classes of production and research property other than plant equipment identified in item (ii) of Table I of the clause at 52.245-9, Use and Charges, may be charged on the basis of use rather than the rental period, or on some other equitable basis. In such cases, the clause at 52.245-9, Use and Charges, shall be appropriately modified.

(b) The contracting officer cognizant of the Government production and research property shall ensure the collection of any rent due the Government from the contractor.

45.404 Rent-free use.

(a) The rental required by 45.403 above does not apply to the following Government production and research property:

(1) That which is located in Government-owned, contractor-operated plants operated on a cost-plus-fee basis (but see 45.405).

(2) That which is left in place or installed on contractor-owned property for mobilization or future Government production purposes. However, rent computed in accordance with 45.403(a) shall apply to that portion of property or its capacity used or authorized for use.

(3) Items of equipment that are part of a general program approved by the Federal Emergency Management Agency (FEMA) and present unusual problems in relation to the time required for their preparation for shipment, installation, and operation because of size, complexity, or performance characteristics.

(4) Any other Government production and research property that may be excepted by FEMA.

(b) The contracting officer cognizant of the Government production and research property may grant written authorization for rent-free use of production and research property in the possession of nonprofit organizations when used for research, development, or educational work and—

(1) The use of the property is directly or indirectly in the national interest;

(2) The property will not be used for the direct benefit of a profitmaking organization; and

(3) The Government receives some direct benefit (such as rights to use the results of the work without charge) from its use. As a minimum, the contractor shall furnish a report on the work for which the property was provided.

(c) If the contracting officer has obtained adequate price or other consideration, Government production and research property may also be used rent-free under—

(1) Prime contracts that specifically authorize such use without charge; and

(2) Subcontracts of any tier, if the contracting officer awarding the prime contract has specifically authorized rent-free use by the subcontractor.

(d) After award, a contract may be modified to eliminate rent for using

Government production and research property. In this case, the contract shall be equitably adjusted to reflect the elimination of rent and any other amount attributable thereto.

45.405 Contracts with foreign governments or international organizations.

Requests by, or for the benefit of, foreign governments or international organizations to use Government production and research property shall be processed and costs shall be recovered or rental charged in accordance with agency procedures.

45.406 Use of Government production and research property on independent research and development programs.

The contracting officer cognizant of Government production and research property in the possession of a contractor may authorize a contractor to use the property on an independent research and development (IR&D) program, if—

(a) Such use will not conflict with the primary use of the property or enable the contractor to retain property that could otherwise be released;

(b) The contractor agrees not to include as a charge against any Government contract the rental value of the property used on its IR&D program; and

(c) A rental charge for the portion of the contractor's IR&D program cost allocated to commercial work, computed in accordance with 45.403, is deducted from any agreed-upon Government share of the contractor's IR&D costs.

45.407 Non-Government use of plant equipment.

Requirements for authorization and dollar thresholds for non-Government use of specific types of plant equipment shall be set at the agency level. The following general policies and requirements shall be used by agencies in supplementing this section:

(a) The contracting officer's advance written approval shall be required for any non-Government use of active plant equipment. Before authorizing non-Government use exceeding 25 percent, the contracting officer shall obtain approval of the head (or designee) of the agency that awarded the contract to which the property is accountable.

(b) The approvals under paragraph (a) above may be granted only when it is in the Government's interest—

(1) To keep the equipment in a high state of operational readiness through regular use;

(2) Because substantial savings to the Government would accrue through overhead cost-sharing and receipt of rental; or

(3) To avoid an inequity to a contractor who is required by the Government to retain the equipment in place.

(c) If the contractor's request for non-Government use in excess of 25 percent is approved, the contracting officer may require the contractor to insure the property against loss or damage. Facilities contracts may be modified to require such insurance.

Subpart 45.5—Management of Government Property in the Possession of Contractors

45.500 Scope of subpart.

This subpart prescribes the minimum requirements contractors must meet in establishing and maintaining control over Government property. It applies to contractors organized for profit and, except as otherwise noted, to non-profit organizations. In order for the special requirements in this subpart governing nonprofit organizations to apply, the contract must identify the contractor as a nonprofit organization. If there is any inconsistency between this subpart and the terms of the contract under which the Government property is provided, the terms of the contract shall govern.

45.501 Definitions.

Accessory item, as used in this subpart, means an item that facilitates or enhances the operation of plant equipment but which is not essential for its operation.

Agency-peculiar property (see 45.301).

Auxiliary item, as used in this subpart, means an item without which the basic unit of plant equipment cannot operate.

Contractor-acquired property (see 45.101).

Custodial records, as used in this subpart, means written memoranda of any kind, such as requisitions, issue hand receipts, tool checks, and stock record books, used to control items issued from tool cribs, tool rooms, and stockrooms.

Discrepancies incident to shipment, as used in this subpart, means all deficiencies incident to shipment of Government property to or from a contractor's facility whereby differences exist between the property purported to have been shipped and property actually received. Such deficiencies include loss, damage, destruction, improper status and condition coding, errors in identity or classification, and improper consignment.

Facilities (see 45.301).

Government-furnished property (see 45.101).

Government property (see 45.101).

Individual item record, as used in this subpart, means a separate card, form, document or specific line(s) of computer data used to account for one item of property.

Material (see 45.301).

Nonprofit organization (see 45.301).

Plant equipment (see 45.101).

Property administrator, as used in this subpart, means an authorized representative of the contracting officer assigned to administer the contract requirements and obligations relating to Government property.

Real property (see 45.101).

Salvage, as used in this subpart, means property that, because of its worn, damaged, deteriorated, or incomplete condition or specialized nature, has no reasonable prospect of sale or use as serviceable property without major repairs, but has some value in excess of its scrap value.

Scrap, as used in this subpart, means personal property that has no value except for its basic material content.

Special test equipment (see 45.101).

Special tooling (see 45.101).

Stock record, as used in this subpart, means a perpetual inventory record which shows by nomenclature the quantities of each item received and issued and the balance on hand.

Utility distribution system, as in this subpart, includes distrib and transmission lines, substatio installed equipment forming an gral part of the system by which water, steam, electricity, seweraç other utility services are transm between the outside building or s ture in which the services are use the point of origin, disposal, or co tion with some other system. It not include communication service

Work-in-process, as used in this part, means material that has bee leased to manufacturing, enginee design or other services under the tract and includes undelivered m factured parts, assemblies, and p ucts, either complete or incomplet

45.502 Contractor responsibility.

(a) The contractor is directly res sible and accountable for all Gov ment property in accordance with requirements of the contract. Thi cludes Government property in possession or control of a subcon tor. The contractor shall establish maintain a system in accordance this subpart to control, protect, serve, and maintain all Governm property. This property co system shall be in writing unless property administrator determ that maintaining a written syste unnecessary. The system shall b viewed and, if satisfactory, appr in writing by the property admini tor.

(b) The contractor shall main and make available the records quired by this subpart and accoun all Government property until lieved of that responsibility. The tractor shall furnish all necessary to substantiate any request for r from responsibility.

(c) (1) The contractor shall be sponsible for the control of Gov ment property under this subpart upon—

(i) Delivery of Government- nished property into its custody control;

(ii) Delivery, when property is chased by the contractor and the tract calls for reimbursement by Government (this requirement not alter or modify contractual requirements relating to passage of title);

(iii) Approval of its claim for reimbursement by the Government or upon issuance for use in contract performance, whichever is earlier, of property withdrawn from contractor-owned stores and charged directly to the contract; or

(iv) Acceptance of title by the Government when title is acquired pursuant to specific contract clauses or as a result of change orders or contract termination.

(2) Property to which the Government has acquired a lien or title solely as a result of advance, progress, or partial payments is not subject to the requirements of this subpart.

(d) The contractor shall require subcontractors provided Government property under the prime contract to comply with the requirements of this subpart. Procedures for assuring subcontractor compliance shall be included in the contractor's property control system. Where the property administrator assigned to the contract has requested supporting property administration from another contract administration office, the contractor may accept the system approval of the supporting property administrator instead of performing duplicative actions to assure the subcontractor's compliance.

(e) If the property administrator finds any portion of the contractor's property control system to be inadequate, the contractor must take any necessary corrective action before the system can be approved. If the contractor and property administrator cannot agree regarding the adequacy of control and corrective action, the matter shall be referred to the contracting officer.

(f) When Government property (excluding misdirected shipments, see 45.505-12) is disclosed to be in the possession or control of the contractor but not provided under any contract, the contractor shall promptly (1) record such property according to the established property control procedure and (2) furnish to the property administrator all known circumstances and data pertaining to its receipt and a statement as to whether there is a need for its retention.

(g) The contractor shall promptly report all Government property in excess of the amounts needed to complete full performance under the contracts providing it or authorizing its use.

(h) When unrecorded Government property is found, both the cause of the discrepancy and actions taken or needed to prevent recurrence shall be determined and reported to the property administrator.

[48 FR 42392, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986]

45.502-1 Receipts for Government property.

The contractor shall furnish written receipts for all or specified classes of Government property only when the property administrator deems it essential for maintaining minimum acceptable property controls. If evidence of receipt is required for contractor-acquired property, the contractor shall provide it before submitting its request for payment for the property. For Government-furnished property, the contractor shall provide the required receipt immediately upon receipt of the property.

45.502-2 Discrepancies incident to shipment.

(a) *Government-furnished property.* If overages, shortages, or damages are discovered upon receipt of Government-furnished property, the contractor shall provide a statement of the condition and apparent causes to the property administrator and to other activities specified in the approved property control system. Only that quantity of property actually received will be recorded on the official records.

(b) *Contractor-acquired property.* The contractor shall take all actions necessary in adjusting overages, shortages, or damages in shipment of contractor-acquired property from a vendor or supplier. However, when the shipment has moved by Government bill of lading and carrier liability is indicated, the contractor shall report the discrepancy in accordance with paragraph (a) above.

45.503 Relief from responsibility.

(a) Unless the contract or contracting officer provides otherwise, the contractor shall be relieved of property control responsibility for Government property by—

(1) Reasonable and proper consumption of property in the performance of the contract as determined by the property administrator;

(2) Retention by the contractor, with the approval of the contracting officer, of property for which the Government has received consideration;

(3) The authorized sale of property, provided the proceeds are received by or credited to the Government;

(4) Shipment from the contractor's plant, under Government instructions, except when shipment is to a subcontractor or other location of the contractor; or

(5) A determination by the contracting officer of the contractor's liability for any property that is lost, damaged, destroyed, or consumed in excess of that normally anticipated in a manufacturing or processing operation, if—

(i) The determination is furnished to the contractor in writing;

(ii) The Government is reimbursed where required by the determination; and

(iii) Property rendered unserviceable by damage is properly disposed of, and the determination is cross-referenced to the shipping or other documents evidencing disposal.

(b) Nonprofit organizations are relieved of responsibility for Government property when title to the property is transferred to the contractor (see 35.014).

45.504 Contractor's liability.

(a) Subject to the terms of the contract and the circumstances surrounding the particular case, the contractor may be liable for shortages, loss, damages, or destruction of Government property. The contractor may also be liable when the use or consumption of Government property unreasonably exceeds the allowances provided for by the contract, the bill of material, or other appropriate criteria.

(b) The contractor shall investigate and report to the property administrator all cases of loss, damage, or destruction of Government property in its possession or control as soon as the facts become known or when requested by the property administrator. A report shall also be furnished when completed and accepted products or end items are lost, damaged, or destroyed while in the contractor's possession or control.

(c) The contractor shall require any of its subcontractors possessing or controlling Government property accountable under the contract to investigate and report all instances of loss, damage, or destruction of such property.

45.505 Records and reports of Government property.

(a) The contractor's property control records shall constitute the Government's official property records unless an exception has been authorized. The contractor shall establish and maintain adequate control records for all Government property, including property provided to and in the possession or control of a subcontractor. The property control records specified in this section are the minimum required by the Government. Unless the property administrator directs otherwise, when a subcontractor has an approved property control system for Government property provided under its own prime contracts, the contractor shall use the records created and maintained under that system.

(b) The contractor's property control system shall provide financial accounts for Government-owned property in the contractor's possession or control. The system shall be subject to internal control standards and be supported by property records for such property.

(c) Official Government property records must identify all Government property and provide a complete, current, auditable record of all transactions. The contractor's system of records maintenance shall be sufficient to adequately control Government property as required by this section. The contractor's system of records maintenance, as a minimum, shall be equivalent to and maintained in the same manner as the contractor's system for maintaining records of contractor-owned property, but need not exceed the requirements of this subpart. The records shall be safeguarded from tampering or destruction. Records shall be accessible to authorized Government personnel.

(d) Separate property records for each contract are desirable, but a consolidated property record may be maintained if it provides the required information.

(e) Special tooling and special test equipment fabricated from materials that are the property of the Government shall be recorded as Government-owned immediately upon fabrication. Special tooling and special test equipment fabricated from materials that are the property of the contractor shall be recorded as Government property at the time title passes to the Government.

(f) Property records of the type established for components acquired separately shall be used for serviceable components permanently removed from items of Government property as a result of modification.

(g) The contractor's property control system shall contain a system or technique to locate any item of Government property within a reasonable period of time.

[48 FR 42392, Sept. 19, 1983, as amended at 53 FR 43394, Oct. 26, 1988]

45.505-1 Basic information.

Unless summary records are used as authorized under 45.505-5(a), the contractor's property control records shall provide the following basic information for every item of Government property in the contractor's possession, regardless of value (other subsections of 45.505 require additional information for specific categories of Government property):

(a) The name, description, and National Stock Number (if furnished by the Government or available in the property control system).

(b) Quantity received (or fabricated), issued, and on hand.

(c) Unit price (and unit of measure).

(d) Contract number or equivalent code designation.

(e) Location.

(f) Disposition.

(g) Posting reference and date of transaction.

45.505-2 Records of pricing information.

(a) *Requirement for unit prices.* (1) The contractor's property control system shall contain the unit price for each item of Government property except as provided in (b) below. When a contractor records the unit price of property on other than the quantitative inventory records, those supplementary records shall become part of the official Government property records.

(2) (*Note: This subparagraph (2) does not apply to nonprofit organizations.*) The requirement that unit prices be contained in the official Government property records does not apply to those separate property records located at a contractor's secondary sites and subcontractor plants; *provided*, that—

(i) Records maintained by the prime contractor at its primary site include unit prices; and

(ii) The prime contractor agrees to furnish actual or estimated unit prices to the secondary site or subcontractor as the need arises.

(3) When definite information as to unit price cannot be obtained, reasonable estimates will be used.

(b) *Determining unit price.* (1) *Contractor-acquired and contractor-fabricated property.* Except for items fabricated by nonprofit organizations for research and development purposes, the unit price of contractor-acquired and contractor-fabricated property shall be determined in accordance with the system established by the contractor in conformance with consistently applied sound accounting principles. Generally, separate unit prices should be applied to items of special tooling and special test equipment fabricated or acquired by the contractor. However, if the contractor's accounting system is acceptable, and if maintaining detailed cost records results in excessive accounting cost or is otherwise impracticable, group pricing may be used for special tooling, special test equipment, and work-in-process in accordance with the contractor's acceptable cost accounting system. All processed material, fabricated parts, components, and assemblies charged to the contractor's work-in-process inventory, including items in temporary storage while awaiting processing, may be considered as work-in-process for this purpose.

(2) *Government-furnished property.* The Government shall determine and furnish to the contractor the unit price of Government-furnished property. Transportation and installation costs shall not generally be considered as part of the unit price for this purpose. Normally, the unit price of Government-furnished property will be provided on the document covering shipment of the property to the contractor. In the event the unit price is not provided on the document, the contractor will take action to obtain the information.

45.505-3 Records of material.

(a) *General.* All Government material furnished to the contractor, as well as other material to which title has passed to the Government by reason of allocation from contractor-owned stores or purchase by the contractor for direct charge to a Government contract or otherwise, shall be recorded in accordance with the contractor's property control system and the requirements of this section.

(b) *Consolidated stock record.* When a contractor has more than one Government contract under which Government material is provided, a consolidated record for materials may be authorized by the property administrator, *provided,* the total quantity of any item is allocated to each contract by contract number and each requisition of material from contractor-owned stores is charged to the contract on which the material is to be used. The supporting document or issue slip shall show the contract number or equivalent code designation to which the issue is charged.

(c) *Custodial records.* The contractor shall maintain custodial records for tool crib items, guard force items, protective clothing, and other items issued to individuals for use in their work.

(d) *Use of receipt and issue documents.* (*Note: This paragraph (d) does not apply to nonprofit organizations.*) The property administrator may authorize the contractor to maintain, in lieu of stock records, a file of appropriately cross-referenced documents evidencing receipt, issue, and use of Government-provided material that is issued for immediate consumption and is not entered in the inventory record as a matter of sound business practice. This method of control may be authorized for—

(1) Material charged through overhead;

(2) Material under research and development contracts;

(3) Subcontracted or outside production items;

(4) Nonstock or special items;

(5) Items that are produced for direct charge to a contract, or are acquired and issued for installation upon receipt, and involve no spoilage; and

(6) Items issued from contractor-owned inventory direct to production or maintenance, etc.

(e) *Material issued directly upon receipt.* (*Note: This paragraph (e) applies only to nonprofit organizations.*)

(1) Under fixed-price contracts, the contractor's documents evidencing receipt and issue will be accepted as property control records for Government-furnished material issued directly by the contractor upon receipt so as to be considered consumed under the contract.

(2) Under cost-reimbursement contracts, Government invoices, contractor's purchase documents, or other evidence of acquisition and issue will be accepted as adequate property records for material furnished to or acquired by the contractor and issued directly so as to be considered consumed under the contract.

(f) *Multicontract cost and material control.* (*Note: This paragraph (f) does not apply to nonprofit organizations.*)

(1) *Description and scope.* A multicontract cost and material control system substitutes a system of financial accounting for the requirements for physical identification of Govern-

ment material. The system operates as follows:

(i) The contractor may acquire, requisition, receive, store, and issue like items of material for the total requirements of all contracts involved in the system without identifying the material to each contract.

(ii) The contractor may commingle, during any stage of contract performance, Government-owned and contractor-owned material and work-in-process that was furnished, acquired, or produced for all Government contracts covered by the system, without physical segregation or identification to the individual contracts.

(iii) In lieu of physical segregation and identification to individual contracts, periodic calculation of requirements and distribution of costs to all contracts permits the allocation of costs of material to products delivered. This system, by reflecting the material expended to perform each contract at any stage in production, permits usage analysis to determine the reasonableness of consumption and expenditure of Government material.

(iv) The system may include all Government contracts of any type that involve common repetitive operations.

(v) The system does not require commingling of all common materials under all contracts. For example, items of Government-furnished material of high value or in short supply may be excluded from commingling and reserved for use in performing the contract under which furnished.

(vi) The contractor shall take physical inventories of material in stores included in the systems (other than work-in-process) at least annually, extend and reconcile prices to the quantitative balance for each item, and record adjustments in the stock record and financial inventory control accounts. Such physical inventories and adjustments, as well as equitable distribution to cost accounts of any inventory losses, shall be reviewed by and are subject to the approval of the property administrator.

(2) *Criteria.* A multicontract cost and material control system may be authorized if—

(i) The contractor demonstrates that adopting the system will result in savings or improved operations or that it will otherwise be in the Government's interest;

(ii) The system is applied to existing Government contracts only and excludes materials acquired or costs incurred for non-Government work or in anticipation of future Government work; and

(iii) The contractor's accounting system is adequate to—

(A) Provide on a complete and timely basis a clear *audit trail* from costs of materials acquired for each contract to materials used or disposed of on each contract;

(B) Reflect separately for Government-furnished and contractor-acquired material in stores (except work-in-process) the inventory balances as affected by receipts, issues, adjustments, and other dispositions;

(C) Determine unit costs for each identifiable part, component, subassembly, assembly, end item, and contract item;

(D) Calculate amounts for cost reimbursements and progress payments during the life of the contract by applying or allocating such unit costs developed through each stage of work-in-process to contract items for the requirements of each contract; and

(E) Assure that when Government material furnished for use under one contract is authorized for use on another contract, the initial contract receives credit.

(3) *Authorization.* The administrative contracting officer may authorize a contractor who is performing or will perform more than one Government contract to use the multicontract cost and material control system. The property administrator shall approve whatever detailed operating procedures are necessary for each system authorized.

(4) *Requirement.* Whenever a multicontract cost and material control system is authorized, the contractor's financial accounts shall include all material in the system acquired or furnished for Government work and shall satisfy the requirements in subdivision (f)(2)(iii) of 45.505-3 above.

45.505-4 Records of special tooling and special test equipment.

(Note: The special tooling requirements of this subsection 45.505-4 do not apply to nonprofit organizations except for paragraph (c).)

(a) The contractor's property control system shall provide the basic information listed in 45.505-1 regarding each item of Government-owned special tooling and special test equipment, including any general purpose test equipment incorporated as components in such a manner that removal and reuse may be feasible and economical.

(b) If the contractor uses group pricing of special tooling or special test equipment, as recognized in 45.505-2(b), unit prices may be computed when required.

(c) In the case of special tooling acquired or fabricated by nonprofit organizations or furnished by the Government to nonprofit organizations for research and development, the Government invoices, contractor's purchase document, or other documents that evidence acquisition or issue will be accepted as adequate property control records.

(d) Records identifying special tooling and special test equipment shall include the identification number and item on which used.

(e) The contractor shall, when specified by the contract, identify and report special tooling and special test equipment by retention category (e.g., assembly tooling or critical tooling for spares or replacements).

45.505-5 Records of plant equipment.

(a) The contractor shall maintain individual item records for each item of plant equipment having a unit cost of $5,000 or more. Summary stock records may be maintained for plant equipment costing less than $5,000 per unit, except where the contract administration office determines that individual item records are necessary for effective control, calibration, or maintenance.

(b) In addition to the information required in 45.505-1, the contractor's records of Government-owned plant equipment, regardless of value, shall include—

(1) Federal Supply Code for the manufacturer (as listed in Cataloging Handbook H4-1 and H4-2) (available from the Superintendent of Documents, Government Printing Office (GPO), Washington, D.C. 20402);

(2) Federal Supply Classification (Cataloging Handbooks H2-1, H2-2, and H2-3) (available from GPO); and

(3) The original manufacturer's model or part number.

(c) For each item of Government-owned plant equipment having a unit cost of $5,000 or more, the contractor shall, in addition to the requirements of (b) above, include—

(1) Serial number and year built (when available);

(2) Government identification/tag number; and

(3) Acquisition and disposition document references and dates.

(d) The property administrator may determine that the information in (c)(1) and (2) above should be recorded in the property records for plant equipment costing less than $5,000.

(e) Accessory and auxiliary equipment shall be recorded on the record of the associated item of plant equipment. If the accessory or auxiliary item is not attached to, a part of, or acquired for use with a specific item of plant equipment, it shall be recorded either in an individual item record or in a summary stock record. When accessory and auxiliary items are permanently separated from the basic item of plant equipment, the unit price of the basic item shall be appropriately reduced.

45.505-6 Special reports of plant equipment.

An agency may set requirements for any special reports of plant equipment it determines necessary.

45.505-7 Records of real property.

(a) The contractor shall maintain an itemized record of the description, location, acquisition cost, and disposition of all Government real property (including unimproved real property); all alterations, all construction work, and sites connected with such alteration and construction, acquired by purchase, lease, or otherwise. These records, including maps, drawings, plans, specifications, and supplementary data where necessary, shall (1) be complete, (2) show the original cost of the property and improvements and the cost of any changes and additions, and (3) be appropriately indexed.

(b) Costs incurred by the contractor or the Government for new construction, including erection, installation, or assembly of Government real property in possession of the contractor, shall be capitalized in the official Government real property records and financial accounts maintained by the contractor for the Government.

(c) Costs incurred for additions, expansions, extensions, conversions, alterations, and improvements, including applicable portions of capital maintenance, that increase the value, life, utility, capability, or serviceability of Government real property shall be capitalized.

(d) Costs incurred for portable buildings or facilities specifically constructed for tests that involve destruction of the facility shall not be capitalized in the Government real property records or financial accounts.

(e) Costs incurred for maintenance, repair, or rearrangement to maintain the Government real property in good physical condition, utility, capacity, or serviceability shall be charged to expense, and the real property records shall not be affected.

(f) When Government-owned real property is sold, transferred, donated, destroyed by fire or other cause, abandoned-in-place, or condemned, the financial accounts shall be reduced by the presently recorded cost and the real property records annotated with a supporting statement, including pertinent facts.

45.505-8 Records of scrap or salvage.

(a) The contractor shall maintain records of all scrap or salvage generated, except as provided in 45.507. These records shall conform to the contractor's established system of scrap and salvage control approved by the property administrator.

(b) The contractor's property control system shall provide the following information:

(1) Contract number, if practical, or equivalent code designation from which the scrap or salvage derived.

(2) Nomenclature or description of salvable items or classification (material content) of scrap.

(3) Quantity on hand.

(4) Posting reference and date of transaction.

(5) Disposition.

45.505-9 Records of related data and information.

The contractor shall maintain property control and accountability, in accordance with sound business practice, of manufacturing or assembly drawings; installation, operation, repair, or maintenance instructions; and other similar information furnished to the contractor by the Government or generated or acquired by the contractor under the contract and for which title vests in the Government. The requirements of this subpart do not otherwise apply to such property.

45.505-10 Records of completed products.

The contractor shall maintain a record of all completed products produced under a contract as follows:

(a) When there is no time lapse between Government inspection and acceptance of the completed products and shipment from the plant site, the records shall, as a minimum, consist of a summary of quantities accepted and shipped. When end items are accepted by the Government and stored with the contractor awaiting shipment, the record shall identify quantities stored, location, and disposition action.

(b) On contracts that provide for the contractor to retain completed products for further use under the contract or other contracts, such items shall be considered *Government-furnished property* upon acceptance and shall be recorded as required by this subpart.

(c) When completed products are returned to a contractor under the terms of a warranty clause, the contractor shall maintain, by contract, a record containing a description of the items involved, quantities received and returned to the Government, and other pertinent data necessary to determine that a proper accounting for all property has been made.

45.505-11 Records of transportation and installation costs of plant equipment.

(*Note: This subsection 45.505-11 does not apply to nonprofit organizations.*)

(a) *Transportation costs.* (1) The contractor shall record within the property control system the transportation and installation costs directly borne by the Government for each item of Government-owned plant equipment with an acquisition cost of $5,000 or more. The administrative contracting officer may require the contractor to provide such recorded costs for use in computing rental charges.

(2) If transportation costs are not included in the price of equipment delivered, the contractor shall contact the property administrator for instructions for obtaining applicable freight data.

(b) *Installation costs.* (1) When the contractor performs installation, the cost shall be computed in accordance with the contractor's accounting system (if the system is acceptable for other contract cost determination purposes) and recorded in the property record.

(2) When installation is subcontracted, the contractor shall record the cost paid to the subcontractor in the property record.

(3) When installation costs are included in the price of equipment delivered to the using location, the property records should be so annotated.

45.505-12 Records of misdirected shipments.

The contractor's property control system shall provide the following information regarding each misdirected shipment of Government property received:

(a) Identity of shipment, such as shipping document or bill of lading.

(b) Origin of shipment.

(c) Content (items in the shipment) per shipping documents, if available.

(d) Location.

(e) Disposition.

45.505-13 Records of property returned for rework.

(a) The contractor shall maintain quantitative records of property returned for processing to assure control from time of receipt through return of the items to the Government. The contractor shall establish item records under its property control system and shall include the information required in 45.505-1.

(b) The records shall specify the quantity of units returned to the Government and the quantity otherwise disposed of with proper authority.

45.505-14 Reports of Government property.

(a) The contractor's property control system should provide annually the total acquisition cost of Government property for which the contractor is accountable under each contract with each agency, including Government property at subcontractor plants and alternate locations, in the following classifications (property classifications may be varied to meet individual agency needs):

(1) Land and rights therein.

(2) Other real property, including utility distribution systems, buildings, structures, and improvements thereto.

(3) Plant equipment of $5,000 or more.

(4) Plant equipment of less than $5,000.

(b) The contractor shall report the information under paragraph (a) as directed by the contracting officer.

45.506 Identification.

(a) The contractor shall identify, mark, and record all Government property promptly upon receipt, unless exempted by this section, and shall record assigned numbers on all applicable documents pertaining to the property control system. Markings shall be removed or obliterated when Government property is sold, scrapped, or donated.

(b) All Government material and plant equipment having an acquisition cost less than $5,000 shall be identified as Government property except in those cases where—

(1) No material or plant equipment of the same type costing less than $5,000 at the same location is owned by the contractor, its employees, or other contracting agencies;

(2) Adequate physical control is maintained over protective clothing, tool crib, guard force, and other items issued to individuals for use in their work;

(3) Property is of bulk type, or its general nature of packing or handling precludes adequate marking; or

(4) Property is commingled, as authorized by 45.507.

(c) In accordance with procedures approved by the property administrator, the contractor shall mark Government-owned special tooling and special test equipment with a serial number and an indication of Government ownership. If marking will damage the equipment or is otherwise impracticable, the contractor shall promptly report the problem to the property administrator. The contractor shall mark in a manner similar to plant equipment all components of special test equipment that have an acquisition cost of $5,000 or more and are incorporated in a manner that makes removal and reutilization feasible and economical.

(d) The contractor shall identify Government-owned plant equipment as such, unless (1) summary records are used as authorized under 45.505-5(a), (2) it is excluded under 45.506(b), or (3) when the size or nature of the equipment makes identification impracticable. (Excepted items shall be entered and described on the equipment property record.) Property shall be identified by a legible, permanent, conspicuous, and tamper-proof method (e.g., decals, plates, stamping, etc.). Identification shall consist of a serial number and an indication of Government ownership (unless already properly identified as Government property). For items included in a standard agency registration system, registration numbers obtained from the owning agency through the property administrator may be used in lieu of other identification numbers.

(e) Accessory or auxiliary equipment associated with a specific item of plant equipment and recorded on the property records need not be marked with an identification number, unless necessary to assure its return with the associated basic item.

[48 FR 42392, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

45.507 Segregation of Government property.

Government property shall be kept physically separate from contractor-owned property. However, when advantageous to the Government and consistent with the contractor's authority to use such property, the property may be commingled—

(a) When the Government property is special tooling, special test equipment, or plant equipment clearly identified and recorded as Government property;

(b) When approved by the property administrator in connection with research and development contracts;

(c) When material is included in a multicontract cost and material control system (however, see 45.505-3(f));

(d) When (1) scrap of a uniform nature is produced from both Government-owned and contractor-owned material and physical segregation is impracticable, (2) scrap produced from Government-owned material is insignificant in consideration of the cost of segregation and control, or (3) Government contracts involved are fixed-price and provide for the retention of the scrap by the contractor; or

(e) When otherwise approved by the property administrator.

45.508 Physical inventories.

The contractor shall periodically physically inventory all Government property (except materials issued from stock for manufacturing, research, design, or other services required by the contract) in its possession or control and shall cause subcontractors to do likewise. The contractor, with the approval of the property administrator, shall establish the type, frequency, and procedures. These may include electronic reading, recording and reporting or other means of reporting the existence and location of the property and reconciling the records. Type and frequency of inventory should be based on the contractor's established practices, the type and use of the Government property involved, or the amount of Government property involved and its monetary value, and the reliability of the contractor's property control system. Type and frequency of physical inventories normally will not vary between contracts being performed by the contractor, but may vary with the types of property being controlled. Personnel who perform the physical inventory shall not be the same individuals who maintain the property records or have custody of the property unless the contractor's operation is too small to do otherwise.

[48 FR 42392, Sept. 19, 1983, as amended at 54 FR 25069, June 12, 1989]

45.508-1 Inventories upon termination or completion.

(a) *General.* Immediately upon termination or completion of a contract, the contractor shall perform and cause each subcontractor to perform a physical inventory, adequate for disposal purposes, of all Government property applicable to the contract, unless the requirement is waived as provided in paragraph (b) below.

(b) *Exception.* The requirement for physical inventory at the completion of a contract may be waived by the property administrator when the property is authorized for use on a follow-on contract; *provided,* that—

(1) Experience has established the adequacy of property controls and an acceptable degree of inventory discrepancies; and

(2) The contractor provides a statement indicating that record balances have been transferred in lieu of preparing a formal inventory list and that the contractor accepts responsibility and accountability for those balances under the terms of the follow-on contract.

(c) *Listings for disposal purposes.* (Note: This paragraph (c) applies only to nonprofit organizations.)

(1) Standard items that have been modified may be described on listings for disposal purposes as standard items with a general description of the modification.

(2) Items that have been fabricated, such as test equipment, shall be described in sufficient detail to permit a potential user to determine whether they are of sufficient interest to warrant further inspection.

45.508-2 Reporting results of inventories.

The contractor shall, as a minimum, submit the following to the property administrator promptly after completing the physical inventory:

(a) A listing that identifies all discrepancies disclosed by a physical inventory.

(b) A signed statement that physical inventory of all or certain classes of Government property was completed on a given date and that the official property records were found to be in agreement except for discrepancies reported.

45.508-3 Quantitative and monetary control.

When requested by the contracting officer, the contractor's reports of results of physical inventory shall be prepared on a quantitative and monetary basis and segregated by categories of property.

45.509 Care, maintenance, and use.

The contractor shall be responsible for the proper care, maintenance, and use of Government property in its possession or control from the time of receipt until properly relieved of responsibility, in accordance with sound industrial practice and the terms of the contract. The removal of Government property to storage, or its contemplated transfer, does not relieve the contractor of these responsibilities.

45.509-1 Contractor's maintenance program.

(a) Consistent with the terms of the contract, the contractor's maintenance program shall provide for—

(1) Disclosure of need for and the performance of preventive maintenance;

(2) Disclosure and reporting of need for capital rehabilitation; and

(3) Recording of work accomplished under the program.

(b) Preventive maintenance is maintenance performed on a regularly scheduled basis to prevent the occurrence of defects and to detect and correct minor defects before they result in serious consequences. An effective preventive maintenance program shall include at least—

(1) Inspection of buildings at periodic intervals to assure detection of deterioration and the need for repairs;

(2) Inspection of plant equipment at periodic intervals to assure detection of maladjustment, wear, or impending breakdown;

(3) Regular lubrication of bearings and moving parts in accordance with a lubrication plan;

(4) Adjustments for wear, repair, or replacement of worn or damaged parts and the elimination of causes of deterioration;

(5) Removal of sludge, chips, and cutting oils from equipment that will not be used for a period of time;

(6) Taking necessary precautions to prevent deterioration caused by contamination, corrosion, and other substances; and

(7) Proper storage and preservation of accessories and special tools furnished with an item of plant equipment but not regularly used with it.

(c) The contractor's maintenance program shall provide for disclosing and reporting the need for major repair, replacement, and other capital rehabilitation work for Government property in its possession or control.

(d) The contractor shall keep records of maintenance actions performed and any deficiencies in the Government property discovered as a result of inspections.

45.509-2 Use of Government property.

(a) The contractor's procedures shall be in writing and adequate (1) to assure that Government property will be used only for those purposes authorized in the contract and that any required approvals will be obtained, and (2) to provide a basis for determining and allocating rental charges.

(b) With respect to plant equipment with an acquisition value of $5,000 or more, the procedures, as a minimum, shall—

(1) Establish a minimum level of use below which an analysis of need shall be made and retention justified, except for inactive plants and equipment retained for mobilization (the use level may be established for individual items or families of items, depending upon circumstances of use);

(2) Provide for recording authorized and actual use consistent with the established use levels;

(3) Require periodic analyses of production needs for plant equipment utilization based upon known requirements; and

(4) Provide for prompt reporting to the contracting officer of all plant equipment for which retention is not justified.

[48 FR 42392, Sept. 19, 1983, as amended at 52 FR 30078, Aug. 12, 1987]

45.510 Property in possession of subcontractors.

The contractor shall require any of its subcontractors possessing or controlling Government property to adequately care for and maintain that property and assure that it is used only as authorized by the contract. The contractor's approved property control system shall include procedures necessary for accomplishing this responsibility.

45.511 Audit of property control system.

The Government may audit the contractor's property control system as frequently as conditions warrant. These audits may take place at any time during contract performance, upon contract completion or termination, or at any time thereafter during the period the contractor is required to retain such records. The contractor shall make all such records and related correspondence available to the auditors.

Subpart 45.6—Reporting, Redistribution, and Disposal of Contractor Inventory

45.600 Scope of subpart.

This subpart establishes policies and procedures for the reporting, redistribution, and disposal of Government property excess to contracts and of property that forms the basis of a claim against the Government (e.g., termination inventory under fixed-price contracts). This subpart does not apply to the disposal of real property or to property for which the Government has a lien or title solely as a result of advance or progress payments that have been liquidated.

45.601 Definitions.

Common item, as used in this subpart, means material that is common to the applicable Government contract and the contractor's other work.

Contractor-acquired property (see 45.101).

Contractor inventory, as used in this subpart, means—

(a) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in the Government and which exceeds the amounts needed to complete full performance under the entire contract;

(b) Any property that the Government is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of the contract (or subcontract thereunder), before completion of the work, for the convenience or at the option of the Government; and

(c) Government-furnished property that exceeds the amounts needed to complete full performance under the entire contract.

Government-furnished property (see 45.101).

Government property (see 45.101).

Line item, as used in this subpart, means a single line entry on a reporting form that indicates a quantity of property having the same description and condition code from any one contract at any one reporting location.

Personal property, as used in this subpart, means property of any kind or interest in it except real property, records of the Federal Government, and naval vessels of the following categories: battleships, cruisers, aircraft carriers, destroyers, and submarines.

Plant clearance, as used in this subpart, means all actions relating to the screening, redistribution, and disposal of contractor inventory from a contractor's plant or work site. The term *contractor's plant* includes a contractor-operated Government facility.

Plant clearance officer, as used in this subpart, means an authorized representative of the contracting officer assigned responsibility for plant clearance.

Plant clearance period, as used in this subpart, means the period beginning on the effective date of contract completion or termination and ending 90 days (or such longer period as may be agreed to) after receipt by the contracting officer of acceptable inventory schedules for each property classification. The final phase of the plant clearance period means that period after receipt of acceptable inventory schedules.

Plant equipment (see 45.101).

Precious metals, as used in this subpart, means uncommon and highly valuable metals characterized by their superior resistance to corrosion and oxidation. Included are silver, gold, and the platinum group metals—platinum, palladium, iridium, osmium, rhodium, and ruthenium.

Property administrator (see 45.501).

Public body means any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, any agency or instrumentality of any of the foregoing, any Indian tribe, or any agency of the Federal Government.

Real property (see 45.101).

Reportable property, as used in this subpart, means contractor inventory that must be reported for screening in accordance with this subpart before disposition as surplus.

Reporting activity, as used in this subpart, means the Government activity that initiates the Standard Form 120, Report of Excess Personal Property (or when acceptable to GSA, by data processing output).

Salvage (see 45.501).

Scrap (see 45.501).

Screening completion date, as used in this subpart, means the date on which all screening required by this subpart is to be completed. It includes screening within the Government and the donation screening period.

Serviceable or usable property, as used in this subpart, means property that has a reasonable prospect of use or sale either in its existing form or after minor repairs or alterations.

Special test equipment (see 45.101).

Special tooling (see 45.101).

Surplus property, as used in this subpart, means contractor inventory not required by any Federal agency.

Surplus Release Date (SRD), as used in this subpart, means the date on which screening of personal property for Federal use is completed and the property is not needed for any Federal use. On that date, property becomes surplus and is eligible for donation.

Termination inventory, as used in this subpart, means any property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated and properly allocable to the terminated portion of the contract. It includes Government-furnished property. It does not include any facilities, material, special test equipment, or special tooling that are subject to a separate contract or to a special contract requirement governing their use or disposition.

Work-in-process (see 45.501).

45.602 [Reserved]

45.603 Disposal methods.

An agency may exercise its rights to require delivery of any contractor inventory. If the agency does not exercise these rights, the contractor inventory shall be disposed of by one of the following methods in the priority indicated:

(a) Purchase or retention at cost by prime contractor or subcontractor of contractor-acquired property (see 45.605-1).

(b) Return of contractor-acquired property to suppliers (see 45.605-2).

(c) Use within the Government through the use of prescribed screening procedures (see 45.608).

(d) Donation to eligible donees (see 45.609).

(e) Sale (including purchase or retention at less than cost by the prime contractor or subcontractor)(see 45.610).

(f) Donation to public bodies in lieu of abandonment (see 45.611).

(g) Abandonment or destruction (see 45.611).

45.604 Restrictions on purchase or retention of contractor inventory.

A contractor's or subcontractor's authority to purchase, retain, or dispose of contractor inventory is subject to any contract provisions and to applicable Government restrictions on the disposition of property that is classified for security reasons, possesses military offensive or defensive characteristics, or is dangerous to public health, safety, or welfare.

45.605 Contractor-acquired property.

45.605-1 Purchase or retention at cost.

(a) The plant clearance officer shall encourage contractors to purchase or retain contractor-acquired property at cost. However, the contractor shall not include any part of the cost of property purchased or retained in any claim for reimbursement against the Government. Under cost-reimbursement contracts, appropriate adjustments shall be made for previously reimbursed costs. When the property is for use on a continuing Government contract or commercial operation, handling and transportation charges may be considered an allowable cost (included in the contractor's settlement proposal as *other costs* in the case of a termination), provided that the charges are reasonable.

(b) If a contractor purchases or retains contractor inventory for use on a continuing Government contract that is subsequently terminated, the property shall be allocated to the continuing contract, even though its purchase would otherwise constitute undue anticipation of production schedules. If, as a result of the purchase or retention of property from a terminated contract for use on other Government contracts, the contractor terminates subcontracts under the other Government contracts, reasonable termination charges of the subcontracts may be included as an allocable cost under the contract that generated the excess property.

45.605–2 Return to suppliers.

The plant clearance officer shall encourage contractors to return allocable quantities of contractor-acquired property to suppliers for full credit less either the supplier's normal restocking charge or 25 percent of the cost, whichever is less. Contractors may be reimbursed for reasonable transportation, handling, and restocking charges, but not for the cost of the returned property. Under cost-reimbursement contracts, appropriate adjustments shall be made for costs previously reimbursed. A contractor's property control system shall include procedures to ensure property is returned to the supplier for appropriate credit whenever feasible.

[48 FR 42392, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

45.605–3 Cost-reimbursement contracts.

Under cost-reimbursement contracts, property purchased or retained by the contractor or returned to suppliers shall not be reported on inventory schedules. The cognizant contract administration office, in coordination with the cognizant auditor, shall periodically review such transactions to protect the Government's interests.

45.606 Inventory schedules.

45.606–1 Submission.

(a) When property is no longer needed to perform the contract, the contractor shall prepare inventory schedules in accordance with the contract and instructions from the plant clearance officer and shall promptly submit the schedules to the cognizant contract administration office. Detailed instructions and requirements governing preparing and submitting inventory schedules are contained in 45.606–5. Agencies may use special inventory schedules for intra-agency screening of particular categories of contractor inventory (e.g., plant equipment of $5,000 or more). Such schedules may also be used for screening with other Federal agencies after coordination with GSA.

(b) The certificate on the inventory schedule (which tenders title to the property) must be executed when contractor inventory is reported. The prime contractor shall execute thi certificate, except that for subcontractor termination inventory the subcontractor shall execute the certificate.

45.606–2 Common items.

The contractor's inventory schedule shall not include any items that the contractor can reasonably use on other work without financial loss. However, the schedules shall include common items specified by the contracting officer for delivery to the Government or which are Government-furnished property.

45.606–3 Acceptance.

(a) Within 15 days after receipt of inventory schedules, the plant clearance officer shall review them, determine their acceptability, and request the contractor to correct any inadequate listings. Inventory schedules should not be rejected if the information is adequate for disposal purposes, even if complete cost data on work-in-process are not available. Rejection shall be limited, when possible, to specific items and shall not necessarily render the entire schedule unacceptable. If substantial errors are discovered that were not apparent on termination inventory schedules previously found acceptable, the final phase of a plant clearance period shall not begin until corrected schedules have been submitted, unless the plant clearance officer determines otherwise.

(b) The plant clearance officer, with the assistance of other Government personnel as necessary, shall verify that (1) the inventory is present at the location indicated, (2) the inventory is allocable to the contract, (3) the quantity and condition are correctly stated, and (4) the contractor has endeavored to divert items to other work. The verification may be recorded on SF 1423, Inventory Verification Survey. The plant clearance officer shall require the contractor to promptly correct any discrepancies on the inventory schedule or resubmit the schedule as necessary.

[48 FR 42392, Sept. 19, 1983, as amended at 55 FR 25530, June 21, 1990]

45.606-4 Withdrawals.

If, before final disposition, the contractor becomes aware that any items of contractor-acquired property listed in the inventory schedules are usable on other work without financial loss, the contractor shall purchase the items or retain them at cost and amend the inventory schedules and claim accordingly. Upon notifying the plant clearance officer, the contractor may purchase or retain at cost any other items of property included in the inventory schedules. Withdrawal of any Government-furnished property is subject to the written approval of the plant clearance officer. If withdrawal is requested after screening has started, the plant clearance officer shall notify immediately the appropriate screening activity.

45.606-5 Instructions for preparing and submitting schedules of contractor inventory.

(a) *Use of forms.* The contractor shall report contractor inventory on the following forms, as appropriate.

(1) *Standard Form 1426, Inventory Schedule A (Metals in Mill Product Form) and SF 1427, Inventory Schedule A - Continuation Sheet.* These forms are to be used to list metals in raw or primary form as furnished by the mill and on which there has been no subsequent fabricating operations. They are also to be used for listing nonmetallic materials, such as plastics, rubber, or lumber, in mill product form. They are not to be used for listing castings or forgings, which shall be reported on SF 1428.

(2) *Standard Form 1428, Inventory Schedule B and SF 1429, Inventory Schedule B - Continuation Sheet.* These forms are to be used to list all contractor inventory (including plant equipment) for which Standard Forms 1426, 1430, 1432, or 1434 are not appropriate. However, agencies may direct listing of particular categories of plant equipment on agency forms when standard forms are not appropriate. (See 45.505-6 and 45.606-1(a).)

(3) *Standard Form 1430, Inventory Schedule C (Work in Process) and SF 1431, Inventory Schedule C - Continuation Sheet.* These forms are to be used to list all work in process.

(4) *Standard Form 1432, Inventory Schedule D (Special Tooling and Special Test Equipment) and SF 1433, Inventory Schedule D - Continuation Sheet.* These forms are to be used to list such contractor inventory as dies, jigs, gauges, fixtures, special tools, and special test equipment.

(5) *Standard Form 1434, Termination Inventory Schedule E.* This is a short form to be used with SF 1438, Settlement Proposal (Short Form). Applicability is limited to termination settlement proposals under $10,000.

(b) *Submission.*

(1) Contractors shall report contractor inventory promptly after determining it to be excess, unless a later date is authorized by the contract or the plant clearance officer.

(2) Unless contract provisions or agency regulations prescribe otherwise, 12 copies of inventory schedules listing serviceable or salvable items and 6 copies of inventory schedules listing scrap items shall be presented to the plant clearance officer at the cognizant contract administration office.

(3) The standard inventory schedule forms may be reproduced by contractors, provided no change is made in size or format. Machine listings may be submitted if all essential elements of data are included and the appropriate signed standard form is submitted as a cover sheet.

(4) The appropriate continuation sheet shall be used when more than one page is needed.

(5) Partial schedules may be submitted when they cover substantial portions of a particular property classification of contractor inventory. The first page of each schedule submitted shall be identified as partial or final in the title block of the schedule.

(6) The contractor should consult with the plant clearance officer when in doubt as to item descriptions or other inventory schedule requirements.

(c) *Grouping contractor inventory for reporting purposes.* All line items of contractor inventory shall be grouped into the following categories in the order indicated and reported on separate forms (line items may not be divided for the purpose of avoiding screening requirements):

(1) *Classified property.* This category includes all property bearing a security classification, regardless of acquisition cost. Classified property should be further subdivided into the same categories as unclassified property (see paragraph (3) below).

(2) *Government-furnished property.* This category should be subdivided into the same categories as unclassified property (see paragraph (3) below).

(3) *Unclassified property.* Unclassified property shall be subdivided as follows:

(i) Special tooling, regardless of acquisition cost.

(ii) Scrap, regardless of acquisition cost.

(iii) Salvage, regardless of acquisition cost.

(iv) Remaining property having a line item acquisition cost of $500 or less.

(v) Property having a line item acquisition cost of more than $500, further separated into the following categories (these categories may be revised to suit agency needs):

(A) Aeronautical material and equipment.

(B) Electronic material and equipment.

(C) Special test equipment.

(D) Other serviceable or usable property.

(d) *General instructions for completing forms.* The inventory schedule forms are self-explanatory, except for the following general instructions and the specific instructions in paragraph (e) below.

(1) If the inventory applies solely to one contract modification, indicate the contract modification number in the same block as the prime contract number. If the inventory results from the termination of a contract, enter the termination docket number in the same block as the prime contract number.

(2) Provide in column b an accurate and complete commercial description for each item of serviceable contractor inventory. Where practical, show the manufacturer's name, address, and catalog number. Describe other items in sufficient detail to permit the Government to determine appropriate disposition. Include in descriptions for all line items the National Stock Number furnished to the contractor with Government-furnished property and the National Stock Number available in the contractor's property control system.

(3) Identify in column b any industrial diamonds, diamond swarf, and property containing economically recoverable quantities of precious metals by the type of metal and express the quantity of the metal in the appropriate weight unit or in the percentage of total content. In addition, hazardous material or property contaminated with hazardous material shall be identified as to the type of hazardous material.

(4) Enter in column c one of the following codes to indicate the condition of each item of material:

Code 1, Unused-good. Unused property that is usable without repairs and identical or interchangeable with new items from normal supply sources.

Code 2, Unused-fair. Unused property that is usable without repairs, but is deteriorated or damaged to the extent that utility is somewhat impaired.

Code 3, Unused-poor. Unused property that is usable without repairs, but is considerably deteriorated or damaged. Enough utility remains to classify the property better than salvage.

Code 4, Used-good. Used property that is usable without repairs and most of its useful life remains.

Code 5, Used-fair. Used property that is usable without repairs, but is somewhat worn or deteriorated and may soon require repairs.

Code 6, Used-poor. Used property that may be used without repairs, but is considerably worn or deteriorated to the degree that remaining utility is limited or major repairs will soon be required.

Code 7, Repairs required-good. Required repairs are minor and should not exceed 15 percent of original acquisition cost.

Code 8, Repairs required-fair. Required repairs are considerable and are estimated to range from 16 percent to 40 percent of original acquisition cost.

Code 9, Repairs required-poor. Required repairs are major because property is badly damaged, worn, or deteriorated, and are estimated to range from 41 percent to 65 percent of original acquisition cost.

Code X, Salvage. Property has some value in excess of its basic material content, but repair or rehabilitation to use for the originally intended purpose is clearly impractical. Repair for any use would exceed 65 percent of the original acquisition cost.

Code S, Scrap. Material that has no value except for its basic material content.

(5) Enter in columns e and f the standard or invoiced cost of the material being reported. If such data are not available, enter the estimated cost, identified by the symbol "(e)".

(6) Enter after the amount of the contractor's offer in column g the letter "A" if a credit for acquisition has been authorized or approved by the plant clearance officer. Enter the letter "C" if the amount represents your offer to acquire the item. In either case, enter the quantity on a second line if it is less than the full quantity shown in column d.

(e) *Instructions for completing specific forms.* The following instructions are in addition to the general instructions in paragraph (d) and the self-explanatory blocks on the inventory forms.

(1) *Inventory Schedule A (Metals in Mill Product Form) (SF 1426).*

(i) *Classification.* List each type of metal (such as aluminum or carbon steel) on a separate form, with the name or alloy shown in the Property Classification block. List like forms of the metal or alloy together in sequence. (For example, for carbon steel, group all the strip, followed by sheets, followed by the bar stock, etc.)

(ii) *Description.* Enter in column b the full commercial description and weight for all items. Identify the material specification entered in column b2 as either a Government specification or that of a particular industrial society or manufacturer. Complete columns b3, b4, and b5 to show the thickness, width, and length.

(2) *Inventory Schedule B (SF 1428).*

(i) *Classification.* Use a separate form for each classification. Enter the name of the classification in the Property Classification block. Items having no commercial value should be placed in a single classification designated *no commercial value.* The term *raw materials (other than metals)* means material in primary form. Examples are plastics, textiles, lumber, and chemicals. Arrange items in sequence under separate subheadings. For example, under the classification *chemicals,* group separately all acids, all alkalis, all recins, etc.

(ii) *Description.* In the inventory description for plant equipment (see 45.101 for definition), include the following as a minimum:

(A) Nomenclature or description of the item and Federal Supply Classification (see Cataloging Handbooks H2-1, H2-2, and H2-3).

(B) Federal Supply Code for Manufacturers (see Cataloging Handbooks H4-1 and H4-2) and, if available in the contractor's property control system, the name and address of the equipment manufacturer.

(C) Model/part number.

(3) *Inventory Schedule C (Work in Process) (SF 1430).*

(i) *Classification.* No classification of items is required. Do not list finished components on this form (use SF 1428).

(ii) *Description.* Enter in column b a description in sufficient detail to permit the Government to determine the appropriate disposition. Estimate percentage of completion for each line item.

(iii) *Condition* (column c). Generally, conditions X (salvage) or S (scrap) are applicable to work in process (see paragraph (d)(4) above).

(4) *Inventory Schedule D (Special Tooling and Special Test Equipment) (SF 1432).*

(i) *Classification.* Use a new form for each general classification, such as dies, jigs, gauges, fixtures, special tooling, and special test equipment.

(ii) *Description.* Furnish a description which will enable the plant clearance officer or screener to determine the appropriate disposition. Include tool nomenclature, tool number, related product part number, or function which the tool performs. Designate special tooling usable for maintenance programs by placing the letter "M" in the left-hand column, *For Use of Contracting Agency Only.*

(i) *Classification.* Use of a new form for each general classification of special tooling and special test equipment.

(ii) *Description.* Furnish a description which will enable the plant clearance officer or screener to determine the appropriate disposition, including the potential for reutilization. Include tool nomenclature, tool number, related product part number, and function which the tool performs. Designate special tooling usable for maintenance programs by placing the letter "M" in the left-hand column, *For Use of Contracting Agency Only.* Provide the end-item application and a brief description of the test function for each unit of special test equipment.

(5) *Termination Inventory Schedule E (SF 1434).*

(i) *Classification.* No special classification is required, but similar items should be grouped together. Several classifications may be listed on one form.

(ii) *Description.* Enter in column b the full commercial description of all items which have commercial value. For other items, furnish a description in sufficient detail to permit the Government to determine the appropriate disposition.

[48 FR 42392, Sept. 19, 1983, as amended at 52 FR 30078, Aug. 12, 1987; 54 FR 25060, June 12, 1989]

45.607 Scrap.

45.607-1 General.

(a) The contractor need not itemize scrap on inventory schedules if (1) the material is physically segregated in the contractor's plant and (2) the contractor submits a statement describing the material, estimating its cost, and providing other information necessary for the plant clearance officer to verify whether the property is scrap. The contractor shall sort the scrap to the extent economically feasible to assure the highest sale proceeds.

(b) The plant clearance officer shall review the schedules of property reported as scrap and, if necessary, physically inspect the property involv
the plant clearance officer deter
that any of the property is servic
usable, or salvable, the cont
shall resubmit it on appropriate i
tory schedules.

45.607-2 Recovering precious metals

(a) GSA is responsible for initi
the Government-wide precious m
recovery program (see FPMR 101
for procedures and requirements
covering precious metals).

(b) Agencies shall assure that
tractors generating contractor i
tory containing precious metal-be
scrap identify and promptly r
such items. Agencies are also resp
ble for establishing and maintain
program for recovering pre
metals. Agencies having no rec
and disposal facility available ma
quest information or recovery a
ance from the GSA regional
serving the area or the DOD Pre
Metals Recovery Program Man
Attention DLA-SIP, Cameron Sta
Alexandria, VA 22314.

(c) Precious metals shall be
aged in nonporous, smooth conta
in a manner to prevent loss thr
leakage or damage to the contai
(Glass containers shall not be u
Grindings or sweepings shall no
packaged in paper or wooden con
ers, because loss occurs by adhesi
the containers. Containers shal
marked to show the type of pre
metals.

(d) The shipping document sha
dicate the net weight of each ite
the nearest ounce (troy or avo
pois). Shipment shall be made by
most economical means available,
sistent with adequate safeguard
prevent loss or theft.

45.608 Screening of contractor inven

45.608-1 General.

(a) Serviceable or usable propert
cluded in the contractor's inven
schedules that is not purchased o
tained by the prime contractor or
contractor or returned to supp
shall be screened for use by Gov
ment agencies before disposition
donation or sale. Agencies shall as
the widespread dissemination of i

mation concerning the availability of contractor inventory.

(b) There are four categories of screening: standard, agency, limited, and special items. The plant clearance officer shall determine the categories of screening required, initiate prescribed screening, and assure accomplishment of transfer and donation.

Table 45-1 lists the type of property and screening period for each of these categories. When circumstances warrant, the plant clearance officer may extend the period for agency screening or arrange for more extensive screening than that prescribed. In the event of a conflict between Table 45-1 and a specific contract requirement, items shall be screened as provided by the contract.

Table 45-1

Screening Requirements by Type of Property

Screening Categories	Type of Property	Period
Standard	Line items in excess of $500..	90 days/(see 45.608-2)
Agency	Special tooling, perishables, property bearing a security classification, property dangerous to public health and safety, regardless of acquisition cost, and agency-peculiar property..	30 days/(See 45.608-3)
Limited	Special tooling, scrap and salvage, property in condition codes 3, 6, 9, X, and S, work-in-process, inventory schedules (the total acquisition cost of which is reported as $2,500 or less), and line items of $500 or less (except perishables, property bearing a security classification, and property dangerous to public health and safety)..	30 days/(see 45.608-4)
Special Items	Special test equipment with standard components..	(see 45.608-5(a))
	Special test equipment without standard components.	(see 45.608-5(b))
	Printing equipment....................	(see 45.608-5(c))
	Automatic data processing equipment..	(see 45.608-5(d))
	Nuclear materials......................	(see 45.608-5(e))

45.608-2 Standard screening.

(a) Standard screening applies to serviceable property with a line item value in excess of $500 that does not meet the criteria for another screening category.

(b) Standard screening begins on the date the plant clearance officer receives acceptable contractor inventory schedules and ends 90 days thereafter. The period is broken into three phases as follows:

(1) *1st through 30th day—screening by the contracting agency.* The agency shall screen the listed items for its use. When screening is completed, the plant clearance officer shall delete the retained items from the schedules.

(2) *31st through 75th day—screening by all Federal agencies.* Not later than the 31st day, the plant clearance officer shall send four copies of the revised schedules and Standard Form (SF) 120, Report of Excess Personal Property, to the General Services Administration (GSA) regional office that serves the region in which the property is located. If the plant clearance officer receives a request for property transfer after submission of the SF 120, and before receiving a GSA property transfer order, a prompt request shall be forwarded to GSA for approval to withdraw the items from the inventory schedule. The regional GSA office will prepare and issue circulars and catalogs to all Federal agencies within the region. GSA will honor requests for transfer of property on a *first-come first-served* basis through the 75th day. The GSA regional office will transmit to the plant clearance officer the approved orders and shipping instructions for property to be transferred. The 75th day is the surplus release date and will be shown on the SF 120. The plant clearance officer may not extend this date.

(3) *76th through 90th day—screening by GSA for possible donation.* During this period, GSA will arrange for screening of all remaining property for possible donation to eligible donees. Procedures for donation are in 45.609. The 90th day is the screening completion date and will be shown on the SF 120. The plant clearance officer shall not extend this date.

45.608-3 Agency screening.

Agency screening is the procedure for screening certain types of property (see Table 45-1) only within the contracting agency. The screening period begins on the date the plant clearance officer receives acceptable inventory schedules and ends 30 days later.

45.608-4 Limited screening.

(a) Items that are scrap or salvage or that otherwise have a limited potential for use (except special tooling) are not ordinarily subject to standard or agency screening. The plant clearance officer shall include listings of such property in a special file, which shall be made available to GSA for limited screening. The screening period for such property begins on the date the plant clearance officer receives acceptable inventory schedules and ends 30 days later. This period is apportioned into two phases, as follows:

(1) 1st through 15th day—GSA selection of items for Federal utilization.

(2) 16th through 30th day—GSA selection of items for donation.

(b) For special tooling, the screening period described in paragraph (a) above begins upon completion of agency screening.

45.608-5 Special items screening.

Special procedures are established for the following types of property:

(a) *Special test equipment with standard components.* (1) Contractors reporting special test equipment that contains standard, general, or multipurpose components will describe the composite unit to clearly reflect its capability. Standard components that can be economically removed and reused will be listed and described in sufficient detail to permit screening.

(2) If the contractor has a requirement for the standard components to meet other approved special test equipment or facilities requirements, the contractor shall annotate the SF 1432, Inventory Schedule D (Special Tooling and Special Test Equipment), to reflect this requirement. Screening shall be accomplished in accordance with agency procedures for the first 30 days. If there are no agency requirements for the composite unit, and if the administrative contracting officer approves the retention, the contractor shall have priority for the standard components for which it has indicated a requirement.

(3) Standard components that have not been retained by the agency or the contractor shall be screened in accordance with standard requirements for the 31st through 75th day. Standard components shall not be removed from the composite unit until a requirement has been established. If no requirements exist, the composite units shall be donated or sold in accordance with prescribed procedures.

(b) *Special test equipment without standard components.* Special test equipment without standard components shall receive agency screening for 30 days. Items for which no requirements exist shall receive limited screening for an additional 30 days.

(c) *Printing equipment.* Agencies shall report all printing equipment excess to their requirements to the Public Printer, Government Printing Office, North Capitol and H Streets, NW, Washington, DC 20401, after screening within the agency (see 44 U.S.C. 312). If the Public Printer indicates no requirements, the reporting activity shall submit the listing of printing equipment to the General Services Administration for further use and donation screening.

(d) *Procedures for automatic data processing equipment (ADPE).* (1) The plant clearance officer shall report ADPE items on SF 120, Report of Excess Personal Property (or when acceptable to GSA, by data processing output). This requirement applies, regardless of Federal Supply Class, to Government-owned ADPE or to ADPE leased by the contractor under terms providing the Government an option to purchase (or other residual interests, including the right to use until expiration of the lease). ADPE should be reported as soon as it is possible to project the release date, within the following reporting schedule:

(i) Government-owned ADPE shall be reported upon receipt of notice of complete termination or when it is determined that the property will no longer be needed on the contract. After completion of screening within the agency, schedules listing ADPE

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shall be referred to GSA for a 90-day screening period.

(ii) Leased ADPE, which is charged to one or more cost-reimbursement contracts, shall be reported promptly on a separate SF 120 when it is determined that the property will no longer be needed on the contracts. To preclude unnecessary lease costs, the release date established shall not extend the rental period beyond the date it can be released to the lessor. A quotation shall be requested from the lessor projecting the reduced price at which the equipment may be purchased based on accumulated rental credits through the anticipated release date. A copy of this quotation should be attached to the Standard Form 120, but submission of the Standard Form 120 should not be delayed pending receipt of this information.

(2) The following information shall be reported on SF 120:

(i) A complete list of each equipment item, identified by manufacturer's series and model number, and modifications and attachments applied to each component (including identification number if Government-owned); type of maintenance contract; contractor; and monthly cost.

(ii) A separate attachment showing the time in service for each component, average use (hours per month), average downtime per month for the 12-month period immediately preceding the report, and, if appropriate, a narrative description of any history of repeated equipment failure.

(iii) A list of compilers and software packages, such as executive routines, engineering drawings, and maintenance manuals, available with the equipment.

(iv) In the case of a complete equipment configuration, information regarding power and air conditioning requirements.

(e) *Nuclear materials.* (1) The possession, use, and transfer of certain nuclear materials are subject to the regulatory controls of the Nuclear Regulatory Commission (NRC). The materials are defined as follows:

(i) By-product material—any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to producing or using special nuclear material.

(ii) Source material—uranium or thorium, or any combination thereof, in any physical or chemical form; or ores which contain by weight one-twentieth of 1 percent (0.05 percent) or more of uranium, thorium, or any combination thereof. Source material does not include special nuclear material.

(iii) Special nuclear material—plutonium, uranium 233, uranium enriched in the isotope 233 or in the isotope 235, and any other material that the NRC determines to be special nuclear material (but not including source material); or any material artificially enriched by any nuclear material.

(2) Plant clearance officers shall submit listings of excess nuclear material in the categories described above for screening by the contracting activity. If there are no requirements, the ultimate method of disposal shall be dependent upon the license issued by the NRC or the respective states and pertinent Federal and agency regulations.

[48 FR 42392, Sept. 19, 1983, as amended at 54 FR 34756, Aug. 21, 1989]

45.608-6 Waiver of screening requirements.

Agency heads or their designees may authorize exceptions from screening requirements; *provided,* (a) there are compelling circumstances clearly in the Government's interest and (b) the contracting agency prepares a written notice, including justification, and provides a copy to the Administrator, General Services Administration, and the contract administration office 10 days before the effective date of the exception.

45.608-7 Reimbursement of costs for transfer of contractor inventory.

The contracting agency shall not be reimbursed for the acquisition cost of any property selected by another agency or for overhead or administrative costs associated with such property. The transferree will pay any transportation costs that are not the contractor's responsibility. Costs for packing, crating, preparation for shipment, and loading of contractor inventory are chargeable to the contract for assets subject to the Government property clauses at 52.245-2, Government Property (Fixed-Price Contracts) and 52.245-5, Government Property (Cost-Reimbursement, Time-and-Material, or Labor-hour Contracts), and such costs are ordinarily included in the contractor's settlement proposal for termination inventory. The transferee will pay such costs for property subject to 52.245-7, Government Property (Consolidated Facilities), or 52.245-10, Government Property (Facilities Acquisition), or 52.245-11, Government Property (Facilities Use), unless such costs are otherwise the contractor's responsibility. The contract administration office is responsible for obtaining packing, crating, and handling service. To accelerate plant clearance, the transferee shall include all appropriate data, including funding data, in the transfer or shipping document.

[54 FR 34756, Aug. 21, 1989]

45.608-8 Report of excess personal property (SF 120).

(a) This subsection provides instructions for completing SF 120, Report of Excess Personal Property, when reporting contractor inventory in accordance with 45.608-2. (For reporting other agency excess personal property, see 41 CFR 101-43.4901-120-1, Instructions for preparing SF 120).

(b) All items on the form are self-explanatory, except as follows:

Item 1, Report number. Enter the serial number of the report and any other identifying number or symbol required by the reporting agency. If the report is a correction or withdrawal (complete or partial) of a prior report, the original report number shall be entered, followed by the letter a, b, or c, etc., to identify the number of successive correcting or withdrawing reports.

Item 3, Total cost. Enter the total of all amounts shown on the inventory schedules.

Item 4, Type of report.

Box b—Check if necessary to correct an original report and complete items 1, 2, 3, 4, 5, and 7. Complete the remaining items only to the extent necessary to show the correction.

Box c—Check for partial withdrawals of contractor inventory previously reported and complete items 1, 2, 3, 4, 5, and 7. Re-identify in column 18(b) the line items or portions of line items withdrawn. In column 18(e), show the number of units withdrawn. In column 18(g), show the acquisition cost of the units withdrawn. In item 3, enter the total acquisition cost of all items withdrawn.

Box d—Check for total withdrawal of contractor inventory previously reported and complete items 1, 2, 3, 4, 5, and 7. Provide explanatory remarks in column 18(b).

Item 5, To. Enter the name(s) and address(es) of the screening agencies or the GSA regional office cognizant of the location of the property. (ADPE, except supply items under $1,500, is reported to the Central Office, GSA.)

Item 6, Appropriation or fund to be reimbursed. No entry shall be made in this item if the net proceeds are to be deposited in the Treasury as miscellaneous receipts (see 45.610-3). However, in exchange/sale transactions an appropriation number is required.

Item 8, Report approved by. Enter signature and title of the Federal official approving report.

Item 12, GSA control number. Not to be used by reporting activity.

Item 13, FSC group number, if known. If inventory schedules contain multiple FSC groups, insert "See Inventory Schedules."

Item 14, Location of property. Enter the name of contractor holding the property and the specific address where the property is located.

Item 15, Reimbursement required. Enter X in the block designated "No."

Item 16, Agency control number. Leave blank.

Item 17, Surplus release date (see 45.608-2).

Item 18, Excess property list. Leave blank.

Column a, Item number. Leave blank.

Column b, Description. Enter the following information:

(1) Identification of attached inventory schedules and the number of pages for each schedule.

(2) The screening completion date (see 45.608-2).

(3) The following notation: "It is imperative that fund appropriations for the transportation of the materials be furnished with the transfer order." If, pursuant to 45.608-7, the transferee is responsible for funding, packing, crating, and handling, include this additional notation: "Fund appropriations for packing, crating, and handling of inventory described herein must also be provided by the transferee."

(4) Contract number.

(5) When reporting motor vehicles in Federal Supply Groups 23, 24, and 38—

(i) In column 18(b), the estimated one-time cost of repairs (parts and labor); and

(ii) In column 18(c), a condition code based on the estimated cost of repairs.

(c) Columns c through h. Leave blank, except as they are used for 5(ii) above.

[48 FR 42392, Sept. 19, 1983, as amended at 54 FR 34756, Aug. 21, 1989]

45.609 Donations.

(a) Property may be donated only after it has been determined to be surplus following appropriate utilization screening. The donation of surplus property to an authorized donee is subordinate to any need for property by a Federal agency.

(b) The GSA is responsible for making necessary arrangements for donation screening of serviceable property during the last 15 days of the 90-day screening period.

(c) Items that have been selected for donation shall not be retained longer than 42 calendar days from the surplus release date. The plant clearance officer shall authorize release to the eligible donees immediately upon receipt of GSA approval and shipping instructions. If approval and shipping instructions, including provision for payment of all costs incident to donation, are not received within the 42-day period, the property shall be otherwise disposed of as surplus. All costs incident to donation that are not the responsibility of the contractor shall be borne by the donee.

(d) Agencies having a current essential requirement may withdraw property undergoing donation screening. In all other cases, property may be withdrawn only after GSA concurrence.

45.610 Sale of surplus contractor inventory.

45.610-1 Responsibility.

(a) The Administrator, GSA, exercises general supervision and direction over the disposition of surplus personal property, including sales of surplus contractor inventory. Policy and procedures for sales of contractor inventory are contained in the Federal Property Management Regulations (FPMR) 41 CFR part 101-45. Sales of contractor inventory under the control of the Department of Defense are conducted in accordance with the DOD Supplement to the FAR.

(b) Reportable property submitted to GSA on SF 120 for utilization screening and not otherwise transferred or donated will automatically be programmed for sale by the GSA regional office.

(c) All other property requiring sale shall be reported to GSA on SF 126, Report of Personal Property for Sale, and in accordance with any additional instructions provided by the GSA regional office cognizant of the location where the property is physically located.

45.610-2 Exemptions from sale by GSA.

(a) Agency heads may seek exemptions from the Administrator, GSA, by submitting a letter explaining the impairment or adverse effect of sale by GSA and justifying the need for the exemption.

(b) GSA regional offices may authorize sale by the reporting activity of perishable items or small lots of limited-value property at isolated locations.

45.610-3 Proceeds of sale.

Proceeds of any sale are to be credited to the Treasury of the United States as miscellaneous receipts, except where the contract or any subcontract thereunder authorizes the proceeds to be credited to the price or cost of the work (40 U.S.C. 485(a) and (e)).

45.610-4 Contractor inventory in foreign countries.

Contractor inventory located in foreign countries shall be sold or disposed of in accordance with agency procedures (see 40 U.S.C. 511-514).

45.611 Destruction or abandonment.

(a) Surplus property may be destroyed or abandoned only after every effort has been made to dispose of it by other authorized methods. Before authorizing destruction or abandonment, the plant clearance officer shall determine in writing that—

(1) The property has no commercial value and no value to the Government;

(2) The estimated cost of care and handling is greater than the probable sale price; or

(3) Because of its nature, the property constitutes a danger to public health, safety, or welfare.

(b) Unless permitted by the contract, no contractor inventory shall be abandoned on the contractor's premises without the contractor's written consent.

(c) Surplus property for which a determination has been made under subparagraph (a)(1) or (2) above may, however, be donated to public bodies in lieu of abandonment or destruction. All costs incident to donation shall be borne by the donee.

45.612 Removal and storage.

45.612-1 General.

Contractor inventory shall be removed from the contractor's premises as soon as possible to preclude storage expenses.

45.612-2 Special storage at the contractor's risk.

When the contractor finds it necessary to remove property from the premises before expiration of the plant clearance period, the contractor may, with the concurrence of the plant clearance officer, store property in a warehouse or other storage location on or off the contractor's premises. Storage shall in no way modify the contractor's responsibility for the property. The expense of storage, including any cost incident to the transportation to and from the storage area, shall normally be borne by the contractor and shall not be charged directly or indirectly to Government contracts unless the contracting officer determines that the storage is for the convenience of the Government.

45.612-3 Special storage at the Government's expense.

(a) Contractor inventory may be stored at the Government's expense only when the contracting officer determines that it should be retained in storage for anticipated use.

(b) When the plant clearance officer recommends that the contracting office execute a storage agreement with the contractor, the request shall be accompanied with adequate data to justify the agreement (e.g., property to be stored, storage period, and cost to the Government).

(c) If the contractor will not agree to storage on its premises, the plant clearance officer shall submit adequate information to permit a decision by the contracting office for storage on a Government or commercial facility (e.g., storage space required; necessary packing, crating, and shipping services; and information as to available Government or commercial storage facilities in the local area).

45.613 Property disposal determinations.

Written determinations supporting abandonment, destruction, or other appropriate disposition shall be made by the plant clearance officer and reviewed by an appropriate reviewing authority within the agency.

45.614 Subcontractor inventory.

(a) The disposal policies and procedures in this subpart are applicable to contractor inventory in the possession of subcontractors, except inventory under terminated subcontracts for which the termination contracting officer has authorized the prime contractor to conclude settlements (see 49.108-4).

(b) Subcontractors in all tiers shall prepare inventory schedules in accordance with the requirements of this subpart. Forms prescribed for use by prime contractors may be used by subcontractors, but their use is not required if substantially equivalent information is provided. Subcontractor inventory and any disposal recommendations (including scrap recommendations) shall be reported through the next-higher-tier subcontractor to the contractor, who is responsible for reporting property to the cognizant plant clearance officer. The prime contractor and each subcontractor are responsible for review and approval of inventory schedules submitted by their respective next-lower-tier subcontractors. This includes review and, if necessary, physical survey of subcontractor inventory that is contained in a termination settlement proposal to assure that it is physically, technically, and quantitatively allocable to the contract, and cannot be reasonably diverted to other work of the subcontractor.

(c) Any rights which the prime contractor has or acquires in the inventory of first-tier or lower-tier subcontractors shall, to the extent directed by the contracting officer, be exercised for the benefit of the Government in accordance with the provisions of the prime contract.

(d) Contract administration offices shall assure that prime contractors have performed adequate allocability reviews of subcontractor inventory and have determined that materials reasonably usable on other prime or subcontractor work are not included in a termination settlement proposal. The plant clearance officer for the prime contractor plant is responsible for determining the adequacy of screening, allocability reviews, and proper crediting of proceeds for the disposal of subcontractor inventory by the prime contractor. Assistance should generally be secured from other officers for verification, determination of allocability, local screening, and plant clearance action when property is located outside the geographic area of the cognizant contract administration office.

[48 FR 42392, Sept. 19, 1983, as amended at 54 FR 34756, Aug. 21, 1989]

45.615 Accounting for contractor inventory.

Following disposition of all contractor inventory, and after due application of proceeds, the plant clearance officer shall prepare SF 1424, Inventory Disposal Report, accounting for all property reported by the contractor and its disposition. The report shall indicate any inventory lost, damaged, destroyed, or otherwise unaccounted for, as well as any changes in quantity or value of inventory made by the contractor after submission of the initial schedules. The report shall be transmitted to the property administrator or, for termination inventory, to the termination contracting officer.

PART 46—QUALITY ASSURANCE

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42415, Sept. 19, 1983, unless otherwise noted.

46.000 Scope of part.

This part prescribes policies and procedures to ensure that supplies and services acquired under Government contract conform to the contract's quality and quantity requirements. Included are inspection, acceptance, warranty, and other measures associated with quality requirements.

Subpart 46.1—General

46.101 Definitions.

Acceptance, as used in this part, means the act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract.

Contract quality requirements, means the technical requirements in the contract relating to the quality of the product or service and those contract clauses prescribing inspection, and other quality controls incumbent on the contractor, to assure that the product or service conforms to the contractual requirements.

Government contract quality assurance, means the various functions, including inspection, performed by the Government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.

Inspection, means examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

Off-the-shelf item, means an item produced and placed in stock by a contractor, or stocked by a distributor, before receiving orders or contracts for its sale. The item may be commercial or produced to military or Federal specifications or description.

Subcontractor (see 44.101).

Testing, means that element of inspection that determines the properties or elements, including functional operation of supplies or their components, by the application of established scientific principles and procedures.

46.102 Policy.

Agencies shall ensure that—

(a) Contracts include inspection and other quality requirements, including warranty clauses when appropriate, that are determined necessary to protect the Government's interest.

(b) Supplies or services tendered by contractors meet contract requirements;

(c) Government contract quality assurance is conducted before acceptance (except as otherwise provided in this part), by or under the direction of Government personnel;

(d) No contract precludes the Government from performing inspection;

(e) Nonconforming supplies or services are rejected, except as otherwise provided in 46.407; and

(f) The quality assurance and acceptance services of other agencies are used when this will be effective, economical, or otherwise in the Government's interest (see subpart 42.1.)

46.103 Contracting office responsibilities.

Contracting offices are responsible for—

(a) Receiving from the activity responsible for technical requirements any specifications for inspection, testing, and other contract quality requirements essential to ensure the integrity of the supplies or services (the activity responsible for technical requirements is responsible for prescribing such inspection, testing, and other contract quality requirements);

(b) Including in solicitations and contracts the appropriate requirements for the contractor's control of quality for the supplies or services to be acquired;

(c) Issuing any necessary instructions to the cognizant contract administration office and acting on recommendations submitted by that office (see 42.301 and 46.104(f); and

(d) When contract administration is retained (see 42.203), verifying that the contractor fulfills the contract quality requirements.

46.104 Contract administration office responsibilities.

When a contract is assigned for administration to the contract administration office cognizant of the contractor's plant, that office, unless specified otherwise, shall—

(a) Develop and apply efficient procedures for performing Government contract quality assurance actions under the contract in accordance with the written direction of the contracting office:

(b) Perform all actions necessary to verify whether the supplies or services conform to contract quality requirements;

(c) Maintain, as part of the performance records of the contract, suitable records reflecting—

(1) The nature of Government contract quality assurance actions, including, when appropriate, the number of observations made and the number and type of defects; and

(2) Decisions regarding the acceptability of the products, the processes, and the requirements, as well as action to correct defects.

(d) Implement any specific written instructions from the contracting office;

(e) Report to the contracting office any defects observed in design or technical requirements, including contract quality requirements; and

(f) Recommend any changes necessary to the contract, specifications, instructions, or other requirements that will provide more effective operations or eliminate unnecessary costs (see 42.102(e) and 46.103(c)).

46.105 Contractor responsibilities.

(a) The contractor is responsible for carrying out its obligations under the contract by—

(1) Controlling the quality of supplies or services;

(2) Tendering to the Government for acceptance only those supplies or services that conform to contract requirements;

(3) Ensuring that vendors or suppliers of raw materials, parts, components, subassemblies, etc., have an acceptable quality control system; and

(4) Maintaining substantiating evidence, when required by the contract, that the supplies or services conform to contract quality requirements, and furnishing such information to the Government as required.

(b) The contractor may be required to provide and maintain an inspection system or program for the control of quality that is acceptable to the Government (see 46.202).

(c) The control of quality by the contractor may relate to, but is not limited to—

(1) Manufacturing processes, to ensure that the product is produced to, and meets, the contract's technical requirements;

(2) Drawings, specifications, and engineering changes, to ensure that manufacturing methods and operations meet the contract's technical requirements;

(3) Testing and examination, to ensure that practices and equipment provide the means for optimum evaluation of the characteristics subject to inspection;

(4) Reliability and maintainability assessment (life, endurance, and continued readiness);

(5) Fabrication and delivery of products, to ensure that only conforming products are tendered to the Government;

(6) Technical documentation, including drawings, specifications, handbooks, manuals, and other technical publications;

(7) Preservation, packaging, packing, and marking; and

(8) Procedures and processes for services to ensure that services meet contract performance requirements.

(d) The contractor is responsible for performing all inspections and test required by the contract except those specifically reserved for performance by the Government (see 46.201(c).

[48 FR 42415, Sept. 19, 1983, as amended at 55 FR 38517, Sept. 18, 1990]

Subpart 46.2—Contract Quality Requirements

46.201 General.

(a) The contracting officer shall include in the solicitation and contract the appropriate quality requirements. The type and extent of contract quality requirements needed depends on the particular acquisition and may range from inspection at time of acceptance to a requirement for the contractor's implementation of a comprehensive program for controlling quality.

(b) As feasible, solicitations and contracts may provide for alternative, but substantially equivalent, inspection methods to obtain wide competition and low cost. The contracting officer may also authorize contractor-recommended alternatives when in the Government's interest and approved by the activity responsible for technical requirements.

(c) Although contracts generally make contractors responsible for performing inspection before tendering supplies to the Government, there are situations in which contracts will provide for specialized inspections to be performed solely by the Government. Among situations of this kind are—

(1) Tests that require use of specialized test equipment or facilities not ordinarily available in suppliers' plants or commercial laboratories (e.g., ballistic testing of ammunition, unusual environmental tests, and simulated service tests); and

(2) Contracts that require Government testing for first article approval (see subpart 9.3).

(d) Except as otherwise specified by the contract, required contractor testing may be performed in the contractor's or subcontractor's laboratory or testing facility, or in any other laboratory or testing facility acceptable to the Government.

46.202 Types of contract quality requirements.

Contract quality requirements fall into three general categories, depending on the extent of quality assurance needed by the Government for the acquisition involved.

46.202-1 Government reliance on inspection by contractor.

(a) Except as specified in (b) below, the Government shall rely on the contractor to accomplish all inspection and testing needed to ensure that supplies or services acquired under small purchases conform to contract quality requirements before they are tendered to the Government (see 46.301).

(b) The Government shall not rely on inspection by the contractor if the contracting officer determines that the Government has a need to test the supplies or services in advance of their tender for acceptance, or to pass judgment upon the adequacy of the contractor's internal work processes. In making the determination, the contracting officer shall consider—

(1) The nature of the supplies and services being purchased and their intended use (see 46.204 and Table 46-1);

(2) The potential losses in the event of defects;

(3) The likelihood of uncontested replacement or correction of defective work; and

(4) The cost of detailed Government inspection.

[48 FR 42415, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986]

46.202-2 Standard inspection requirements.

(a) Standard inspection requirements are contained in the clauses prescribed in 46.302 through 46.308, and 46.310, and in the product and service specifications that are included in solicitations and contracts.

(b) The clauses referred to in (a) above—

(1) Require the contractor to provide and maintain an inspection system that is acceptable to the Government;

(2) Give the Government the right to make inspections and tests while work is in process; and

(3) Require the contractor to keep complete, and make available to the Government, records of its inspection work.

46.202-3 Higher-level contract quality requirements.

(a) Higher-level contract quality requirements are contained in the clause prescribed in 46.311. Such requirements are appropriate in solicitations and contracts for complex and critical items (see 46.203(b) and (c) or when the technical requirements of the contract are such as to require—

(1) Control of such things as work operations, in-process controls, and inspection (see 46.204 and Table 46-1); or

(2) Attention to such factors as organization, planning, work instructions, documentation control, and advanced metrology.

(b) If it is in the Government's interest to require that higher-level contract quality requirements be maintained, the contract shall require the contractor to comply with a Government-specified inspection system, quality control system, or quality program (e.g., MIL-I-45208, MIL-Q-9858, NHB 5300.4(1B), NHB 5300.4(1C), FED-STD-368, or ANSI/ASME NQA-1). The contracting officer shall consult technical personnel before including one of these specifications in a contract.

46.203 Criteria for use of contract quality requirements.

The extent of contract quality requirements, including contractor inspection, required under a contract shall usually be based upon the classification of the contract item (supply or service) as determined by its technical description, its complexity, and the criticality of its application.

(a) *Technical description.* Contract items may be technically classified as—

(1) Commercial (described in commercial catalogs, drawings, or industrial standards);

(2) Military-Federal (described in Government drawings and specifications); or

(3) Off-the-shelf (see 46.101).

(b) *Complexity.* (1) Complex items have quality characteristics, not wholly visible in the end item, for which contractual conformance must be established progressively through precise measurements, tests, and controls applied during purchasing, manufacturing, performance, assembly, and functional operation either as an individual item or in conjunction with other items.

(2) Noncomplex items have quality characteristics for which simple measurement and test of the end item are sufficient to determine conformance to contract requirements.

(c) *Criticality.* (1) A critical application of an item is one in which the failure of the item could injure personnel or jeopardize a vital agency mission. A critical item may be either peculiar, meaning it has only one application, or common, meaning it has multiple applications.

(2) A noncritical application is any other application. Noncritical items may also be either peculiar or common.

46.204 Application of criteria.

Subject to mandatory limitations contained in the clause prescriptions (see subpart 46.3), Table 46-1 may be used as a guide in selecting the appropriate contract quality requirements. Where circumstances warrant, the contracting officer may specify a requirement different from that arrived at through use of the table, except for off-the-shelf items.

TABLE 46-1 CONTRACT QUALITY REQUIREMENTS GUIDE

Item		Type of Contract	
Technical Description	Complexity	Application	Quality Requirement
Commercial	Noncomplex	Noncritical Common	Contractor inspection (46.202-1)
Commercial	Noncomplex	Noncritical Peculiar	Contractor inspection (46.202-1)
Commercial	Noncomplex	Critical	Standard inspection (46.202-2)
Commercial	Complex	Noncritical Common	Contractor inspection (46.202-1)
Commercial	Complex	Noncritical Peculiar	Standard inspection (46.202-2)
Commercial	Complex	Critical	Higher-level (46.202-3)
Military-Federal	Noncomplex	Noncritical Common	Standard inspection (46.202-2)
Military-Federal	Noncomplex	Noncritical Peculiar	Standard inspection (46.202-2)
Military-Federal	Noncomplex	Critical	Higher-level (46.202-3)
Military-Federal	Complex	Noncritical Common	Standard inspection (46.202-2)
Military-Federal	Complex	Noncritical Peculiar	Higher-level (46.202-3)
Military-Federal	Complex	Critical	Higher-level (46.202-3)
Off-the-shelf	All	Noncritical	Contractor inspection (46.202-1)
Off-the-shelf	All	Critical	Standard inspection (46.202-2)

Subpart 46.3—Contract Clauses

46.301 Contractor inspection requirements.

The contracting officer shall insert the clause at 52.246-1, Contractor Inspection Requirements, in solicitations and contracts for supplies or services when the contract amount is expected to be within the small purchase limitation and (a) inclusion of the clause is necessary to ensure an explicit understanding of the contractor's inspection responsibilities, or (b) inclusion of the clause is required under agency procedures. The clause shall not be used if the contracting officer has made the determination specified in 46.202-1(b).

46.302 Fixed-price supply contracts.

The contracting officer shall insert the clause at 52.246-2, Inspection of Supplies—Fixed-Price, in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation and inclusion of the clause is in the Government's interest. If a fixed-price incentive contract is contemplated, the contracting officer shall use the clause with its Alternate I. If a fixed-ceiling-price contract with retroactive price redetermination is contemplated, the contracting officer shall use the clause with its Alternate II.

46.303 Cost-reimbursement supply contracts.

The contracting officer shall insert the clause at 52.246-3, Inspection of Supplies—Cost-Reimbursement, in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a cost-reimbursement contract is contemplated.

46.304 Fixed-price service contracts.

The contracting officer shall insert the clause at 52.246-4, Inspection of Services—Fixed-Price, in solicitations and contracts for services, or supplies that involve the furnishing of services, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation and inclusion is in the Government's interest.

46.305 Cost-reimbursement service contracts.

The contracting officer shall insert the clause at 52.246-5, Inspection of Services—Cost Reimbursement, in solicitations and contracts for services, or supplies that involve the furnishing of services, when a cost-reimbursement contract is contemplated.

46.306 Time-and-material and labor-hour contracts.

The contracting officer shall insert the clause at 52.246-6, Inspection—Time-and-Material and Labor-Hour, in solicitations and contracts when a time-and-material contract or a labor-hour contract is contemplated. If Government inspection and acceptance are to be performed at the contractor's plant, the contracting officer shall use the clause with its Alternate I.

[48 FR 42415, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986]

46.307 Fixed-price research and development contracts.

(a) The contracting officer shall insert the clause at 52.246-7, Inspection of Research and Development—Fixed-Price, in solicitations and contracts for research and development when (1) the primary objective of the contract is the delivery of end items other than designs, drawings, or reports, (2) a fixed-price contract is contemplated, and (3) the contract amount is expected to exceed the small purchase limitation; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate.

(b) The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation, and its use is in the Government's interest.

46.308 Cost-reimbursement research and development contracts.

The contracting officer shall insert the clause at 52.246-8, Inspection of Research and Development—Cost-Reimbursement, in solicitations and contracts for research and development when (a) the primary objective of the contract is the delivery of end items other than designs, drawings, or reports, and (b) a cost-reimbursement contract is contemplated; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate. If it is contemplated that the contract will be on a no-fee basis, the contracting officer shall use the clause with its Alternate I.

46.309 , Research and development contracts (short form).

The contracting officer shall insert the clause at 52.246-9, Inspection of Research and Development (Short Form), in solicitations and contracts for research and development when the clause prescribed in 46.307 or the clause prescribed in 46.308 is not used.

[51 FR 27120, July 29, 1986]

46.310 Facilities contracts.

The contracting officer shall insert the clause at 52.246-10, Inspection of Facilities, in solicitations and contracts when a facilities contract is contemplated.

46.311 Higher-level contract quality requirement.

The contracting officer shall insert the clause at 52.246-11, Higher-Level Contract Quality Requirement (Government Specification), in solicitations and contracts when the inclusion of a higher-level contract quality requirement is appropriate (see 46.202-3).

46.312 Construction contracts.

The contracting officer shall insert the clause at 52.246-12, Inspection of Construction, in solicitations and contracts for construction when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation, and its use is in the Government's interest.

46.313 Contracts for dismantling, demolition, or removal of improvements.

The contracting officer shall insert the clause at 52.246-13, Inspection—Dismantling, Demolition, or Removal of Improvements, in solicitations and contracts for dismantling, demolition, or removal of improvements.

46.314 Transportation contracts.

The contracting officer shall insert the clause at 52.246-14, Inspection of Transportation, in solicitations and contracts for freight transportation services (including local drayage) by rail, motor (including bus), domestic freight forwarder, and domestic water carriers (including inland, coastwise, and intercoastal). The contracting officer shall not use the clause for the acquisition of transportation services by domestic or international air carriers or by international ocean carrie or to freight services provided und bills of lading or to those negotiate for reduced rates under 49 U.S. 10721(b)(1). (See part 47, Transport tion.)

46.315 Certificate of conformance.

The contracting officer shall inser the clause at 52.246-15, Certificate o Conformance, in solicitations and contracts for supplies or services whe the conditions in 46.504 apply.

46.316 Responsibility for supplies.

The contracting officer shall inser the clause at 52.246-16, Responsibilit for Supplies, in solicitations and contracts for (a) supplies, (b) services involving the furnishing of supplies, o (c) research and development, when fixed-price contract is contemplate and the contract amount is expecte to exceed the small purchase limitation. The contracting officer may insert the clause in such solicitation and contracts when the contract amount is not expected to exceed the small purchase limitation and inclusion of the clause is authorized under agency procedures.

Subpart 46.4—Government Contract Quality Assurance

46.401 General.

(a) Government contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to contract requirements.

(b) Each contract shall designate the place or places where the Government reserves the right to perform quality assurance.

(c) If the contract provides for performance of Government quality assurance at source, the place or places of performance may not be changed without the authorization of the contracting officer.

(d) If a contract provides for delivery and acceptance at destination and the Government inspects the supplies at a place other than destination, the supplies shall not ordinarily be reinspected at destination, but should be examined for quantity, damage in transit, and possible substitution or fraud.

(e) Government inspection shall be performed by or under the direction or supervision of Government personnel.

(f) Government inspection shall be documented on an inspection or receiving report form or commercial shipping document/packing list, under agency procedures (see subpart 46.6).

(g) Agencies may prescribe the use of inspection approval or disapproval stamps to identify and control supplies and material that have been inspected for conformance with contract quality requirements.

46.402 Government contract quality assurance at source.

Agencies shall perform contract quality assurance, including inspection, at source if—

(a) Performance at any other place would require uneconomical disassembly or destructive testing;

(b) Considerable loss would result from the manufacture and shipment of unacceptable supplies, or from the delay in making necessary corrections;

(c) Special required instruments, gauges, or facilities are available only at source;

(d) Performance at any other place would destroy or require the replacement of costly special packing and packaging;

(e) A higher-level contract quality requirement is included in the contract (see 46.202-3);

(f) Government inspection during contract performance is essential;

(g) Supplies requiring inspection are destined for points of embarkation for overseas shipment (unless the contracting officer determines in advance that necessary inspection functions can be provided at such points); or

(h) It is determined for other reasons to be in the Government's interest.

46.403 Government contract quality assurance at destination.

(a) Government contract quality assurance that can be performed at destination is normally limited to inspection of the supplies or services. Inspection shall be performed at destination under the following circumstances—

(1) Supplies are purchased off-the-shelf and require no technical inspection;

(2) Necessary testing equipment is located only at destination;

(3) Perishable subsistence supplies purchased within the United States, except that those supplies destined for overseas shipment will normally be inspected for condition and quantity at points of embarkation;

(4) Brand name products purchased for authorized resale through commissaries or similar facilities (however, supplies destined for direct overseas shipment may be accepted by the contracting officer or an authorized representative on the basis of a tally sheet evidencing receipt of shipment signed by the port transportation officer or other designated official at the transshipment point);

(5) The products being purchased are processed under direct control of the National Institutes of Health or the Food and Drug Administration of the Department of Health and Human Services;

(6) The contract is for services performed at destination; or

(7) It is determined for other reasons to be in the Government's interest.

(b) Overseas inspection of supplies shipped from the United States shall not be required except in unusual circumstances, and then only when the contracting officer determines in advance that inspection can be performed or makes necessary arrangements for its performance.

46.404 Government contract quality assurance of small purchases.

(a) In determining the type and extent of Government contract quality assurance to be required for small purchases, the contracting officer shall consider the criticality of application of the supplies or services, the amount of possible losses, and the likelihood of uncontested replacement of defective work (see 46.202-1).

(b) When the conditions in 46.202-1(b) apply, the following policies shall govern:

(1) Unless a special situation exists, the Government shall inspect small purchases at destination and only for type and kind; quantity; damage; operability (if readily determinable); and preservation, packaging, packing, and marking, if applicable.

(2) Special situations may require more detailed quality assurance and the use of a standard inspection or higher-level contract quality requirement. These situations include those listed in 46.402 and contracts for items having critical applications. See Table 46-1 at 46.204 for other possible situations.

(3) Detailed Government inspection may be limited to those characteristics that are special or likely to cause harm to personnel or property. When repetitive purchases of the same item are made from the same manufacturer with a history of defect-free work, Government inspection may be reduced to a periodic check of occasional purchases.

46.405 Subcontracts.

(a) Government contract quality assurance on subcontracted supplies or services shall be performed only when required in the Government's interest. The primary purpose is to assist the contract administration office cognizant of the prime contractor's plant in determining the conformance of subcontracted supplies or services with contract requirements or to satisfy one or more of the factors included in (b) below. It does not relieve the prime contractor of any responsibilities under the contract. When appropriate, the prime contractor shall be requested to arrange for timely Government access to the subcontractor facility.

(b) The Government shall perform quality assurance at the subcontract level when—

(1) The item is to be shipped from the subcontractor's plant to the using activity and inspection at source is required;

(2) The conditions for quality assurance at source are applicable (see 46.402);

(3) The contract specifies that certain quality assurance functions, which can be performed only at the subcontractor's plant, are to be pe
formed by the Government; or

(4) It is otherwise required by t
contract or determined to be in t
Government's interest.

(c) Supplies or services for whi
certificates, records, reports, or simil
evidence of quality are available at t
prime contractor's plant shall not
inspected at the subcontractor's pla
except occasionally to verify this e
dence or when required under (
above.

(d) All oral and written statemen
and contract terms and conditions
lating to Government quality assu
ance actions at the subcontract lev
shall be worded so as not to—

(1) Affect the contractual relatio
ship between the prime contractor a
the Government, or between t
prime contractor and the subcontra
tor;

(2) Establish a contractual relatio
ship between the Government and t
subcontractor; or

(3) Constitute a waiver of the Go
ernment's right to accept or reject t
supplies or services.

46.406 Foreign governments.

Government contract quality assu
ance performed for foreign gover
ments or international agencies sha
be administered according to the fo
eign policy and security objectives
the United States. Such support sha
be furnished only when consisten
with or required by legislation, execu
tive orders, or agency policies concer
ing mutual international programs.

46.407 Nonconforming supplies or serv ices.

(a) Contracting officers shoul
reject supplies or services not con
forming in all respects to contract re
quirements (see 46.102). In those in
stances where deviation from thi
policy is found to be in the Gover
ment's interest, such supplies or serv
ices may be accepted only as author
ized in this section.

(b) Contractors ordinarily shall b
given an opportunity to correct or re
place nonconforming supplies or serv
ices when this can be accomplished
within the required delivery schedule.

Unless the contract specifies otherwise (as may be the case in some cost-reimbursement contracts), correction or replacement shall be without additional cost to the Government. Subparagraph (e)(2) of the clause at 52.246-2, Inspection of Supplies—Fixed-Price, reserves to the Government the right to charge the contractor the cost of Government reinspection and retests because of prior rejection.

(c) (1) In situations not covered by (b) above, the contracting officer shall ordinarily reject supplies or services when the nonconformance adversely affects safety, health, reliability, durability, performance, interchangeability of parts or assemblies, weight or appearance (where a consideration), or any other basic objective of the specification. However, there may be circumstances (e.g., reasons of economy or urgency) when acceptance of such supplies or services is determined by the contracting officer to be in the Government's interest. The contracting officer shall make this determination, based upon—

(i) Advice of the technical activity that the material is safe to use, and will perform its intended purpose;

(ii) Information regarding the nature and extent of the nonconformance;

(iii) A request from the contractor for acceptance of the supplies or services (if feasible);

(iv) A recommendation for acceptance or rejection, with supporting rationale; and

(v) The contract adjustment considered appropriate, including any adjustment offered by the contractor.

(2) The cognizant contract administration office, or other Government activity directly involved, shall furnish this data to the contracting officer in writing, except that in urgent cases it may be furnished orally and later confirmed in writing. Before making a decision to accept, the contracting officer shall obtain the concurrence of the activity responsible for the technical requirements of the contract and, where health factors are involved, of the responsible health official of the agency concerned.

(d) If the nonconformance is minor, in that it does not affect any of the factors referred to in (c) above, the cognizant contract administration office may make the determination to accept or reject, except where this authority is withheld by the contracting office of the contracting activity. To assist in making this determination, the contract administration office may establish a joint contractor-contract administrative office review group. Acceptance of nonconforming supplies that affect any of the factors referred to in (c) above is outside the scope of the review group and must be handled as specified there.

(e) Contracting officers shall discourage the repeated tender of nonconforming supplies or services, including those with only minor nonconformances, by appropriate action, such as rejection and documenting the contractor's performance record.

(f) Each contract under which nonconforming supplies or services are accepted as authorized in (c) above shall be modified to provide for an equitable price reduction or other consideration. However, when supplies or services involving minor nonconformances are accepted, the contract shall not be modified unless (1) it appears that the savings to the contractor in fabricating the nonconforming supplies or performing the nonconforming services will exceed the cost to the Government of processing the modification, or (2) the Government's interests otherwise require a contract modification.

(g) Notices of rejection shall include the reasons for rejection and be furnished promptly to the contractor. Promptness in giving this notice is essential because, if timely nature of rejection is not furnished, acceptance may in certain cases be implied as a matter of law. The notice shall be in writing if—

(1) The supplies or services have been rejected at a place other than the contractor's plant;

(2) The contractor persists in offering nonconforming supplies or services for acceptance; or

(3) Delivery or performance was late without excusable cause.

46.408 Single-agency assignments of Government contract quality assurance.

(a) Government-wide responsibility for quality assurance support for acquisitions of certain commodities is assigned as follows:

(1) For drugs, biologics, and other medical supplies—the Food and Drug Administration;

(2) For food, except seafood—the Department of Agriculture.

(3) For seafood—the National Marine Fisheries Service of the Department of Commerce.

(b) Agencies requiring quality assurance support for acquiring these supplies should request the support directly from the cognizant office.

Subpart 46.5—Acceptance

46.501 General.

Acceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in this subpart and subject to other terms and conditions of the contract. Acceptance may take place before delivery, at the time of delivery, or after delivery, depending on the provisions of the terms and conditions of the contract. Supplies or services shall ordinarily not be accepted before completion of Government contract quality assurance actions (however, see 46.504). Acceptance shall ordinarily be evidenced by execution of an acceptance certificate on an inspection or receiving report form or commercial shipping document/packing list.

46.502 Responsibility for acceptance.

Acceptance of supplies or services is the responsibility of the contracting officer. When this responsibility is assigned to a cognizant contract administration office or to another agency (see 42.102(c)), acceptance by that office or agency is binding on the Government.

46.503 Place of acceptance.

Each contract shall specify the place of acceptance. Contracts that provide for Government contract quality assurance at source shall ordinarily provide for acceptance at source. Co
tracts that provide for Governme
contract quality assurance at destin
tion shall ordinarily provide for a
ceptance at destination. (For transpo
tation terms, see subpart 47.3). Su
plies accepted at a place other tha
destination shall not be reinspected
destination for acceptance purpose
but should be examined at destinatio
for quantity, damage in transit, an
possible substitution or fraud.

46.504 Certificate of conformance.

A certificate of conformance (se
46.315) may be used in certain in
stances instead of source inspectio
(whether the contract calls for accep
ance at source or destination) at th
discretion of the contracting officer
the following conditions apply:

(a) Acceptance on the basis of a con
tractor's certificate of conformance
in the Government's interest.

(b) (1) Small losses would be in
curred in the event of a defect; or

(2) Because of the contractor's repu
tation or past performance, it is likel
that the supplies or services furnishe
will be acceptable and any defectiv
work would be replaced, corrected, o
repaired without contest. In no cas
shall the Government's right to in
spect supplies under the inspectio
provisions of the contract be preju
diced.

46.505 Transfer of title and risk of loss.

(a) Title to supplies shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

(b) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the contractor until, and shall pass to the Government upon—

(1) Delivery of the supplies to a carrier if transportation is f.o.b. origin; or

(2) Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

(c) Paragraph (b) above shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the contractor until cure or acceptance. After cure or acceptance, paragraph (b) above shall apply.

(d) Under paragraph (b) above, the contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

(e) The policy expressed in (a) through (d) above is specified in the clause at 52.246-16, Responsibility for Supplies, which is prescribed in 46.316.

Subpart 46.6—Material Inspection and Receiving Reports

Agencies shall prescribe procedures and instructions for the use, preparation, and distribution of material inspection and receiving reports and commercial shipping document/packing lists to evidence Government inspection (see 46.401) and acceptance (see 46.501).

Subpart 46.7—Warranties

46.701 Definitions.

Acceptance (see 46.101).

Correction, as used in this subpart, means the elimination of a defect.

Warranty, as used in this subpart, means a promise or affirmation given by a contractor to the Government regarding the nature, usefulness, or condition of the supplies or performance of services furnished under the contract.

46.702 General.

(a) The principal purposes of a warranty in a Government contract are (1) to delineate the rights and obligations of the contractor and the Government for defective items and services and (2) to foster quality performance.

(b) Generally, a warranty should provide—

(1) A contractual right for the correction of defects notwithstanding any other requirement of the contract pertaining to acceptance of the supplies or services by the Government; and

(2) A stated period of time or use, or the occurrence of a specified event, after acceptance by the Government to assert a contractual right for the correction of defects.

(c) The benefits to be derived from a warranty must be commensurate with the cost of the warranty to the Government.

46.703 Criteria for use of warranties.

The use of warranties is not mandatory. In determining whether a warranty is appropriate for a specific acquisition, the contracting officer shall consider the following factors:

(a) *Nature and use of the supplies or services.* This includes such factors as—

(1) Complexity and function;

(2) Degree of development;

(3) State of the art;

(4) End use;

(5) Difficulty in detecting defects before acceptance; and

(6) Potential harm to the Government if the item is defective.

(b) *Cost.* Warranty costs arise from—

(1) The contractor's charge for accepting the deferred liability created by the warranty; and

(2) Government administration and enforcement of the warranty (see paragraph (c) below).

(c) *Administration and enforcement.* The Government's ability to enforce the warranty is essential to the effectiveness of any warranty. There must be some assurance that an adequate administrative system for reporting defects exists or can be established. The adequacy of a reporting system may depend upon such factors as the—

(1) Nature and complexity of the item;

(2) Location and proposed use of the item;

(3) Storage time for the item;

(4) Distance of the using activity from the source of the item;

(5) Difficulty in establishing existence of defects; and

(6) Difficulty in tracing responsibility for defects.

(d) *Trade practice.* In many instances an item is customarily warranted in the trade, and, as a result of that practice, the cost of an item to the Government will be the same whether or not a warranty is included. In those instances, it would be in the Government's interest to include such a warranty.

(e) *Reduced requirements.* The contractor's charge for assumption of added liability may be partially or completely offset by reducing the Government's contract quality assurance requirements where the warranty provides adequate assurance of a satisfactory product.

46.704 Authority for use of warranties.

The use of a warranty in an acquisition shall be approved in accordance with agency procedures.

46.705 Limitations.

(a) Except for the warranties in the clauses at 52.246-3, Inspection of Supplies—Cost-Reimbursement, and 52.246-8, Inspection of Research and Development—Cost-Reimbursement, the contracting officer shall not include warranties in cost-reimbursement contracts, unless authorized in accordance with agency regulations (see 46.708).

(b) Warranty clauses shall not limit the Government's rights under an inspection clause (see subpart 46.3) in relation to latent defects, fraud, or gross mistakes that amount to fraud.

(c) Except for warranty clauses in construction contracts, warranty clauses shall provide that the warranty applies notwithstanding inspection and acceptance or other clauses or terms of the contract.

46.706 Warranty terms and conditions.

(a) To facilitate the pricing and enforcement of warranties, the contracting officer shall ensure that warranties clearly state the—

(1) Exact nature of the item and its components and characteristics that the contractor warrants;

(2) Extent of the contractor's warranty including all of the contractor's obligations to the Government for breach of warranty;

(3) Specific remedies available to the Government; and

(4) Scope and duration of the warranty.

(b) The contracting officer shall consider the following guidelines when preparing warranty terms and conditions:

(1) *Extent of contractor obligations* (i) Generally, the contractor's obligations under warranties extend to all defects discovered during the warranty period, but do not include damage caused by the Government. When a warranty for the entire item is not advisable, a warranty may be required for a particular aspect of the item that may require special protection (e.g., installation, components, accessories, subassemblies, preservation, packaging, and packing, etc.).

(ii) If the Government specifies the design of the end item and its measurements, tolerances, materials, tests, or inspection requirements, the contractor's obligations for correction of defects shall usually be limited to defects in material and workmanship or failure to conform to specifications. If the Government does not specify the design, the warranty extends also to the usefulness of the design.

(iii) If express warranties are included in a contract (except contracts for commercial items), all implied warranties of merchantability and fitness for a particular purpose shall be negated by the use of specific language in the clause (see clauses 52.246-17, Warranty of Supplies of a Noncomplex Nature; 52.246-18, Warranty of Supplies of a Complex Nature; and 52.246-19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria).

(2) *Remedies* (i) Normally, a warranty shall provide as a minimum that the Government may (A) obtain an equitable adjustment of the contract, or (B) direct the contractor to repair or replace the defective items at the contractor's expense.

(ii) If it is not practical to direct the contractor to make the repair or replacement, or, because of the nature of the item, the repair or replacement does not afford an appropriate remedy to the Government, the warranty should provide alternate remedies, such as authorizing the Government to—

(A) Retain the defective item and reduce the contract price by an amount equitable under the circumstances; or

(B) Arrange for the repair or replacement of the defective item, by the Government or by another source, at the contractor's expense.

(iii) If it can be foreseen that it will not be practical to return an item to the contractor for repair, to remove it to an alternate source for repair, or to replace the defective item, the warranty should provide that the Government may repair, or require the contractor to repair, the item in place at the contractor's expense. The contract shall provide that in the circumstance where the Government is to accomplish the repair, the contractor will furnish at the place of delivery the material or parts, and the installation instructions required to successfully accomplish the repair.

(iv) Unless provided otherwise in the warranty, the contractor's obligation to repair or replace the defective item, or to agree to an equitable adjustment of the contract, shall include responsibility for the costs of furnishing all labor and material to (A) reinspect items that the Government reasonably expected to be defective, (B) accomplish the required repair or replacement of defective items, and (C) test, inspect, package, pack, and mark repaired or replaced items.

(v) If repair or replacement of defective items is required, the contractor shall generally be required by the warranty to bear the expense of transportation for returning the defective item from the place of delivery specified in the contract (irrespective of the f.o.b. point or the point of acceptance) to the contractor's plant and subsequent return. When defective items are returned to the contractor from other than the place of delivery specified in the contract, or when the Government exercises alternate remedies, the contractor's liability for transportation charges incurred shall not exceed an amount equal to the cost of transportation by the usual commercial method of shipment between the place of delivery specified in the contract and the contractor's plant and subsequent return.

(3) *Duration of the warranty.* The time period or duration of the warranty must be clearly specified and shall be established after consideration of such factors as (i) the estimated useful life of the item, (ii) the nature of the item including storage or shelf-life, and (iii) trade practice. The period specified shall not extend the contractor's liability for patent defects beyond a reasonable time after acceptance by the Government.

(4) *Notice.* The warranty shall specify a reasonable time for furnishing notice to the contractor regarding the discovery of defects. This notice period, which shall apply to all defects discovered during the warranty period, shall be long enough to assure that the Government has adequate time to give notice to the contractor. The contracting officer shall consider the following factors when establishing the notice period:

(i) The time necessary for the Government to discover the defects.

(ii) The time reasonably required for the Government to take necessary administrative steps and make a timely report of discovery of the defects to the contractor.

(iii) The time required to discover and report defective replacements.

(5) *Markings.* The packaging and preservation requirements of the contract shall require the contractor to stamp or mark the supplies delivered or otherwise furnish notice with the supplies of the existence of the warranty. The purpose of the markings or notice is to inform Government personnel who store, stock, or use the supplies that the supplies are under warranty. Markings may be brief but should include (i) a brief statement that a warranty exists, (ii) the substance of the warranty, (iii) its duration, and (iv) who to notify if the supplies are found to be defective. For commercial items (see 46.709), the contractor's trade practice in warranty marking is acceptable if sufficient information is presented for supply personnel and users to identify warranted supplies.

(6) *Consistency.* Contracting officers shall ensure that the warranty clause and any other warranty conditions in the contract (e.g., in the specifications or an inspection clause) are consistent. To the extent practicable, all of the

warranties to be contained in the contract should be expressed in the warranty clause.

46.707 Pricing aspects of fixed-price incentive contract warranties.

If a fixed-price incentive contract contains a warranty (see 46.708), the estimated cost of the warranty to the contractor should be considered in establishing the incentive target price and the ceiling price of the contract. All costs incurred, or estimated to be incurred, by the contractor in complying with the warranty shall be considered when establishing the total final price. Contractor compliance with the warranty after the establishment of the total final price shall be at no additional cost to the Government.

46.708 Warranties of data.

Warranties of data shall be developed and used in accordance with agency regulations.

46.709 Warranties of commercial items.

If a warranty of commercial items is appropriate, the contracting officer may include a warranty of supplies clause modified for commercial items (see the clause at 52.246-17, Warranty of Supplies of a Noncomplex Nature, Alternate I, and 52.246-18, Warranty of Supplies of a Complex Nature, Alternate I). More appropriate warranty language may be included if the contracting officer determines that the Government's planned usage of the item is inconsistent with the item's normal usage, or that Government specifications have substantially altered the item. The Government may adopt the contractor's standard commercial warranty if the contracting officer determines it is not inconsistent with the rights that would be afforded the Government under a warranty of supplies clause (see the clauses at 52.246-17, Warranty of Supplies of a Noncomplex Nature, and 52.246-18, Warranty of Supplies of a Complex Nature) or other terms of the contract.

46.710 Contract clauses.

The clauses and alternates prescribed in this section may be used in solicitations and contracts in which in-
clusion of warranty coverage is appr
priate. However, because of the mar
situations that may influence the wa
ranty terms and conditions appropr
ate to a particular acquisition, the co
tracting officer may vary the tern
and conditions of the clauses and
ternates to the extent necessary. Th
alternates prescribed in this sectio
address the clauses; however, the co
ditions pertaining to each alterna
must be considered if the terms ar
conditions are varied to meet a pa
ticular need.

(a) (1) The contracting officer ma
insert a clause substantially the sam
as the clause at 52.246-17, Warranty
Supplies of a Noncomplex Nature,
solicitations and contracts for noncon
plex items when a fixed-price supp
contract is contemplated and the u
of a warranty clause has been a
proved under agency procedures.

(2) If commercial items are to be a
quired, the contracting officer may u
the clause with its Alternate I.

(3) If it is desirable to specify th
necessary transportation incident
correction or replacement will be
the Government's expense (as migl
be the case if, for example, the cost
a warranty would otherwise be prohil
itive), the contracting officer may u
the clause with its Alternate II.

(4) If the supplies cannot be o
tained from another source, the co
tracting officer may use the clau
with its Alternate III.

(5) If a fixed-price incentive contra
is contemplated, the contracting off
cer may use the clause with its Alte
nate IV.

(6) If it is anticipated that recove
of the warranted item will involve co
siderable Government expense for di
assembly and/or reassembly of larg
items, the contracting officer may u
the clause with its Alternate V.

(b) (1) The contracting officer ma
insert a clause substantially the sam
as the clause at 52.246-18, Warranty
Supplies of a Complex Nature, in s
licitations and contracts for delive
able complex items when a fixed-pric
supply or research and developme
contract is contemplated and the us
of a warranty clause has been a
proved under agency procedures.

(2) If commercial items are to be acquired, the contracting officer may use the clause with its Alternate I.

(3) If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), the contracting officer may use the clause with its Alternate II.

(4) If a fixed-price incentive contract is contemplated, the contracting officer may use the clause with its Alternate III.

(5) If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, the contracting officer may use the clause with its Alternate IV.

(c) (1) The contracting officer may insert a clause substantially the same as the clause at 52.246-19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria, in solicitations and contracts when performance specifications or design are of major importance; a fixed-price supply, service, or research and development contract for systems and equipment is contemplated; and the use of a warranty clause has been approved under agency procedures.

(2) If it is desirable to specify that necessary transportation incident to correction or replacement will be at the Government's expense (as might be the case if, for example, the cost of a warranty would otherwise be prohibitive), the contracting officer may use the clause with its Alternate I.

(3) If a fixed-price incentive contract is contemplated, the contracting officer may use the clause with its Alternate II.

(4) If it is anticipated that recovery of the warranted item will involve considerable Government expense for disassembly and/or reassembly of larger items, the contracting officer may use the clause with its Alternate III.

(d) The contracting officer may insert a clause substantially the same as the clause at 52.246-20, Warranty of Services, in solicitations and contracts for services when a fixed-price contract for services is contemplated and the use of a warranty clause has been approved under agency procedures; unless a clause substantially the same as the clause at 52.246-19, Warranty of Systems and Equipment under Performance Specifications or Design Criteria, has been used.

(e) (1) The contracting officer may insert a clause substantially the same as the clause at 52.246-21, Warranty of Construction, in solicitations and contracts when a fixed-price construction contract (see 46.705(c)) is contemplated and the use of a warranty clause has been approved under agency procedures.

(2) If the Government specifies in the contract the use of any equipment by *brand name and model,* the contracting officer may use the clause with its Alternate I.

Subpart 46.8—Contractor Liability for Loss of or Damage to Property of the Government

46.800 Scope of subpart.

This subpart prescribes policies and procedures for limiting contractor liability for loss of or damage to property of the Government that (a) occurs after acceptance and (b) results from defects or deficiencies in the supplies delivered or services performed.

46.801 Applicability.

(a) The subpart applies to contracts other than those for (1) automatic data processing, (2) telecommunications, (3) construction, (4) architect-engineer services and (5) maintenance and rehabilitation of real property. This subpart does not apply to items priced at or based on catalog or market prices except as indicated in 46.804.

(b) See subpart 46.7, Warranties, for policies and procedures concerning contractor liability caused by nonconforming technical data.

46.802 Definition.

High-value item, as used in this subpart, means a contract end item that (a) has a high unit cost (normally exceeding $100,000 per unit), such as an aircraft, an aircraft engine, a communication system, a computer system, a missile, or a ship, and (b) is designated by the contracting officer as a high-value item.

46.803 Policy.

(a) *General.* The Government will generally act as a self-insurer by relieving contractors, as specified in this subpart, of liability for loss of or damage to property of the Government that (1) occurs after acceptance of supplies delivered or services performed under a contract and (2) results from defects or deficiencies in the supplies or services. However, the Government will not relieve the contractor of liability for loss of or damage to the contract end item itself, except for high-value items.

(b) *High-value items.* In contracts requiring delivery of high-value items, the Government will relieve contractors of contractual liability for loss of or damage to those items. However, this relief shall not limit the Government's rights arising under the contract to—

(1) Have any defective item or its components corrected, repaired, or replaced when the defect or deficiency is discovered before the loss of or damage to a high-value item occurs; or

(2) Obtain equitable relief when the defect or deficiency is discovered after such loss or damage occurs.

(c) *Exception.* The Government will not provide contractual relief under paragraphs (a) and (b) above when contractor liability can be preserved without increasing the contract price.

(d) *Limitations.* Subject to the specific terms of the limitation of liability clause included in the contract, the relief provided under paragraphs (a) and (b) above does not apply—

(1) To the extent that contractor liability is expressly provided under a contract clause authorized by this regulation;

(2) When a defect or deficiency in, or the Government's acceptance of, the supplies or services results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel; or

(3) To the extent that any contractor insurance, or self-insurance reserve, covers liability for loss or damage suffered by the Government through purchase or use of the supplies delivered or services performed under the contract.

46.804 Items priced at or based on catalog or market prices.

Contractors generally (a) carry product liability or similar insurance, or maintain a reserve for self-insurance, covering liability arising from defective items and (b) reflect its cost in catalog or market prices. Therefore, for items being priced at or based on catalog or market prices (see 15.804-3(c)), contracting officers should not provide relief under the policy in 46.803 by including a clause prescribed in 46.805, unless they obtain an appropriate reduction from the catalog or market price to reflect reduced contractor liability.

46.805 Contract clauses.

(a) *Contracts that exceed the small purchase limitation in 13.000.* The contracting officer shall insert the appropriate clause or combination of clauses specified in subparagraphs (a)(1) through (a)(5) of this section in solicitations and contracts when the contract amount is expected to be in excess of the small purchase limitation in 13.000 and the contract is subject to the requirements of this subpart as indicated in 46.801:

(1) In contracts requiring delivery of end items that are not high-value items, insert the clause at 52.246-23, Limitation of Liability.

(2) In contracts requiring delivery of high-value items, insert the clause at 52.246-24, Limitation of Liability—High-Value Items.

(3) In contracts requiring delivery of both high-value items and other end items, insert both clauses prescribed in (1) and (2) above, Alternate I of the clause at 52.246-24, and identify clearly in the contract schedule the line items designated as high-value items.

(4) In contracts requiring the performance of services, insert the clause at 52.246-25, Limitation of Liability—Services.

(5) In contracts requiring both the performance of services and the delivery of end items, insert the clause prescribed in subparagraph (4) above and the appropriate clause or clauses pre-

scribed in subparagraph (1), (2), or (3) above, and identify clearly in the contract schedule any high-value line items.

(b) *Contracts within the small purchase limitation in 13.000.* The clauses prescribed by paragraph (a) of this section are not required for contracts within the small purchase limitation in 13.000. However, in response to a contractor's specific request, the contracting officer may insert the clauses prescribed in subparagraph (a)(1) or (a)(4) of this section in a contract within the small purchase limitation in 13.000 and obtain any price reduction that is appropriate.

[48 FR 42415, Sept. 19, 1983, as amended at 55 FR 3886, Feb. 5, 1990]

46.806 Subcontracts.

(a) The clause at 52.246-23, Limitation of Liability, and the clause at 52.246-25, Limitation of Liability—Services, each require the contractor to insert the same clause in all subcontracts.

(b) The clause at 52.246-24, Limitation of Liability—High-Value Items, and its Alternate I require the contractor to insert that clause, the clause at 52.246-23, Limitation of Liability, or both, as appropriate, in all subcontracts. However, they require the contractor to obtain the contracting officer's written approval before including the clause at 52.246-24, Limitation of Liability—High-Value Items. The contracting officer shall approve the use of this clause in a subcontract only if the clause would have been used had the subcontract been a prime contract with the Government.

PART 47—TRANSPORTATION

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42424, Sept. 19, 1983, unless otherwise noted.

47.000 Scope of subpart.

(a) This part prescribes policies and procedures for—

(1) Applying transportation and traffic management considerations in the acquisition of supplies; and

(2) Acquiring transportation or transportation-related services by contract methods other than bills of lading, transportation requests, transportation warrants, and similar transportation forms. Even though the FAR does not regulate the acquisition of transportation or transportation-related services when the bill of lading is the contract, this contract method is widely used and, therefore, relevant guidance on the use of the bill of lading, particularly the Government bill of lading (GBL), is provided in this part.

(b) The definitions in this part have been condensed from statutory definitions. In case of inconsistency between the language of this part and the statutory requirements, the statute shall prevail.

47.001 Definitions.

Carrier or *commercial carrier* means a common carrier or a contract carrier.

Common carrier, as used in this part, means a person holding itself out to the general public to provide transportation for compensation.

Contract carrier means a person providing transportation for compensation under continuing agreements with one person or a limited number of persons.

CONUS or *Continental United States* means the 48 contiguous states and the District of Columbia.

F.o.b. means free on board. This term is used in conjunction with a physical point to determine (a) the responsibility and basis for payment of freight charges and (b) unless otherwise agreed, the point at which title for goods passes to the buyer or consignee.

F.o.b. origin means free on board at origin; i.e., the seller or consignor places the goods on the conveyance by which they are to be transported. Unless the contract provides otherwise, cost of shipping and risk of loss are borne by the buyer or consignee.

F.o.b. destination means free on board at destination; i.e., the seller or consignor delivers the goods on seller's or consignor's conveyance at destination. Unless the contract provides otherwise, cost of shipping and risk of loss are borne by the seller or consignor.

Freight means supplies, goods, and transportable property.

Shipment, as used in this part, means freight transported or to be transported.

47.002 Applicability.

(a) All Government personnel concerned with the activities listed in subparagraphs (1) through (4) below shall follow the regulations in part 47 as applicable:

(1) Acquisition of supplies.

(2) Acquisition of transportation and transportation-related services.

(3) Transportation assistance and traffic management.

(4) The making and administration of contracts under which payments are made from Government funds for (i) the transportation of supplies, (ii) transportation-related services, or (iii) transportation of contractor personnel and their personal belongings.

(b) Subpart 42.14, Traffic and Transportation Management, shall be used for administering transportation contracts, transportation-related contracts, and those portions of supply and other contracts that involve transportation.

Subpart 47.1—General

47.101 Policies.

(a) The contracting officer shall obtain traffic management advice and assistance (see 47.105) in the consideration of transportation factors required for—

(1) Solicitations and awards;

(2) Contract administration, modification, and termination; and

(3) Transportation of property by the Government to and from contractors' plants.

(b) (1) The preferred method of transporting supplies for the Government is by commercial carriers. However, Government-owned, leased, or chartered vehicles, aircraft, and vessels may be used if (i) they are available and not fully utilized, (ii) their use will result in substantial economies, and (iii) their use is in accordance with all applicable statutes, agency policies and regulations.

(2) If the three circumstances listed in subparagraph (b)(1) above apply, Government vehicles may be used for purposes such as—

(i) Local transportation of supplies between Government installations;

(ii) Pickup and delivery services that commercial carriers do not perform in connection with line-haul transportation;

(iii) Transportation of supplies to meet emergencies; and

(iv) Accomplishment of program objectives that cannot be attained by using commercial carriers.

(c) Agencies shall not accord preferential treatment to any mode of transportation or to any particular carrier either in awarding or administering contracts for the acquisition of supplies or in awarding contracts for the acquisition of transportation. (See subparts 47.2 and 47.3 for situations in which the contracting officer is permitted to use specific modes of transportation.)

(d) Agencies shall place with small business concerns purchases and contracts for transportation and transportation-related services as prescribed in part 19.

(e) Agencies shall comply with the Fly America Act, the Cargo Preference Act, and related statutes as prescribed in subparts 47.4, Air Transportation by U.S.-Flag Carriers, and 47.5, Ocean Transportation by U.S.-Flag Vessels.

47.102 Transportation insurance.

(a) The Government generally (1) retains the risk of loss of and/or damage to its property that is not the legal liability of commercial carriers and (2) does not buy insurance coverage for its property in the possession of commercial carriers (40 U.S.C. 726). (See part 28, Bonds and Insurance.)

(b) Under special circumstances the Government may, if such action is considered necessary and in the Government's interest, (1) buy insurance coverage for Government property or (2) require the carrier to (i) assume full responsibility for loss of or damage to the Government property in its possession and (ii) buy insurance to cover the carrier's assumed responsibility. The cost of this insurance to the carrier shall be part of the transportation cost. (The Secretary of the Treasury prescribes regulations regarding shipments of valuables in 31 CFR parts 261 and 262.)

(c) (1) If special circumstances dictate the need for the Government to buy insurance coverage, the contracting officer shall ascertain that (i) there is no statutory prohibition and (ii) funds for insurance are available.

(2) The contracting officer shall document the need and authorization for insurance coverage in the contract file.

47.103 Transportation Documentation and Audit Regulation (TDA).

(a) The United States Government bill of lading (GBL) generally shall be used for the transportation of property of the United States for which the Government pays the transportation charges directly to commercial carriers.

(b) (1) Regulations and procedures governing the GBL, documentation, payment, and audit of transportation services acquired by the United States Government are prescribed in 41 CFR 101-41, Transportation Documentation and Audit. Included in this regulation, among others, is the limited authority for the use of commercia forms and procedures to acquir freight or express transportation fo small shipments of a recurring natur when transportation costs do no exceed $100.

(2) For DOD shipments, corresponding guidance is in Chapter 214 of the Military Traffic Management Regulation (MTMR).

(c) Subsection 42.1403-2 prescribe regulations and procedures for the occasional use of contractor-prepaid commercial bills of lading for the transportation of supplies weighing not more than 1,000 pounds that are acquired by the Government on f.o.b. origin terms.

47.104 Government rate tenders under section 10721 of the Interstate Commerce Act.

47.104-1 Government freight.

(a) Common carriers subject to the jurisdiction of the Interstate Commerce Commission may under the provisions of 49 U.S.C. 10721 offer to transport persons or property for the account of the United States without charge or at reduced rates.

(b) Section 10721 rates are published in Government rate tenders and apply to shipments moving for the account of the Government; i.e., on—

(1) Government bills of lading;

(2) Commercial bills of lading endorsed to show that such bills of lading are to be exchanged for, or converted to, Government bills of lading at destination after delivery to the consignees; or

(3) Commercial bills of lading endorsed to show that total transportation charges are assignable to, and will be reimbursed by, the Government (see the clause at 52.247-1, Commercial Bill of Lading Notations).

(c) Government agencies may negotiate with carriers for additional or revised section 10721 rates in appropriate situations. Only qualified transportation officers shall carry out these negotiations. (See 47.105 for transportation assistance.) The following are examples of situations in which negotiations for additional or revised section 10721 rates may be appropriate:

(1) Volume movements are expected.

(2) Shipments will be made on a recurring basis between designated places, and substantial savings in transportation costs appear possible even though a volume movement is not involved.

(3) Transit arrangements are feasible and advantageous to the Government.

47.104-2 Fixed-price contracts.

(a) *F.o.b. destination*. Section 10721 quotations do not apply to shipments under fixed-price f.o.b. destination contracts (delivered price).

(b) *F.o.b. origin*. Under fixed-price f.o.b. origin contracts, shipments normally shall be made on GBL's. However, if it is advantageous to the Government, the contracting officer may occasionally require the contractor to prepay the freight charges to a specific destination. In such cases, the contractor shall use a commercial bill of lading and be reimbursed for the direct and actual transportation cost as a separate item in the invoice. The clause at 52.247-1, Commercial Bill of Lading Notations, will ensure that the Government in this type of arrangement obtains the benefit of section 10721 rates.

47.104-3 Cost-reimbursement contracts.

(a) The Interstate Commerce Commission has ruled that section 10721 rates may be applied to shipments other than those made by the Government if the total benefit accrues to the Government; i.e., the Government must pay the charges or directly and completely reimburse the party that initially bears the freight charges. Therefore, section 10721 rates may be used for shipments moving on commercial bills of lading in cost-reimbursement contracts under which the transportation costs are direct and allowable costs under the cost principles of part 31.

(b) Section 10721 rates may be applied to the movement of household goods and personal effects of contractor employees who are relocated for the convenience and at the direction of the Government and whose total transportation costs are reimbursed by the Government.

(c) The clause at 52.247-1, Commercial Bill of Lading Notations, will ensure that the Government receives the benefit of lower section 10721 rates in cost-reimbursement contracts as described in paragraphs (a) and (b) above.

(d) Contracting officers shall—

(1) Include in contracts a statement requiring the contractor to use carriers that offer acceptable service at reduced rates if available; and

(2) Ensure that contractors receive the name and location of the transportation officer designated to furnish support and guidance when using Government rate tenders under 47.104-5(b).

(e) Transportation officers shall—

(1) Advise and assist contracting officers and contractors; and

(2) Make available to contractors the names of carriers that provide service under section 10721 quotations, cite applicable rate tenders, and advise contractors of the statement that must be shown on the carrier's commercial bill of lading (see the clause at 52.247-1, Commercial Bill of Lading Notations).

47.104-4 Contract clause.

(a) The contracting officer, in order to ensure the application of section 10721 rates, shall insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts when the contracts will be—

(1) Cost-reimbursement contracts, including those that may involve the movement of household goods (see 47.104-3(b)); or

(2) Fixed-price f.o.b. origin contracts (other than small purchases under part 13) (see 47.104-2(b) and 47.104-3).

(b) The contracting officer may insert the clause at 52.247-1, Commercial Bill of Lading Notations, in solicitations and contracts awarded within the small purchase limitation at 13.000 when it is contemplated that the delivery terms will be f.o.b. origin.

[48 FR 42424, Sept. 19, 1983, as amended at 54 FR 48990, Nov. 28, 1989]

47.104-5 Citation of Government rate tenders.

When section 10721 rates apply, transportation officers or contractors, as appropriate, shall identify the applicable Government rate tender by endorsement on bills of lading, including—

(a) GBL's or commercial bills of lading to be converted to GBL's (see 41 CFR 101-41.303, Conversion of commercial bills of lading to GBL's); and

(b) Properly endorsed commercial bills of lading when transportation charges are reimbursable (see 47.104-2(b) and 47.104-3).

47.105 Transportation assistance.

(a) Civilian Government activities that do not have transportation officers, or otherwise need assistance on transportation matters, shall obtain assistance from (1) the GSA Regional Federal Supply Service Bureau that provides support to the activity or (2) the transportation element of the contract administration office designated in the contract.

(b) Military installations shall obtain transportation assistance from the transportation office of the contracting activity, unless another military activity has been designated as responsible for furnishing assistance, guidance, or data. Military transportation offices shall request needed additional aid from the appropriate area headquarters of the Military Traffic Management Command (MTMC).

[48 FR 42424, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

Subpart 47.2—Contracts for Transportation or for Transportation-Related Services

47.200 Scope of subpart.

(a) This subpart prescribes procedures for the acquisition by sealed bid or negotiated contracts of—

(1) Freight transportation (including local drayage) from rail, motor (including bus), domestic water (including inland, coastwise, and intercoastal) carriers, and from freight forwarders; and

(2) Transportation-related services including but not limited to stevedoring, storage, packing, marking, and ocean freight forwarding.

(b) Except as provided in paragraph (c) below, this subpart does not apply to—

(1) The acquisition of freight transportation from (i) domestic or international air carriers and (ii) international ocean carriers (see subparts 47.4 and 47.5);

(2) Freight transportation acquired by bills of lading;

(3) Freight transportation for which rates are negotiated under 49 U.S.C. 10721(b)(1); or

(4) Small purchases under part 13.

(c) With appropriate modifications, the procedures in this subpart may be applied to the acquisition of freight transportation from the carriers listed in paragraph (b)(1) above and passenger transportation from any carrier or mode.

(d) The procedures in this subpart are applicable to the transportation of household goods and personal effects of persons being relocated at Government expense except when acquired—

(1) Under the commuted rate schedules as required in the Federal Travel Regulation (41 CFR part 101-7);

(2) By U.S. Government bill of lading (GBL); or

(3) By DoD under the Personal Property Management Regulation (DoD 4500.34R).

(e) Additional guidance for DoD acquisition of freight and passenger transportation is in the Military Traffic Management Regulation.

[48 FR 42424, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

47.201 Definitions.

General freight, as used in this subpart, means supplies, goods, and transportable property not encompassed in the definitions of *household goods* or *office furniture.*

Household goods, as used in this subpart, means personal property that belongs to a person and that person's immediate family and includes, but is not limited to household furnishings, equipment and appliances, furniture, clothing, books, and similar property (see 41 CFR 101-7).

ffice furniture, as used in this sub-
t, means furniture, equipment, fix-
es, records, and other equipment
materials used in Government of-
s, hospitals, and similar establish-
nts.

02 Presolicitation planning.

ontracting officers shall inform ac-
ties that plan to acquire transpor-
on or transportation-related serv-
of the applicable lead-time re-
ements, that is—

) The Service Contract Act of 1965
A) requirement for submission of
ndard Form 98, Notice of Intention
Make a Service Contract and Re-
nse to Notice, to the Department
abor not less than the number of
s prescribed by the Department of
or before the issuance of an invita-
for bid, request for proposal, or
mencement of negotiations for
contract exceeding $2,500 that
be subject to the SCA (see sub-
t 22.10);

) The possible requirement to pro-
, during the solicitation period,
for prospective offerors or con-
tors to inspect origin and destina-
locations; or

) The possible requirement for in-
tion by agency personnel of pro-
tive contractor facilities and
pment.

3 Transportation term contracts.

) Transportation term contracts
indefinite delivery requirements
racts for transportation or for
sportation-related services. They
particularly useful for local
age and office relocations within a
ropolitan area.

) Transportation term contracts
contain descriptions of the serv-
to be performed; rates and
ges for these services; the geo-
hical area of coverage; the term of
contract; and minimum or maxi-
order limitations by dollar
unt, shipment size, or other crite-

If appropriate, the transporta-
term contract shall require the
ractor to provide the services cov-
to any Government agency that
s an order for these services
r the contract. If so—

(1) Agencies may place orders for transportation or for transportation-related services under existing term contracts without further consideration of competition, as these term contracts are awarded on a price-competitive basis; and

(2) Agency personnel shall ensure that the orders they place conform to the contract, including any minimum or maximum order limitations.

(d) Policies and procedures regarding the use of GSA term contracts for transportation or for transportation-related services by civilian executive agencies are prescribed in 41 CFR 101-40.109.

47.204 Single-movement contracts.

Single-movement contracts may be awarded for unique transportation services that are not otherwise available under carrier tariffs or covered by DOD or GSA contracts; e.g., special requirements at origin and/or destination.

47.205 Availability of term contracts and basic ordering agreements for transportation or for transportation-related services.

(a) All Government agencies may contract for transportation or for transportation-related services and execute basic ordering agreements (BOA's) (see subpart 16.7) unless agency regulations prescribe otherwise. However, it is generally more economical and efficient for most agencies to make use of term contracts and basic ordering agreements that have been executed by agencies that employ personnel experienced in contracting for transportation or for transportation-related services. The Department of Defense (DOD) and the General Services Administration (GSA) contract for transportation or for transportation-related services on behalf of other activities and agencies. For instance, GSA awards term contracts for services such as local drayage, office moves, and ocean-freight forwarding (see 47.105 for assistance).

(b) Agencies may obtain transportation or transportation-related services for which the cost does not exceed the small purchase limitation under the small purchase procedures in part 13, if term contracts or basic ordering agreements are not available.

47.206 Preparation of solicitations and contracts.

(a) Contracting officers shall prepare solicitations and contracts for transportation or for transportation-related services as prescribed elsewhere in the FAR for fixed-price service contracts to the extent that those requirements are applicable and not inconsistent with the requirements in subpart 47.2.

(b) In addition, the contracting officer shall include in solicitations and contracts for transportation or for transportation-related services provisions, clauses, and instructions as prescribed in section 47.207.

[48 FR 42424, Sept. 19, 1983. Redesignated at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

47.207 Solicitation provisions, contract clauses, and special requirements.

The contracting officer shall include provisions, clauses, and special requirements in solicitations and contracts for transportation or for transportation-related services as prescribed in 47.207-1 through 47.207-9.

47.207-1 Qualifications of offerors.

(a) *Operating authorities.* The contracting officer shall insert the clause at 52.247-2, Permits, Authorities, or Franchises, when regulated transportation is involved. The clause need not be used when a Federal office move is intrastate and the contracting officer determines that it is in the Government's interest not to apply the requirement for holding or obtaining State authority to operate within the State.

(b) *Performance capability for Federal office moving contracts.* (1) The contracting officer shall insert the clause at 52.247-3, Capability to Perform a Contract for the Relocation of a Federal Office, when a Federal office is relocated, to ensure that offerors are capable to perform interstate or intrastate moving contracts involving the relocation of Federal offices.

(2) If a Federal office move is intrastate and the contracting officer determines that it is in the Government's interest not to apply the requirements for holding or obtaining State authority to operate within the State, and to maintain a facility within the State or commercial zone, the contracting officer shall use the clause with its Alternate I.

(c) *Inspection of shipping and receiving facilities.* The contracting officer shall insert the provision at 52.247-4, Inspection of Shipping and Receiving Facilities, when it is desired for offerors to inspect the shipping, receiving, or other sites to ensure realistic bids.

(d) *Familiarization with conditions.* The contracting officer shall insert the clause at 52.247-5, Familiarization with Conditions, to ensure that offerors become familiar with conditions under which and where the services will be performed.

(e) *Financial statement.* The contracting officer shall insert the provision at 52.247-6, Financial Statement, to ensure that offerors are prepared to furnish financial statements.

47.207-2 Duration of contract and time of performance.

The contracting officer shall—

(a) Establish a specific expiration date (month, day, and year) for the contract or state the length of time that the contract will remain in effect; e.g., 6 months commencing from the date of award; and

(b) Include the following items as appropriate:

(1) A statement of the time period during which the service is required when the service is a one-time job; e.g., a routine office relocation.

(2) A time schedule for the performance of segments of a major job; e.g., an office relocation for which the work phases must be coordinated to meet other needs of the agency.

(3) Statements of performance times for particular services; e.g., pickup and delivery services. Specify—

(i) On which days of the week and during which hours of the day pickup and delivery services may be required;

(ii) The maximum time allowable to the contractor for accomplishing delivery under regular or priority service; and

(iii) How much advance notice the contractor will be given for regular pickup services and, if applicable, priority pickup services.

47.207-3 Description of shipment, origin, and destination.

(a) *Origin of shipments.* The contracting officer shall include in solicitations full details regarding the location from which the freight is to be shipped. For example, if a single location is shown, furnish the shipper's name, street address, city, State, and ZIP code. If several or indefinite locations are involved, as in the case of multiple shippers or drayage contracts, describe the area of origin including boundaries and ZIP codes.

(b) *Destination of shipments.* The contracting officer shall include full details regarding delivery points. For example, if a single delivery point is shown, furnish the consignee's name, street address, city, State, and ZIP code. If several or indefinite delivery points are involved, describe the delivery area, including boundaries and ZIP codes.

(c) *Description of the freight.* The contracting officer shall include in solicitations—

(1) An inventory if the freight consists of nonbulk items; and

(2) The freight classification description, which should be obtained from the transportation office. If a freight classification description is not available, use a clear nontechnical description. Include additional details necessary to ensure that the prospective offerors have complete information about the freight; e.g., size, weight, hazardous material, whether packed for export, or unusual value.

(d) *Exclusion of freight.* The contracting officer shall (1) clearly identify any freight or types of shipments that are subject to exclusion; e.g., bulk freight, hazardous commodities, or shipments under or over specified weights; and (2) insert a clause substantially the same as the clause at 52.247-7, Freight Excluded, when any commodities or types of shipments have been identified for exclusion.

(e) *Quantity.* (1) The contracting officer shall state the actual weight of the freight or a reasonably accurate estimate. The following are examples:

(i) If the contract covers transportation services required over an extended period of time, include a schedule of actual or estimated tonnage or number of items to be transported per week, month, or other time period.

(ii) If the contract covers a group movement of household goods, give an estimate of the aggregate weights and the basis for determining the aggregate weight.

(2) The contracting officer shall insert the clause at 52.247-8, Estimated Weights or Quantities Not Guaranteed, when weights or quantities are estimates.

47.207-4 Determination of weights.

The contracting officer shall specify in the contract the method of determining the weights of shipments as appropriate for the kind of freight involved and the type of service required.

(a) *Shipments of freight other than household goods and office furniture.*

(1) The contracting officer shall insert the clause at 52.247-9, Agreed Weight—General Freight, when the shipping activity determines the weight of shipments of freight other than household goods or office furniture.

(2) The contracting officer shall insert the clause at 52.247-10, Net Weight—General Freight, when the weight of shipments of freight other than household goods or office furniture is not known at the time of shipment and the contractor is responsible for determining the net weight of the shipments.

(b) *Shipments of household goods or office furniture.* The contracting officer shall insert the clause at 52.247-11, Net Weight—Household Goods or Office Furniture, when movements of Government employees' household goods or relocations of Government offices are involved.

47.207-5 Contractor responsibilities.

Contractor responsibilities vary with the kinds of freight to be shipped and services required. The contracting officer shall specify clearly those service requirements that are not considered normal transportation or transportation-related requirements.

(a) *Type of equipment.* If appropriate, the contracting officer shall specify the type and size of equipment to be furnished by the contractor. Otherwise, state that the contractor shall furnish clean and sound closed-type equipment of sufficient size to accommodate the shipment.

(b) *Supervision, labor, or materials.* The contracting officer shall insert a clause substantially the same as the clause at 52.247-12, Supervision, Labor, or Materials, when the contractor is required to furnish supervision, labor, or materials.

(c) *Accessorial services—moving contracts.* The contracting officer shall insert a clause substantially the same as the clause at 52.247-13, Accessorial Services—Moving Contracts, in contracts for the transportation of household goods or office furniture.

(d) *Receipt of shipment.* The contracting officer shall insert the clause at 52.247-14, Contractor Responsibility for Receipt of Shipment.

(e) *Loading and unloading.* The contracting officer shall insert the clause at 52.247-15, Contractor Responsibility for Loading and Unloading, when the contractor is responsible for loading and unloading shipments.

(f) *Return of undelivered freight.* The contracting officer shall insert the clause at 52.247-16, Contractor Responsibility for Returning Undelivered Freight, when the contractor is responsible for returning undelivered freight.

47.207-6 Rates and charges.

(a) (1) The contracting officer shall include in the solicitation a statement that the charges in the contract shall not exceed the contractor's charges for the same service that is—

(i) Available to the general public; or

(ii) Otherwise tendered to the Government.

(2) The contracting officer shall insert the clause at 52.247-17, Charges.

(b) The contracting officer shall include in the solicitation a tabulation listing each required service and the basis for the rate (price); e.g., *unit of weight* or *per work-hour,* leaving sufficient space for offerors to insert the rates offered for each service.

(c) The following guidelines apply to the composition of a tabulation of transportation or of transportation-related services and their rate (price) bases:

(1) *Combination of pricing bases.* If various types of services with different bases for assessing charges are required under the same contract, show each service separately and the applicable basis for that service.

(2) *Hourly rate basis.* If charges are based on an hourly rate, state the method for charging for fractions of an hour; e.g., (i) a period of 30 minutes or less is charged at one-half the hourly rate and (ii) the hourly rate applies to any portion of an hour that exceeds 30 minutes.

(3) *Shipments of varying weights.* If charges are based on weight and shipments will vary in weight, request rates on a graduated weight basis. Include a table of graduated weights for offerors to insert rates.

(4) *Multiple origins and/or destinations.* Specify whether rates are requested for each origin and/or each destination or for specific groups of origins and/or destinations.

(5) *Multiple shipments from one origin.* If multiple shipments will be tendered at one time to the contractor for delivery to two or more consignees at the same destination, request the rate applicable to the aggregate weight. If such shipments are for delivery to various destinations along the route between origin and last destination, request the rate applicable to the aggregate weight and a stopoff charge for each intermediate destination.

(i) The contracting officer shall insert the clause at 52.247-18, Multiple Shipments, when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees at the same destination.

(ii) The contracting officer shall insert the clause at 52.247-19, Stopping in Transit for Partial Unloading, when multiple shipments are tendered at one time to the contractor for transportation from one origin to two or more consignees along the route between origin and last destination.

(6) *Estimated quantities or weights.* The contracting officer shall insert in solicitations the provision at 52.247-20, Estimated Quantities or Weights for Evaluation of Offers, when quantities or weights of shipments between each origin and destination are not known, stating estimated quantity or weight for each origin/destination pair.

(7) *Additional services.* If services in addition to those covered in the basic rate are anticipated; e.g., inside delivery, state the conditions under which payment will be made for those services.

47.207-7 Liability and insurance.

(a) The contracting officer shall specify—

(1) The contractor's liability for injury to persons or damage to property other than the freight being transported;

(2) The contractor's liability for loss of and/or damage to the freight being transported; and

(3) The amount of insurance the contractor is required to maintain.

(b) When the contractor's liability for loss of and/or damage to the freight being transported is not specified, the usual measure of liability as prescribed in section 11707 of the Interstate Commerce Act (49 U.S.C. 11707) applies.

(c) The contracting officer shall insert the clause at 52.247-21, Contractor Liability for Personal Injury and/or Property Damage.

(d) The contracting officer shall insert the clause at 52.247-22, Contractor Liability for Loss of and/or Damage to Freight other than Household Goods, in solicitations and contracts for the transportation of freight other than household goods.

(e) The contracting officer shall nsert the clause at 52.247-23, Contractor Liability for Loss of and/or amage to Household Goods, in solicitations and contracts for the transportation of household goods, including he rate per pound appropriate to the tuation.

(f) When freight is not shipped under rates subject to released or declared value, see 28.313(a) and the clause at 52.228-9, Cargo Insurance.

(g) When the contracting officer determines that vehicular liability and/or general public liability insurance required by law are not sufficient for a contract, see 28.313(b) and the clause at 52.228-10, Vehicular and General Public Liability Insurance.

47.207-8 Government responsibilities.

(a) The contracting officer shall state clearly the Government's responsibilities that have a direct bearing on the contractor's performance under the contract; e.g., the Government's responsibility to notify the contractor in advance when hazardous materials are included in a shipment.

(1) *Advance notification.* The contracting officer shall insert the clause at 52.247-24, Advance Nctification by the Government, when the Government is responsible for notifying the contractor of specific service times or unusual shipments.

(2) *Government equipment with or without operators* (i) The contracting officer shall insert the clause at 52.247-25, Government-Furnished Equipment with or without Operators, when the Government furnishes equipment with or without operators.

(ii) Insert the kind of equipment and the locations where the equipment will be furnished.

(3) *Direction and marking.* The contracting officer shall insert the clause at 52.247-26, Government Direction and Marking, when office relocations are involved.

(b) The contracting officer shall insert the clause at 52.247-27, Contract Not Affected by Oral Agreement.

47.207-9 Annotation and distribution of shipping and billing documents.

(a) The contracting officer shall state in detail the responsibilities of the contractor, the contracting agency, and, if appropriate, the consignee for the annotation and distribution of shipping and billing documents. See 41 CFR part 101-41, Transportation Documentation and Audit (TDA).

(b) In instances of mass movements of freight made available to the contractor at one time, it is particularly important that the contracting officer specifies that bills of lading be cross-referenced so that the Government benefits from applicable volume rates.

(c) The contracting officer shall insert the clause at 52.247-28, Contractor's Invoices, in drayage or other term contracts.

Subpart 47.3—Transportation in Supply Contracts

47.300 Scope of subpart.

(a) This subpart prescribes policies and procedures for the application of transportation and traffic management considerations in the acquisition of supplies. The terms and conditions contained in this subpart are applicable to fixed-price contracts.

(b) If a special requirement exists for application of any of these terms and conditions to other types of contracts; e.g., cost-reimbursement contracts, for which transportation arrangements are normally the responsibility of the contractor and transportation costs are allowable (see 31.205-45), the contracting officer shall use the terms and conditions prescribed in this subpart as a guide for (1) contract coverage of transportation and (2) instructions to the contractor to minimize the ultimate transportation costs to the Government.

47.301 General.

(a) Transportation and traffic management factors are important in awarding and administering contracts to ensure that (1) acquisitions are made on the basis most advantageous to the Government and (2) supplies arrive in good order and condition and on time at the required place. (See 47.104 for possible reduced transportation rates for Government shipments).

(b) The requiring activity shall—

(1) Consider all transportation factors including present and future requirements, positioning of supplies, and subsequent distribution to the extent known or ascertainable; and

(2) Provide the contracting office with information and instructions reflecting transportation factors applicable to the particular acquisition.

47.301-1 Responsibilities of contracting officers.

(a) Contracting officers shall obtain from traffic management offices transportation factors required for (1) solicitations and awards and (2) contract administration, modification, and termination, including the movement of property by the Government to and from contractors' plants.

(b) Contracting officers shall request transportation office participation especially before making an initial acquisition of supplies that are unusually large, heavy, high, wide, or long; have sensitive or dangerous characteristics; or lend themselves to containerized movements from the source. In determining total transportation charges, contracting officers shall also consider additional costs arising from factors such as the use of special equipment, excess blocking and bracing material, or circuitous routing.

47.301-2 Participation of transportation officers.

Agencies' transportation officers shall participate in the solicitation and evaluation of offers to ensure that all necessary transportation factors, such as transportation costs, transit arrangements, time in transit, and port capabilities, are considered and result in solicitations and contracts advantageous to the Government. Transportation officers shall provide traffic management assistance throughout the acquisition cycle (see 47.105 Transportation assistance).

[48 FR 42424, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

47.301-3 Using the Defense Transportation System (DTS).

(a) All military and civilian agencies shipping, or arranging for the acquisition and shipment by Government contractors, through the use of military-controlled transport or through military transshipment facilities shall follow Department of Defense (DOD) Regulation 4500.32-R, Military Standard Transportation and Movement

Procedures (MILSTAMP). MILSTAMP establishes uniform procedures and documents for the generation, documentation, communication, and use of transportation information, thus providing the capability for control of shipments moving in the DTS. MILSTAMP has been implemented on a world-wide basis.

(b) Contracting activities are responsible for (1) ensuring that the requirements of the MILSTAMP regulation are included in appropriate contracts for all applicable shipments and (2) enforcing these requirements with regard to shipments under their control. This includes requirements relating to documentation, marking, advance notification of shipment dates, and terminal clearances.

(c) Contractual documents shall designate a contract administration office (see 42.202(d)) as the contact point to which the contractor will provide necessary information to (1) effect MILSTAMP documentation and movement control, including air or water terminal shipment clearances, and (2) obtain data necessary for shipment marking and freight routing. Contractual documents shall specify that the contractor shall not ship directly to a military air or water port terminal without authorization from the designated contract administration office (see 47.305-6(f)).

[48 FR 42424, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986; 55 FR 38517, Sept. 18, 1990]

47.302 Place of delivery—f.o.b. point.

(a) The policies and procedures in 47.304-1, -2, and -3 govern the transportation of supplies from sources in the Continental United States (CONUS), except when identifiable costs, nature of the supplies (security, safety, or value), delivery requirements (premium modes of transport, escorts, transit arrangements, and tentative conditions), or other advantages, limitations, or requirements dictate otherwise. The policies and procedures in 47.304-4 govern the transportation of supplies from sources outside CONUS.

(b) Generally, the contracting officer shall solicit offers, and award contracts, with delivery terms on the basis prescribed in 47.304. The contracting officer shall document the contract file (see 4.801) with justifications for solicitations that do not specify delivery on the basis prescribed in 47.304.

(c) (1) The place of performance of Government acquisition quality assurance actions and the place of acceptance shall not control the delivery term, except that if acceptance is at destination, transportation shall be f.o.b. destination (see 47.304-1(f)).

(2) The fact that transportation is f.o.b. destination does not alone necessitate changing the place of acceptance from origin to destination; and the fact that acceptance is at origin does not necessitate an f.o.b. origin delivery term. Providing for inspection and acceptance at origin (if appropriate under 46.402), in conjunction with an f.o.b. destination term, may be advantageous to both the Government and the contractor. Acceptance of title at origin by the Government permits payment of the contractor, provided the invoice is supported either by a copy of the signed commercial bill of lading (indicating the carrier's receipt of the supplies covered by the invoice for transportation to the particular destination specified in the contract) or by other appropriate evidence of shipment to the particular destination for the contractor's account.

47.303 Standard delivery terms and contract clauses.

Standard delivery terms are listed in 47.303-1 through 47.303-16 (but see 47.300 regarding applicability to cost reimbursement contracts).

[53 FR 34228, Sept. 2, 1988]

47.303-1 F.o.b. origin.

(a) *Explanation of delivery term. F.o.b. origin* means free of expense to the Government delivered—

(1) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipment will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(2) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(3) To a U.S. Postal Service facility; or

(4) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (commercial zones are prescribed by the Interstate Commerce Commission at 49 CFR part 1048).

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Order specified carrier equipment when requested by the Government; or

(ii) If not specified, order appropriate carrier equipment not in excess of capacity to accommodate shipment;

(3) Deliver the shipment in good order and condition to the carrier, and load, stow, trim, block, and/or brace carload or truckload shipment (when loaded by the contractor) on or in the carrier's conveyance as required by carrier rules and regulations;

(4) Be responsible for any loss of and/or damage to the goods—

(i) Occurring before delivery to the carrier;

(ii) Resulting from improper packing and marking; or

(iii) Resulting from improper loading, stowing, trimming, blocking, and/or bracing of the shipment, if loaded by the contractor on or in the carrier's conveyance;

(5) Complete the Government bill of lading supplied by the ordering agency or, when a Government bill of lading is not supplied, prepare a commercial bill of lading or other transportation receipt. The bill of lading shall show—

(i) A description of the shipment in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable;

(ii) The seals affixed to the conveyance with their serial numbers or other identification;

(iii) Lengths and capacities of cars or trucks ordered and furnished;

(iv) Other pertinent information required to effect prompt delivery to the consignee, including name, delivery address, postal address and ZIP code of consignee, routing, etc.;

(v) Special instructions or annotations requested by the ordering agency for commercial bills of lading; e.g., (A) *to be converted to a Government bill of lading,* or (B) *this shipment is the property of, and the freight charges paid to the carrier(s) will be reimbursed by, the Government*; and

(vi) The signature of the carrier's agent and the date the shipment is received by the carrier; and

(6) Distribute the copies of the bill of lading, or other transportation receipts, as directed by the ordering agency.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-29, F.o.b. Origin, when the delivery term is f.o.b. origin.

[48 FR 42424, Sept. 19, 1983, as amended at 53 FR 17859, May 18, 1988]

47.303-2 F.o.b. origin, contractor's facility.

(a) *Explanation of delivery term. F.o.b. origin, contractor's facility* means free of expense to the Government delivered on board the indicated type of conveyance of the carrier (or of the Government if specified) at the designated facility, on the named street or highway, in the city, county, and State from which the shipment will be made.

(b) *Contractor responsibilities.* The contractor's responsibilities are the same as those listed in 47.303-1(b).

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-30, F.o.b. Origin, Contractor's Facility, when the delivery term is f.o.b. origin, contractor's facility.

47.303-3 F.o.b. origin, freight allowed.

(a) *Explanation of delivery term. F.o.b. origin, freight allowed* means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (commercial zones are prescribed by the Interstate Commerce Commission at 49 CFR part 1048); and

(2) An allowance for freight, based on applicable published tariff rates (or Government rate tenders) between the points specified in the contract, is deducted from the contract price.

(b) *Contractor responsibilities.* The contractor's responsibilities are the same as those listed in 47.303-1(b).

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-31, F.o.b. Origin, Freight Allowed, when the delivery term is f.o.b. origin, freight allowed.

[48 FR 42424, Sept. 19, 1983, as amended at 53 FR 17859, May 18, 1988]

47.303-4 F.o.b. origin, freight prepaid.

(a) *Explanation of delivery term. F.o.b. origin, freight prepaid* means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (commercial zones are prescribed by the Interstate Commerce Commission at 49 CFR part 1048); and

(2) The cost of transportation, ultimately the Government's obligation, is prepaid by the contractor to the point specified in the contract.

(b) *Contractor responsibilities.* The contractor's responsibilities are the same as those listed in 47.303-1(b), except that the contractor shall prepare commercial bills of lading or other transportation receipts and shall prepay all freight charges to the extent specified in the contract.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-32, F.o.b. Origin, Freight Prepaid, when the delivery term is f.o.b. origin, freight prepaid.

[48 FR 42424, Sept. 19, 1983, as amended at 53 FR 17859, May 18, 1988]

47.303-5 F.o.b. origin, with differentials.

(a) *Explanation of delivery term. F.o.b. origin, with differentials* means—

(1) Free of expense to the Government delivered—

(i) On board the indicated type of conveyance of the carrier (or of the Government, if specified) at a designated point in the city, county, and State from which the shipments will be made and from which line-haul transportation service (as distinguished from switching, local drayage, or other terminal service) will begin;

(ii) To, and placed on, the carrier's wharf (at shipside, within reach of the ship's loading tackle, when the shipping point is within a port area having water transportation service) or the carrier's freight station;

(iii) To a U.S. Postal Service facility; or

(iv) If stated in the solicitation, to any Government-designated point located within the same city or commercial zone as the f.o.b. origin point specified in the contract (commercial zones are prescribed by the Interstate Commerce Commission at 49 CFR part 1048); and

(2) Differentials for mode of transportation, type of vehicle, or place of delivery as indicated in contractor's offer may be added to the contract price.

(b) *Contractor responsibilities.* The contractor's responsibilities are the same as those listed in 47.303-1(b).

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-33, F.o.b. Origin, with Differentials, when it is likely that offerors may include in f.o.b. origin offers a contingency to compensate for unfavorable routing conditions by the Government at the time of shipment.

[48 FR 42424, Sept. 19, 1983, as amended at 53 FR 17859, May 18, 1988]

47.303-6 F.o.b. destination.

(a) *Explanation of delivery term. F.o.b. destination* means—

(1) Free of expense to the Government delivered, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or *constructive placement* as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity. If rail carrier is used, supplies shall be delivered to the specified unloading platform of the consignee. If motor carrier (includi *piggyback*) is used, supplies shall delivered to truck tailgate at the u loading platform of the consignee. the contractor uses rail carrier (freight forwarder for less than carlo shipments, the contractor shall ensu that the carrier will furnish tailgat delivery if transfer to truck is require to complete delivery to consignee.

(b) *Contractor responsibilities.* Th contractor shall—

(1) (i) Pack and mark the shipmen to comply with contract specification or

(ii) In the absence of specification prepare the shipment in conformanc with carrier requirements;

(2) Prepare and distribute commercial bills of lading;

(3) Deliver the shipment in goo order and condition to the point of delivery specified in the contract;

(4) Be responsible for any loss o and/or damage to the goods occurrin before receipt of the shipment by th consignee at the delivery point specified in the contract;

(5) Furnish a delivery schedule an designate the mode of delivering carrier; and

(6) Pay and bear all charges to th specified point of delivery.

(c) *Contract clause.* The contractin officer shall insert in solicitations an contracts the clause at 52.247-34 F.o.b. Destination, when the deliver term is f.o.b. destination.

47.303-7 F.o.b. destination, within consignee's premises.

(a) *Explanation of delivery term. F.o.b. destination, within consignee's premises* means free of expense to the Government delivered and laid down within the doors of the consignee's premises, including delivery to specific rooms within a building if so specified.

(b) *Contractor responsibilities.* The contractor's responsibilities are the same as those listed in 47.303-6(b).

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-35, F.o.b. Destination, within Consignee's Premises, when the delivery term is f.o.b. destination, within consignee's premises.

47.303-8 F.a.s. vessel, port of shipment.

(a) *Explanation of delivery term. F.a.s. vessel, port of shipment* means free of expense to the Government delivered alongside the ocean vessel and within reach of its loading tackle at the specified port of shipment.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Deliver the shipment in good order and condition alongside the ocean vessel and within reach of its loading tackle, at the point of delivery and on the date or within the period specified in the contract; and

(ii) Pay and bear all applicable charges, including transportation costs, wharfage, handling, and heavy lift charges, if necessary, up to this point;

(3) Provide a clean dock or ship's receipt;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment to the point specified in the contract; and

(5) At the Government's request and expense, assist in obtaining the documents required for (i) exportation or (ii) importation at destination.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-36, F.a.s. Vessel, Port of Shipment, when the delivery term is f.a.s. vessel, port of shipment.

47.303-9 F.o.b. vessel, port of shipment.

(a) *Explanation of delivery term. F.o.b. vessel, port shipment* means free of expense to the Government loaded, stowed, and trimmed on board the ocean vessel at the specified port of shipment.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Deliver the shipment on board the ocean vessel in good order and condition on the date or within the period fixed; and

(ii) Pay and bear all charges incurred in placing the shipment actually on board;

(3) Provide a clean ship's receipt or on-board ocean bill of lading;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment on board the ocean vessel; and

(5) At the Government's request and expense, assist in obtaining the documents required for (i) exportation or (ii) importation at destination.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-37, F.o.b. Vessel, Port of Shipment, when the delivery term is f.o.b. vessel, port of shipment.

47.303-10 F.o.b. inland carrier, point of exportation.

(a) *Explanation of delivery term. F.o.b. inland carrier, point of exportation* means free of expense to the Government, on board the conveyance of the inland carrier, delivered to the specified point of exportation.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) Prepare and distribute commercial bills of lading;

(3) (i) Deliver the shipment in good order and condition in or on the conveyance of the carrier on the date or within the period specified; and

(ii) Pay and bear all applicable charges, including transportation costs, to the point of delivery specified in the contract;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment to the point of delivery specified in the contract; and

(5) At the Government's request and expense, assist in obtaining the documents required for (i) exportation or (ii) importation at destination.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-38, F.o.b. Inland Carrier, Point of Exportation, when the delivery term is f.o.b. inland carrier, point of exportation.

47.303-11 F.o.b. inland point, country of importation.

(a) *Explanation of delivery term. F.o.b. inland point, country of importation* means free of expense to the Government, on board the indicated type of conveyance of the carrier, delivered to the specified inland point where the consignee's facility is located.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods;

(2) (i) Deliver, in or on the inland carrier's conveyance, the shipment in good order and condition to the specified inland point where the consignee's facility is located;

(ii) Pay and bear all applicable charges incurred up to the point of delivery, including transportation costs; export, import, or other fees or taxes; costs of landing; wharfage costs; customs duties and costs of certificates of origin; consular invoices; and other documents that may be required for importation; and

(3) Be responsible for any loss of and/or damage to the goods until their arrival on or in the carrier's conveyance at the specified inland point.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-39, F.o.b. Inland Point, Country of Importation, when the delivery term is f.o.b. inland point, country of importation.

47.303-12 Ex dock, pier, or warehouse, port of importation.

(a) *Explanation of delivery term. Ex dock, pier, or warehouse, port of importation* means free of expense to the Government delivered on the designated dock or pier or in the warehouse at the specified port of importation.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements to protect the goods;

(2) (i) Deliver shipment in good order and condition; and

(ii) Pay and bear all charges up to the point of delivery specified in the contract, including transportation costs; export, import, or other fees or taxes; costs of wharfage and landing, if any; customs duties; and costs of certificates of origin, consular invoices, or other documents that may be required for exportation or importation; and

(3) Be responsible for any loss of and/or damage to the goods occurring before delivery of the shipment to the point of delivery specified in the contract.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-40, Ex Dock, Pier, or Warehouse, Port of Importation, when the delivery term is ex dock, pier, or warehouse, port of importation.

47.303-13 C.& f. destination.

(a) *Explanation of delivery term. C.& f. destination* means free of expense to the Government delivered on board the ocean vessel to the specified point of destination, with the cost of transportation paid by the contractor.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for ocean transportation in conformance with carrier requirements;

(2) (i) Deliver the shipment in good order and condition; and

(ii) Pay and bear all applicable charges to the point of destination specified in the contract, including transportation costs and export taxes or other fees or charges levied because of exportation;

(3) Obtain and dispatch promptly to the Government clean on-board ocean bills of lading to the specified point of destination;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery; and

(5) At the Government's request and expense, provide certificates of origin, consular invoices, or any other documents issued in the country of origin or of shipment, or both, that may be required for importation into the country of destination.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-41, C.&f. Destination, when the delivery term is c.& f. destination.

47.303-14 C.i.f. destination.

(a) *Explanation of delivery term. C.i.f destination* means free of expense to the Government delivered on board the ocean vessel to the specified point of destination, with the cost of transportation and marine insurance paid by the contractor.

(b) *Contractor responsibilities.* The contractor's responsibilities are the same as those listed in 47.303-13(b), except that, in addition, the contractor shall obtain and dispatch to the Government an insurance policy or certificate providing the amount and extent of marine insurance coverage specified in the contract or agreed upon by the Government contracting officer.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-42, C.i.f. Destination, when the delivery term is c.i.f. destination.

47.303-15 F.o.b. designated air carrier's terminal, point of exportation.

(a) *Explanation of delivery term. F.o.b. designated air carrier's terminal, point of exportation* means free of expense to the Government loaded aboard the aircraft, or delivered to the custody of the air carrier (if only the air carrier performs the loading), at the air carrier's terminal specified in the contract.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for air transportation in conformance with carrier requirements to protect the goods and to ensure assessment of the lowest applicable transportation charge;

(2) (i) Deliver the shipment in good order and condition into the conveyance of the carrier, or to the custody of the carrier (if only the carrier performs the loading), at the point of delivery and on the date or within the period specified in the contract; and

(ii) Pay and bear all applicable charges up to this point;

(3) Provide a clean Government bill of lading and/or air waybill;

(4) Be responsible for any loss of and/or damage to the goods occurring before delivery of the goods to the point specified in the contract; and

(5) At the Government's request and expense, assist in obtaining the documents required for the purpose of exportation.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-43, F.o.b. Designated Air Carrier's Terminal, Point of Exportation, when the delivery term is f.o.b. designated air carrier's terminal, point of exportation.

47.303-16 F.o.b. designated air carrier's terminal, point of importation.

(a) *Explanation of delivery term. F.o.b. designated air carrier's terminal, point of importation* means free of expense to the Government delivered to the air carrier's terminal at the point of importation specified in the contract.

(b) *Contractor responsibilities.* The contractor shall—

(1) (i) Pack and mark the shipment to comply with contract specifications; or

(ii) In the absence of specifications, prepare the shipment for air transportation in conformance with carrier requirements to protect the goods;

(2) Prepare and distribute bills of lading or air waybills;

(3) (i) Deliver the shipment in good order and condition to the point of delivery specified in the contract; and

(ii) Pay and bear all charges incurred up to the point of delivery specified in the contract, including transportation costs; export, import, or other fees or taxes; cost of landing, if any; customs duties; and costs of certificates of origin, consular invoices, or other documents that may be required for exportation or importation; and

(4) Be responsible for any loss of and/or damage to the goods until delivery of the goods to the Government at the designated air carrier's terminal.

(c) *Contract clause.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-44, F.o.b. Designated Air Carrier's Terminal, Point of Importation, when the delivery term is f.o.b. designated air carrier's terminal, point of importation.

47.304 Determination of delivery terms.

47.304-1 General.

(a) The contracting officer shall determine f.o.b. terms generally on the basis of overall costs, giving due consideration to the criteria given in 47.304.

(b) Solicitations shall specify whether offerors must submit offers f.o.b. origin, f.o.b. destination, or both; or whether offerors may choose the basis on which they make an offer. The contracting officer shall consider the most advantageous delivery point, such as (1) f.o.b. origin, carrier's equipment, wharf, or specified freight station near contractor's plant; or (2) f.o.b. destination.

(c) In determining whether f.o.b. origin or f.o.b. destination is more advantageous to the Government, the contracting officer shall consider the availability of lower freight rates (Government rate tenders) to the Government for f.o.b. origin acquisitions. F.o.b. origin contracts also present other desirable traffic management features, in that they—

(1) Permit use of transit privileges (see 47.305-13);

(2) Permit diversions to new destinations without price adjustment for transportation (see 47.305-11);

(3) Facilitate use of special routings or types of equipment (e.g., circuitous routing or oversize shipments) (see 47.305-14);

(4) Facilitate, if necessary, use of premium cost transportation and permit Government-controlled transportation;

(5) Permit negotiations for reduced freight rates (see 47.104-1(b)); and

(6) Permit use of small shipment consolidation stations.

(d) When destinations are tentative or unknown, the solicitation shall be f.o.b. origin only (see 47.305-5).

(e) When the size or quantity of supplies with confidential or higher security classification requires commercial transportation services, the contracting officer shall generally specify f.o.b. origin acquisitions.

(f) When acceptance must be at destination, solicitation shall be on an f.o.b. destination only basis.

(g) Following are examples of situations when solicitations shall normally be on an f.o.b. destination only basis because it is advantageous to the Government (see 47.305-4):

(1) Bulk supplies, such as coal, that require other than Government-owned or operated handling, storage, and loading facilities, are destined for shipment outside the continental United States.

(2) Steel or other bulk construction products are destined for shipment outside the continental United States.

(3) Supplies consist of forest products such as lumber.

(4) Perishable or medical supplies are subject to in-transit deterioration.

(5) Evaluation of f.o.b. origin offers is anticipated to result in increased ad-

strative lead time or administra-
cost that would outweigh the po-
ial advantages of an f.o.b. origin
rmination.

4-2 Shipments within CONUS.

Solicitations shall provide that
s may be submitted on the basis
ther or both f.o.b origin and f.o.b.
nation and that they will be eval-
d on the basis of the lowest over-
ost to the Government.

When sufficient reasons exist not
llow this policy, the contract file
be documented to include the
ons.

**4-3 Shipments from CONUS for
verseas delivery.**

When Government acquisitions
lve shipments from CONUS to
seas destinations, delivery f.o.b.
n may afford not only the econo-
of lower freight rates available to
Government within the United
es, but also flexibility for selection
) the port of export and (2) the
n transportation providing the
st overall cost to the Government.

(1) Unless there are valid reasons
e contrary (see 47.304-5), acquisi-
of supplies originating within
US for ultimate delivery to desti-
ons outside CONUS shall be made
e basis of f.o.b. origin. This policy
ies to supplies and equipment to
hipped either directly to a port
for export or to a storage or hold-
rea for subsequent forwarding to
rt area for export.

Justification for the solicitation
ffers on other than an f.o.b. origin
shall be recorded and the con-
file documented accordingly.

Export cargo involves consider-
s of operational and cost factors
the point of origin within
US to the overseas port destina-
The lowest cost of shipping can
etermined only by evaluating and
aring the various prospective
ed costs (including inland, termi-
and ocean costs). Also, agencies
have export licensing privileges
hipments to foreign destinations.
contracting officer shall obtain
e from the transportation officer
sure full use of these privileges.

47.304-4 Shipments originating outside CONUS.

(a) Unless there are valid reasons to the contrary (see 47.304-5), acquisition of supplies originating outside CONUS for ultimate delivery to destinations within CONUS or elsewhere, regardless of the quantity of the shipments, shall be on the basis of f.o.b. origin or f.o.b. destination, whichever is more advantageous to the Government.

(b) The contracting officer shall request the advice of the transportation officer to determine the most appropriate place of delivery to be specified in acquisition documents, giving full consideration to the possible use of Government transportation facilities, reduced rates available, special licensing or custom requirements, and availability of U.S.-flag shipping services between the points involved (see subpart 47.5).

47.304-5 Exceptions.

(a) Unusual conditions or circumstances may require the use of terms other than f.o.b. origin or f.o.b. destination. Such conditions or circumstances include, but are not limited to—

(1) Transportation disabilities at origin or destination;

(2) Mode of transportation required;

(3) Availability of Government or commercial loading, unloading, or transshipment facilities;

(4) Characteristics of the supplies;

(5) Trade customs related to certain supplies;

(6) Origins or destinations in Alaska and Hawaii; and

(7) Program requirements.

(b) Contracting officers shall obtain assistance from transportation officers before issuing solicitations when unusual conditions or circumstances exist that relate to f.o.b. terms.

47.305 Solicitation provisions, contract clauses, and transportation factors.

(a) The contracting officer shall coordinate transportation factors with the transportation office during the planning, solicitation, and award phases of the acquisition process (see 47.105).

(b) To the extent feasible, activities shall schedule deliveries to effect savings in transportation costs, and concomitant reductions in energy consumption by carriers (see 47.305-7 and 47.305-8 for specific possibilities).

47.305-1 Solicitation requirements.

When the acquisition of supplies is on f.o.b. origin or f.o.b. destination delivery terms, the contracting officer shall include in solicitations a requirement that the offeror furnish the Government as much of the following data as is applicable to the particular acquisition:

(a) Modes of transportation and, if rail transportation is used, names of rail carriers serving the offeror's facility.

(b) The number of railroad cars, motor trucks, or other conveyances that can be loaded per day.

(c) Type of packaging; e.g., box, carton, crate, drum, bundle, skids, and when applicable, package number from the governing freight classification.

(d) Number of units packed in one container.

(e) Guaranteed maximum shipping weight; cubic measurement; and length, width, and height of each container.

(f) Minimum size of each shipment.

(g) Number of containers or units that can be loaded in a car, truck, or other conveyance of the size normally used (specify type and size) for the commodity.

(h) Description of material in terms of the governing freight classification or tariff (or Government rate tender) under which lowest freight rates are applicable.

(i) Benefits available to the Government under transit arrangements made by the offeror.

(j) Other requirements as stated under specific section headings.

47.305-2 Solicitations f.o.b. origin and f.o.b. destination—lowest overall cost.

(a) Solicitations, when appropriate, shall specify that offers may be f.o.b. origin, f.o.b. destination, or both; and that they will be evaluated on the basis of the lowest overall cost to the Government.

(b) When offers are solicited on the basis of both f.o.b. origin and f.o.b. destination, the contracting officer shall insert in solicitations the provision at 52.247-45, F.o.b. Origin and/or F.o.b. Destination Evaluation.

47.305-3 F.o.b. origin solicitations.

When preparing f.o.b. origin solicitations, the contracting officer shall refer to 47.303, where f.o.b. origin clauses relating to standard delivery terms are prescribed, and to 42.1404-2, where the use of bills of lading, parcel post, and indicia mail is prescribed. Supply solicitations that will or may result in f.o.b. origin contracts shall also contain requirements, information, provisions, and clauses concerning the following items:

(a) Delivery in carload or truckload lots f.o.b. carrier's equipment, wharf, or freight station.

(b) The requirement that the offeror furnish the following information with the offer:

(1) Location of the offeror's actual shipping point(s) (street address, city, State, and ZIP code) from which supplies will be delivered to the Government.

(2) Whether the offeror's shipping point has a private railroad siding, and the name of the rail carrier serving it.

(3) When the offeror's shipping point does not have a private siding, the names and addresses of the nearest public rail siding and of the carrier serving it. (This will enable transportation officers, when issuing routing instructions, to select the mode of transportation that will provide the required service at the lowest possible overall cost.)

(4) (i) The quantity of supplies to be shipped from each shipping point.

(ii) The contracting officer shall insert in f.o.b. origin solicitations the provision at 52.247-46, Shipping Point(s) Used in Evaluation of F.o.b. Origin Offers, when price evaluation for shipments from various shipping points is contemplated.

(c) When delivery is *f.o.b. origin, contractor's facility,* and the designated facility is not covered by the line-haul transportation rate, the charges required to deliver the shipment to the point where the line-haul rate is applicable.

(d) When delivery is *f.o.b. origin, freight allowed*, the basis on which transportation charges will be allowed, including the origin and destination from and to which transportation charges will be allowed.

(e) If f.o.b. origin offers only are desired, a statement that offers submitted on any other basis will be rejected as nonresponsive.

(f) (1) The methods of transportation used in evaluating offers. The Government normally uses land transportation by regulated common carriers between points in the 48 contiguous United States and the District of Columbia.

(2) The contracting officer shall insert the provision at 52.247-47, Evaluation—F.o.b. Origin, in solicitations that require prices f.o.b. origin for the purpose of establishing the basis on which offers will be evaluated.

(g) (1) When it is believed that prospective contractors are likely to include in f.o.b. origin offers a contingency to compensate for what may be an unfavorable routing condition by the Government at the time of shipment, the contracting officer may permit prospective contractors to state in offers a reimbursable differential that represents the cost of bringing the supplies to any f.o.b. origin place of delivery specified by the Government at the time of shipment (see the clause at 52.247-33, F.o.b. Origin, with Differentials).

(2) Following are situations that might impose on the contractor a substantial cost above *at plant* or *commercial shipping point* prices because of Government-required routings:

(i) The loading nature of the supplies; e.g., wheeled vehicles.

(ii) The different methods of shipment specified by the Government; e.g., towaway, driveaway, tri-level vehicle, or rail car, that may increase the contractor's cost in varying amounts for bringing the supplies to, or loading and bracing the supplies at, the specified place of delivery.

(iii) The contractor's f.o.b. origin shipping point is a port city served by United States inland, coastwise, or intercoastal water transportation, and the contractor would incur additional costs to make delivery f.o.b. a wharf in that city to accommodate water routing specified by the Government.

(iv) The contractor's plant does not have a private rail siding and in order to ship by Government-specified rail routing, the contractor would be required to deliver the supplies to a public siding or freight terminal and to load, brace, and install dunnage in rail cars.

[48 FR 42424, Sept. 19, 1986, as amended at 51 FR 31426, Sept. 3, 1986]

47.305-4 F.o.b. destination solicitations.

(a) When preparing f.o.b destination solicitations, the contracting officer shall refer to 47.303 for the prescription of f.o.b. destination clauses relating to standard delivery terms.

(b) If f.o.b. destination only offers are desired, the solicitation shall state that offers submitted on a basis other than f.o.b. destination will be rejected as nonresponsive.

(c) When supplies will or may be purchased f.o.b. destination but inspection and acceptance will be at origin, the contracting officer shall insert in solicitations and contracts the clause at 52.247-48, F.o.b. Destination—Evidence of Shipment.

47.305-5 Destination unknown.

(a) (1) When destinations are unknown, solicitations shall be f.o.b. origin only.

(2) The contracting officer shall include in the contract file justifications for such solicitations.

(b) (1) When the exact destination of the supplies to be acquired is not known, but the general location of the users can be reasonably established, the acquiring activity shall designate tentative destinations for the purpose of computing transportation costs, showing estimated quantities for each tentative destination.

(2) The contracting officer shall insert in solicitations the provision at 52.247-49, Destination Unknown, when destinations are tentative and only for the purpose of evaluating offers.

(3) If it is necessary to control subsequent shipping weights, the solicitation shall state that subsequent ship-

ments shall be made in carloads or truckloads (see the clause at 52.247-59, F.o.b. Origin—Carload and Truckload Shipments).

(c) (1) When exact destinations are not known and it is impracticable to establish tentative or general delivery places for the purpose of evaluating transportation costs, the contracting officer shall insert in solicitations the provision at 52.247-50, No Evaluation of Transportation Costs.

(2) The solicitation shall also state that the transportation costs of subsequent shipments must be controlled (see, for example, the clause at 52.247-61, F.o.b. Origin—Minimum Size of Shipments).

47.305-6 Shipments to ports and air terminals.

(a) When supplies are acquired on the basis of the delivery terms in 47.303-8 through 47.303-16, the solicitation shall include a requirement that the offeror furnish the Government the following information:

(1) When the delivery term is *f.a.s. vessel, port of shipment, f.o.b. vessel, port of shipment,* or *f.o.b. inland carrier, point of exportation,* the required data shall include—

(i) A delivery schedule in number of units and/or long or short tons;

(ii) Maximum quantities available per shipment;

(iii) The quantity that can be made available for loading to vessel per running day of 24 hours (if acquisition involves a commodity to be shipped in bulk);

(iv) The minimum leadtime required to make supplies available for loading to vessel; and

(v) The port and pier or other designation and, when applicable, the maximum draft of vessel (in feet) that can be accommodated.

(2) When the delivery term is *f.o.b. inland point, country of importation* or *f.o.b. designated air carrier's terminal, point of importation,* the required data shall include—

(i) A delivery schedule in number of units and/or long or short tons;

(ii) Maximum quantities available per shipment; and

(iii) Other data appropriate to shipment by air carrier.

(3) When the delivery term is *ex dock, pier, or warehouse, port of importation* or *c.& f. destination,* the required data shall include—

(i) A delivery schedule in number of units and/or long or short tons;

(ii) Maximum quantities available per shipment; and

(iii) The number of containers or units that can be loaded in a car, truck, or other conveyance of the size normally used (specify type and size) for the commodity.

(4) When the delivery term is *c.i.f. destination,* the required data shall include—

(i) The same as specified in 47.305-6(a)(3); and

(ii) The amount and type of marine insurance coverage; e.g., whether the coverage is *With Average* or *Free of Particular Average* and whether it covers any special risks or excludes any of the usual risks associated with the specific commodity involved.

(5) When the delivery term is *f.o.b. designated air carrier's terminal, point of exportation,* the required data shall include—

(i) A delivery schedule in number of units, type of package, and individual weight and dimensions of each package;

(ii) Minimum leadtime required to make supplies available for loading into aircraft;

(iii) Name of airport and location to which shipment will be delivered; and

(iv) Other data appropriate to shipment by air carrier.

(b) When supplies are acquired for known destinations outside CONUS and originate within CONUS, the contracting officer shall, for transportation evaluation purposes, note in the solicitation the CONUS port of loading or point of exit (aerial or water) and the water port of debarkation that serves the overseas destination.

(c) The contracting officer may also, for evaluation purposes, list in the solicitation other CONUS ports that meet the eligibility criteria compatible with the nature and quantity of the supplies, their destination, type of carrier required, and specified overseas delivery dates. This permits offerors that are geographically remote from the port that normally serves the overseas destination to be competitive as far as transportation costs are concerned.

(d) Unless logistics requirements limit the ports of loading to the ports listed in the solicitation, the solicitation shall state that—

(1) Offerors may nominate additional ports (including ports in Alaska and Hawaii) more favorably located to their shipping points; and

(2) These ports will be considered in the evaluation of offers if they possess all requisite capabilities of the listed ports in relation to the supplies being acquired.

(e) When supplies are to be exported through CONUS ports and offers are solicited on an f.o.b. origin or f.o.b. destination basis, the contracting officer shall insert in solicitations the provision at 52.247-51, Evaluation of Export Offers. The contracting officer shall use the provision with its—

(1) Alternate I, when the CONUS ports of export are DOD water terminals;

(2) Alternate II, when offers are solicited on an f.o.b. origin only basis; or

(3) Alternate III, when offers are solicited on an f.o.b. destination only basis.

(f) (1) When the supplies are to move in the Defense Transportation System (DTS) (see 47.301-3), the contract shall specify that—

(i) A Transportation Control Movement Document (TCMD) must be dispatched to the appropriate DOD air or water clearance authority in accordance with MILSTAMP procedures for all shipments consigned to DOD air or water terminal transshipment points; and

(ii) An Export Release must be obtained for supplies to be transshipped via a water port of loading to overseas destinations, except for shipments for which an Export Release is not required, generally shipments of less than 10,000 pounds, (see paragraph 202024 of the Military Traffic Management Regulation (MTMR) (AR 55-355, NAVSUP 4600.70, MCO 4600.14A, AFM 75-2, DLAR 4500.3).

(2) When shipments will be consigned to DOD air or water terminal transshipment points, the contracting officer shall insert in solicitations and contracts the clause at 52.247-52, Clearance and Documentation Requirements—Shipments to DOD Air or Water Terminal Transshipment Points.

(g) When a contract will not generate any shipments that require an Export Release, only the DOD CONUS ports that serve the overseas destination shall be listed in the solicitation (see MILSTAMP at 47.301-3), except that the responsible contracting officer may limit the water ports listed when such limitation is considered necessary to meet delivery or other requirements.

(h) The award shall specify the United States ports of loading that afford the lowest overall cost to the overseas destination.

(i) When supplies will be from origins outside CONUS to destinations either within or outside CONUS, the contracting officer shall use the appropriate f.o.b. term and include evaluation-of-offers information.

(j) In furtherance of the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)), to encourage and foster the American Merchant Marine, the port of delivery of supplies originating outside the United States and shipped by ocean vessel shall be based on the availability of United States-flag vessels between the ports involved, unless the acquiring activity has given other specific instructions. (See subpart 47.5—Ocean Transportation by U.S.-Flag Vessels.)

(k) For application of the Fly America Act to the transportation of supplies and personnel when the Government is responsible for the transportation costs, see subpart 47.4—Air Transportation by U.S.-Flag Carriers.

(l) Military and civilian agencies shall obtain assistance from transportation offices in connection with all export shipments (see 47.105).

47.305-7 Quantity analysis, direct delivery, and reduction of crosshauling and backhauling.

(a) *Quantity analysis.* (1) The requiring activity shall consider the acquisition of carload or truckload quantities.

(2) When additional quantities of the supplies being acquired can be transported at lower unit transportation costs or with a relatively small increase in total transportation costs, with no impairment to the program schedule, the contracting officer shall ascertain from the requiring activity whether there is a known requirement for additional quantities. This may be the case, for example, when the additional quantity could profitably be stored by the activity for future use, or could be distributed advantageously to several using activities on the same transportation route or in the same geographical area.

(b) *Direct delivery*. When it is the usual practice of a requiring activity to acquire supplies in large quantities for shipment to a central point and subsequent distribution to using activities, as needed, consideration shall be given, if sufficient quantities are involved to warrant scheduling direct delivery, to the feasibility of providing for direct delivery from the contractor to the using activity, thereby reducing the cost of transportation and handling.

(c) *Crosshauling and backhauling*. The contracting officer shall select distribution and transshipment facilities intermediate to origins and ultimate destinations to reduce crosshauling and backhauling; i.e., the transportation of personal property of the same kind in opposite directions or the return of the property to or through areas previously traversed in shipment.

47.305-8 Consolidation of small shipments and the use of stopoff privileges.

(a) *Consolidation of small shipments*. Consolidation of small shipments into larger lots frequently results in lower transportation costs. Therefore, the contracting officer, after consultation with the transportation office and the activity requiring the supplies, may revise the delivery schedules to provide for deliveries in larger quantities.

(b) *Stopping for partial unloading*. When feasible, schedules for delivery of supplies to multiple destinations shall be consolidated and the stopoff privileges permitted under carrier tariffs shall be used for partial unloading at one or more points directly en route between the point of origin and the last destination.

47.305-9 Commodity description and freight classification.

(a) Generally, the freight rate for supplies is based on the rating applicable to the freight classification description published in tariffs filed with Federal and State regulatory bodies. Therefore, the contracting officer shall show in the solicitation a complete description of the commodity to be acquired and of packing requirements to determine proper transportation charges for the evaluation of offers. If supplies cannot be properly classified through reference to freight classification tariffs or if doubt exists, the contracting officer shall obtain the applicable freight classification from the transportation office. In some situations prospective contractors have established an official freight classification description that can be applied.

(b) (1) When the supplies being acquired are new to the supply system, nonstandard, or modifications of previously shipped items, and different freight classifications may apply, the contracting officer shall insert in solicitations the provision at 52.247-53, Freight Classification Description.

(2) The contracting officer shall alert the transportation officer to the possibility of negotiations for appropriate freight classification ratings and reasonable transportation rates.

(c) The solicitation shall contain adequate descriptions of explosives and other dangerous supplies according to (1) the regular freight classification and (2) the hazardous material description and hazard class as shown in 49 CFR 172.101.

(d) The contracting officer shall furnish the freight classification information developed in 47.305-9(a), (b), and (c) above to the contract administration office.

47.305-10 Packing, marking, and consignment instructions.

(a) Acquisition documents shall include packing and marking requirements necessary to prevent deterioration of supplies and damages due to the hazards of shipping, handling, and storage, and, when appropriate, marking in accordance with the requirements of 49 CFR 172.300.

(b) Contracts shall include complete consignment and marking instructions at the time the contract is awarded to ensure that supplies are delivered to proper destinations without delay. If complete consignment information is not initially known, the contracting officer shall issue amended delivery instructions under the Changes clause of the contract (see 43.205) as soon as the information becomes known.

(c) If necessary to meet required delivery schedules, the contracting officer may issue instructions by telephone, teletype, or telegram. The contracting officer shall confirm these instructions in writing.

(d) Marking and consignment instructions for military shipments shall conform to the current issue of MIL-STD-129 (Military Standard Marking for Shipment and Storage) and other applicable DOD regulations. Shipments for civilian agencies shall be marked as specified in Federal Standard 123, Marking for Domestic Shipment (Civil Agencies).

47.305-11 Options in shipment and delivery.

Although the clauses prescribed in subpart 43.2 allow certain changes to be made in regard to shipment and delivery, it may be desirable to provide specifically for certain options in the solicitation.

(a) The Government may reserve the right to—

(1) Direct deliveries of all or part of the contract quantity to destinations or to consignees other than those specified in the solicitation and in the contract;

(2) Direct shipments in quantities that may require transportation rates different from those on which the contract price is based; and

(3) Direct shipments by a mode of transportation other than that stipulated in the solicitation and in the contract.

(b)(1) When the transportation charges are for the account of the contractor, and changes in transportation requirements directed by the Government result in an increase or a decrease in transportation costs, an appropriate equitable adjustment shall be made.

(2) The contracting officer shall insert in solicitations and contracts the clause at 52.247-54, Diversion of Shipment under F.o.b. Destination Contracts, when transportation charges are for the account of the contractor and may need adjustments because of diversion of shipments.

47.305-12 Delivery of Government-furnished property.

(a)(1) When Government property is furnished to a contractor and transportation costs to the Government are a factor in the evaluation of offers, the contracting officer shall include in the solicitation a clear description of the property, its location, and other information necessary for the preparation of cost estimates.

(2) The contracting officer shall insert in solicitations and contracts the clause at 52.247-55, F.o.b. Point for Delivery of Government-Furnished Property, when Government property is to be furnished under a contract and the Government will be responsible for transportation arrangements and costs.

(b) The contracting officer shall describe explosive and dangerous material according to (1) the regular freight classification and (2) the hazardous material description and hazard class as shown in 49 CFR 172.101.

47.305-13 Transit arrangements.

(a) *Transit privileges.* (1) Transit arrangements permit the stopping of a carload or truckload shipment at a specific intermediate point en route to the final destination for storage, processing, or other purposes, as specified in carrier tariffs or rate tenders. A single through rate is charged from origin to final destination plus a transit or other related charge, rather than a more expensive combination of rates to and from the transit point.

(2) The contracting officer shall consider possible benefits available to the Government through the use of exist-

ing transit arrangements or through efforts to obtain additional transit privileges from the carriers. Solicitations incorporating transit arrangements shall be restricted to f.o.b. origin offers, as f.o.b. destination offers can only quote fixed overall delivered prices at first destination.

(3) (i) Traffic management personnel shall furnish information and analyses of situations in which transit arrangements may be beneficial. The quantity to be awarded must be of sufficient tonnage to ensure that carload/truckload shipments can be made by the contractor, and there should be reasonable certainty that shipments out of the transit point will be requested in carload/truckload quantities.

(ii) The contracting officer shall insert in solicitations the provision at 52.247-56, Transit Arrangements, when benefits may accrue to the Government because transit arrangements may apply.

(b) *Transit credits.* (1) In evaluations of f.o.b. origin offers for large quantities of supplies that contractors normally have in process or storage at intermediate points, contracting officers shall make use of contractors' earned commercial transit credits, which are recorded with the carriers. A transit credit represents the transportation costs for a recorded tonnage from the initial point to an intermediate point. The remaining transportation charges from the intermediate point to the Government destination, because they are based on through rates, are frequently lower than the transportation charges that would apply for the same tonnage if the intermediate point were the initial origin point.

(2) If transit credits apply, the contract shall state that the contractor shall ship the goods on prepaid commercial bills of lading, subject to reimbursement by the Government. The contracting officer shall ensure that this does not preclude a proper change in delivery terms under the Changes clause. The shipments move for the account and at the risk of the Government, as they become Government property at origin.

(3) The contractor shall show the transportation and transit charges as separate amounts on the invoice for
each individual shipment. The amo
to be reimbursed by the Governm
shall not exceed the amount quote
the offer. Regulations and procedu
regarding contractor prepaid trans
tation charges are prescribed
42.1403-2.

(4) The contracting officer s
insert in solicitations and contr
the clause at 52.247-57, Transpo
tion Transit Privilege Credits, w
supplies are of such a nature, or w
it is the custom of the trade, that
ferors may have potential transit c
its available and the Government
reduce transportation costs thro
the use of transit credits.

47.305-14 Mode of transportation.

Generally, solicitations shall
specify a particular mode of trans
tation or a particular carrier. If
use of particular types of carrier
necessary to meet program requ
ments, the solicitation shall pro
that only offers involving the speci
types of carriers will be conside
The contracting officer shall obtain
specifications for mode, route, de
ery, etc., from the transportat
office.

**47.305-15 Loading responsibilities of
tractors.**

(a) (1) Contractors are respons
for loading, blocking, and bracing
load shipments as specified in sta
ards published by the Association
American Railroads.

(2) The contracting officer s
insert in solicitations and contr
the clause at 52.247-58, Load
Blocking, and Bracing of Freight
Shipments, when supplies may
shipped in carload lots by rail.

(b) If the nature of the supplies
safety, environmental, or transp
ability factors require special meth
for securing the supplies on the ca
er's equipment, or if only a spe
mode of transportation or type veh
is appropriate, the contracting offi
shall include in solicitations deta
specifications that have been coo
nated with the transportation offic

47.305-16 Shipping characteristics.

(a) *Required shipping weights.* The contracting officer shall insert in solicitations and contracts the clause at 52.247-59, F.o.b. Origin—Carload and Truckload Shipments, when it is contemplated that they may result in f.o.b. origin contracts with shipments in carloads or truckloads. This will facilitate realistic freight cost evaluations of offers and ensure that contractors produce economical shipments of agreed size.

(b) *Guaranteed shipping characteristics.* (1) The contracting officer shall insert in soliciations and contracts, excluding those awarded under the small purchase procedures of Part 13, the clause at 52.247-60, Guaranteed Shipping Characteristics, when shipping and other characteristics are required to evaluate offers as to transportation costs. When all of the shipping characteristics listed in paragraph (a) of the clause at 52.247-60 are not required to evaluate offers as to transportation costs, the contracting officer shall delete the characteristics not required from the clause.

(2) The award document shall show the shipping characteristics used in the evaluation.

(c) *Minimum size of shipments.* When volume rates may apply, the contracting officer shall insert in solicitations and contracts the clause at 52.247-61, F.o.b. Origin—Minimum Size of Shipments.

(d) *Specific quantities unknown.*. (1) When total requirements and destinations to which shipments will be made are known, but the specific quantity to be shipped to each destination cannot be predetermined, solicitations shall state that offers are to be submitted on the basis of delivery *f.o.b. origin* and/or *f.o.b. destination* and that offers will be evaluated on both bases.

(2) The contracting officer shall insert in solicitations and contracts the clause at 52.247-62, Specific Quantities Unknown, when total requirements and destinations to which shipments will be made are known, but the specific quantity to be shipped to each destination cannot be predetermined. This clause protects the interests of both the Government and the contractor during the course of the performance of the contract.

[48 FR 42424, Sept. 19, 1983, as amended at 54 FR 48990, Nov. 28, 1989]

47.306 Transportation factors in the evaluation of offers.

When evaluating offers, contracting officers shall consider transportation and transportation-related costs as well as the offerors' shipping and receiving facilities.

47.306-1 Transportation cost determinations.

When requesting the transportation officer to assist in evaluating offers, the contracting officer shall give the transportation officer all pertinent data, including the following information:

(a) A complete description of the commodity being acquired including packaging instructions.

(b) Planned date of award.

(c) Date of initial shipment.

(d) Total quantity to be shipped (including weight and cubic content, when appropriate).

(e) Delivery schedule.

(f) Contract period.

(g) Possible use of transit privileges, including stopoffs for partial loading or unloading, or both.

47.306-2 Lowest overall transportation costs.

(a) For the evaluation of offers, the transportation officer shall give to the contracting officer, and the contracting officer shall use, the lowest available freight rates and related accessorial and incidental charges that (1) are in effect on, or become effective before, the expected date of the initial shipment and (2) are on file or published on the date of the bid opening.

(b) If rates or related charges become available after the bid opening or the due date of offers, they shall not be used in the evaluation unless they cover transportation for which no applicable rates or accessorial or incidental costs were in existence at the time of bid opening or due date of the offers.

47.306-3 Adequacy of loading and unloading facilities.

(a) When determining the transportation capabilities of an offeror, the contracting officer shall consider the type and adequacy of the offeror's shipping facilities, including the ability to consolidate and ship in carload or truckload lots.

(b) The contracting officer shall consider the type and adequacy of the consignee's receiving facilities to avoid shipping schedules that cannot be properly accommodated.

Subpart 47.4—Air Transportation by U.S.-Flag Carriers

47.401 Definitions.

Air freight forwarder means an indirect air carrier that is responsible for the transportation of property from the point of receipt to the point of destination, and utilizes for the whole or any part of such transportation the services of a direct air carrier or its agent, or of another air freight forwarder.

Gateway airport abroad means the airport from which the traveler last embarks en route to the United States or at which the traveler first debarks incident to travel from the United States.

Gateway airport in the United States means the last U.S. airport from which the traveler's flight departs or the first U.S. airport at which the traveler's flight arrives.

International air transportation means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

United States, as used in this subpart, means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and possessions of the United States.

U.S.-flag air carrier means an air carrier holding a certificate under section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371).

47.402 Policy.

Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 1517) (Fly America Act) requires that Federal employees and their dependents, consultants, contractors, grantees, and others use U.S.-flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent service by these carriers is available.

47.403 Guidelines for implementation of the Fly America Act.

This section 47.403 is based on the Guidelines for Implementation of the Fly America Act (case number B-138942), issued by the Comptroller General of the United States on March 31, 1981.

47.403-1 Availability and unavailability of U.S.-flag air carrier service.

(a) If a U.S.-flag air carrier cannot provide the international air transportation needed or if the use of U.S.-flag air carrier service would not accomplish an agency's mission, foreign-flag air carrier service may be deemed necessary.

(b) U.S.-flag air carrier service is considered available even though—

(1) Comparable or a different kind of service can be provided at less cost by a foreign-flag air carrier;

(2) Foreign-flag air carrier service is preferred by, or is more convenient for, the agency or traveler; or

(3) Service by a foreign-flag air carrier can be paid for in excess foreign currency (unless U.S.-flag air carriers decline to accept excess or near excess foreign currencies for transportation payable only out of such monies).

(c) Except as provided in paragraph 47.403-1(a), U.S.-flag air carrier service shall be used for U.S. Government-financed commercial foreign air travel if service provided by U.S.-flag air carriers is available. In determining availability of a U.S.-flag air carrier, the following scheduling principles shall be followed unless their application would result in the last or first leg of travel to or from the United States being performed by a foreign-flag air carrier:

(1) U.S.-flag air carrier service available at point of origin shall be used to

destination or, in the absence of direct or through service, to the farthest interchange point on a usually traveled route.

(2) When an origin or interchange point is not served by a U.S.-flag air carrier, foreign-flag air carrier service shall be used only to the nearest interchange point on a usually traveled route to connect with U.S.-flag air carrier service.

(3) When a U.S.-flag air carrier involuntarily reroutes the traveler via a foreign-flag air carrier, the foreign-flag air carrier may be used notwithstanding the availability of alternative U.S.-flag air carrier service.

(d) For travel between a gateway airport in the United States and a gateway airport abroad, passenger service by U.S.-flag air carrier shall not be considered available if—

(1) The gateway airport abroad is the traveler's origin or destination airport and the use of U.S.-flag air carrier service would extend the time in a travel status, including delay at origin and accelerated arrival at destination, by at least 24 hours more than travel by a foreign-flag air carrier; or

(2) The gateway airport abroad is an interchange point and the use of U.S.-flag air carrier service would require the traveler to wait 6 hours or more to make connections at that point, or if delayed departure from, or accelerated arrival at, the gateway airport in the United States would extend time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier.

(e) For travel between two points outside the United States, the rules in paragraphs 47.403-1(a), (b), and (c) shall be applicable, but passenger service by a U.S.-flag air carrier shall not be considered to be reasonably available if—

(1) Travel by a foreign-flag air carrier would eliminate two or more aircraft changes en route;

(2) One of the two points abroad is the gateway airport en route to or from the United States and the use of a U.S.-flag air carrier would extend the time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier, including accelerated arrival at the overseas destination or delayed departure from the overseas origin, as well as delay at the gateway airport or other interchange point abroad; or

(3) The travel is not part of the trip to or from the United States and the use of a U.S.-flag air carrier would extend the time in a travel status by at least 6 hours more than travel by a foreign-flag air carrier including delay at origin, delay en route, and accelerated arrival at destination.

(f) For all short-distance travel under either paragraph (d) or paragraph (e) of 47.403-1, U.S. air carrier service shall not be considered available when the elapsed traveltime on a scheduled flight from origin to destination airport by foreign-flag air carrier is 3 hours or less and service by a U.S.-flag air carrier would involve twice such traveltime.

47.403-2 Air transport agreements between the United States and foreign governments.

Nothing in the guidelines of the Comptroller General (see 47.403) shall preclude, and no penalty shall attend, the use of a foreign-flag air carrier that provides transportation under an air transport agreement between the United States and a foreign government, the terms of which are consistent with the international aviation policy goals at 49 U.S.C. 1502(b) and provide reciprocal rights and benefits.

47.403-3 Disallowance of expenditures.

(a) Agencies shall disallow expenditures for U.S. Government-financed commercial international air transportation on foreign-flag air carriers unless there is attached to the appropriate voucher a certificate or memorandum adequately explaining why service by U.S.-flag air carriers was not available, or why it was necessary to use foreign-flag air carriers.

(b) When the travel is by indirect route or the traveler otherwise fails to use available U.S.-flag air carrier service, the amount to be disallowed against the traveler is based on the loss of revenues suffered by U.S.-flag air carriers as determined under the following formula, which is prescribed and more fully explained in 56 Comp. Gen. 209 (1977):

$$\frac{\text{Sum of U.S.-flag carrier segment mileage, authorized}}{\text{Sum of all segment mileage, authorized}} \times \text{Fare payable by Government}$$

MINUS

$$\frac{\text{Sum of U.S.-flag carrier segment mileage, traveled}}{\text{Sum of all segment mileage, traveled}} \times \text{Through fare payed}$$

(c) The justification requirement is satisfied by the contractor's use of the certification contained in the clause at 52.247-63, Preference for U.S.-Flag Air Carriers. (See 47.405.)

47.404 Air freight forwarders.

(a) Agencies may use air freight forwarders that are engaged in international air transportation (49 U.S.C. 1301(24)(c)) for U.S. Government-financed movements of property. The rule on disallowance of expenditures in 47.403-3(a) applies also to the air carriers used by these international air freight forwarders.

(b) Agency personnel shall inform international air freight forwarders that to facilitate prompt payments of their bills, they shall submit with their bills (1) a copy of the airway bill or manifest showing the air carriers used and (2) justification certifications for the use of foreign-flag air carriers. A certification similar to the one shown in the clause at 52.247-63, Preference for U.S.-Flag Air Carriers, satisfies the justification requirement.

47.405 Contract clause.

The contracting officer shall insert the clause at 52.247-63, "Preference for U.S.-Flag Air Carriers, in solicitations and contracts whenever it is possible that U.S. Government-financed international air transportation of personnel (and their personal effects) or property will occur in the performance of the contract." This clause does not apply to small purchases made under part 13.

[48 FR 42424, Sept. 19, 1983, as amended at 53 FR 27468, July 20, 1988]

Subpart 47.5—Ocean Transportation by U.S.-Flag Vessels

47.500 Scope of subpart.

This subpart prescribes policy and procedures for giving preference to U.S.-flag vessels when transportation of supplies by ocean vessel is required. This subpart does not apply to the Department of Defense (DoD). Policy and procedures applicable to DoD appear in DFARS subpart 247.5.

[48 FR 42424, Sept. 19, 1983, as amended at 55 FR 3886, Feb. 5, 1990]

47.501 Definitions.

Dry bulk carrier means a vessel used primarily for the carriage of shipload lots of homogeneous unmarked nonliquid cargoes such as grain, coal, cement, and lumber.

Dry cargo liner means a vessel used for the carriage of heterogeneous marked cargoes in parcel lots. However, any cargo may be carried in these vessels, including part cargoes of dry bulk items or, when carried in deep tanks, bulk liquids such as petroleum and vegetable oils.

Foreign-flag vessel means any vessel of foreign registry including vessels owned by U.S. citizens but registered in a nation other than the United States.

Government vessel, as used in this subpart, means a vessel owned by the U.S. Government and operated directly by the Government or for the Government by an agent or contractor, including a privately owned U.S.-flag vessel under bareboat charter to the Government.

Privately owned U.S.-flag commercial vessel, as used in this subpart, means a vessel (a) registered and operated under the laws of the United States, (b) used in commercial trade of the United States, (c) owned and operated by U.S. citizens, including a vessel under voyage or time charter to the Government, and (d) a Government-owned vessel under bareboat charter to, and operated by, U.S. citizens.

Tanker means a vessel used primarily for the carriage of bulk liquid cargoes such as liquid petroleum products, vegetable oils, and molasses.

U.S.-flag vessel, as used in this subpart, when used independently means either a Government vessel or a privately owned U.S.-flag commercial vessel.

47.502 Policy.

(a) The policy of the United States regarding the use of U.S.-flag vessels is stated in the following acts:

(1) The Cargo Preference Act of 1904 (10 U.S.C. 2631), which requires the Department of Defense to use only U.S.-flag vessels for ocean transportation of supplies for the Army, Navy, Air Force, or Marine Corps unless those vessels are not available at fair and reasonable rates.

(2) The Merchant Marine Act of 1936 (46 U.S.C. 1101), which declares it is the policy of the United States to foster the development and encourage the maintenance of its merchant marine.

(3) The Cargo Preference Act of 1954 (46 U.S.C. 1241(b), which is Section 901(b) of the Merchant Marine Act). Under this Act, Government agencies acquiring, either within or outside the United States, supplies that may require ocean transportation shall ensure that at least 50 percent of the gross tonnage of these supplies (computed separately for dry bulk carriers, dry cargo liners, and tankers) is transported on privately owned U.S.-flag commercial vessels to the extent that such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels. This applies when the supplies are—

(i) Acquired for the account of the United States;

(ii) Furnished to, or for the account of, a foreign nation without provision for reimbursement;

(iii) Furnished for the account of a foreign nation in connection with which the United States advances funds or credits, or guarantees the convertibility of foreign currencies; or

(iv) Acquired with advance of funds, loans, or guaranties made by or on behalf of the United States.

(b) Additional policies providing preference for the use of U.S.-flag vessels are contained in—

(1) 10 U.S.C. 2634 for the transportation of privately-owned vehicles belonging to service members when making permanent change of station moves;

(2) 46 U.S.C. 1241(a) for official business travel by officers and employees of the United States and for the transportation of their personal effects; and

(3) 46 U.S.C. 1241(e) for the transportation of motor vehicles owned by Government personnel when transportation is at Government expense or otherwise authorized by law.

(c) The provisions of the Cargo Preference Act of 1954 may be temporarily waived when the Congress, the President, or the Secretary of Defense declares that an emergency justifying a temporary waiver exists and so notifies the appropriate agency or agencies.

47.503 Applicability.

(a) Except as stated in paragraph (b) below and in 47.504, the Cargo Preference Acts of 1904 and 1954 described in 47.502(a) apply to the following cargoes:

(1) Supplies owned by the Government and in the possession of—

(i) The Government;

(ii) A contractor; or

(iii) A subcontractor at any tier.

(2) Supplies for use of the Government that are contracted for and require subsequent delivery to a Government activity but are not owned by the Government at the time of shipment.

(3) Supplies not owned by the Government at the time of shipment that are to be transported for distribution to foreign assistance programs, but only if these supplies are not acquired or contracted for with local currency funds (see 47.504(b)).

(b) Government-owned supplies to be shipped commercially that are (1) in the possession of a department, a contractor, or a subcontractor at any tier and (2) for use of military departments shall be transported exclusively in privately owned U.S.-flag commercial vessels if such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels.

(c) The 50-percent requirement shall not prevent the use of privately owned U.S.-flag commercial vessels for transportation of up to 100 percent of the cargo subject to the Cargo Preference Act of 1954.

47.504 Exceptions.

The policy and procedures in this subpart do not apply to the following:

(a) Shipments aboard vessels of the Panama Canal Commission or as required or authorized by law or treaty.

(b) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353).

(c) Shipments of classified supplies when the classification prohibits the use of non-Government vessels.

(d) Small purchases under part 13.

47.505 Construction contracts.

(a) Except as stated in paragraph (b) below, construction contractors, including subcontractors and suppliers, engaged in overseas work shall comply with the policies and regulations in this subpart.

(b) These requirements shall not apply to military assistance, foreign aid, or similar projects under the auspices of the U.S. Government when the recipient nation furnishes, or pays for, at least 50 percent of the transportation, in which event foreign-flag vessels may be used for a portion not to exceed 50 percent of the gross tonnage for the project.

47.506 Procedures.

(a) The contracting officer shall obtain assistance from the transportation activity (see 47.105) in developing appropriate shipping instructions and delivery terms for inclusion in solicitations and contracts that may involve ocean transportation of supplies subject to the requirements of the Cargo Preference Act of 1954 (see 47.502(a)(3)).

(b) When the contractor notifies the contracting officer that a privately owned U.S.-flag commercial vessel is not available, the contracting officer shall seek assistance from the transportation activity.

(c) For purposes of determining the availability of privately owned U.S.-flag commercial vessels at fair and reasonable rates, rates filed and published in accordance with the requirements of the Federal Maritime Commission may be accepted as fair and reasonable. When applicable rates for charter cargoes are not in published tariffs, a determination as to whether the rates are fair and reasonable shall be obtained from the Maritime Administration.

(d) The Maritime Administration has issued regulations (46 CFR 381) that require agencies to submit reports regarding ocean shipments. Contracting officers shall follow agency regulations when preparing, or furnishing information for, these reports.

47.507 Contract clauses.

(a) The contracting officer shall insert the clause at 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels, in solicitations and contracts that may involve ocean transportation of supplies subject to the Cargo Preference Act of 1954. (For application of the Cargo Preference Act of 1954, see 47.502(a)(3), 47.503(a), and 47.504.)

(b) If an applicable statute requires, or if it has been determined under agency procedures, that the supplies to be furnished under contracts shall be transported exclusively in privately owned U.S.-flag commercial vessels (see 47.502(a)(1) and 47.503(b)), use the basic clause with its Alternate I.

(c) If an applicable statute requires, or it has been determined under agency procedures, that supplies, materials, or equipment to be shipped under construction contracts shall be transported exclusively in privately owned U.S.-flag commercial vessels (see 47.505), use the basic clause with its Alternate II.

(d) The contracting officer may insert in solicitations and contracts, under agency procedures, additional appropriate clauses concerning the vessels to be used.

PART 48—VALUE ENGINEERING

Sec.

48.000 Scope of part.
48.001 Definitions.

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Subpart 48.1—Policies and Procedures

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.102 Policies.
.103 Processing value engineering change proposals.
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.104-3 Sharing alternative—no-cost settlement method.
.105 Relationship to other incentives.

Subpart 48.2—Contract Clauses

.201 Clauses for supply or service contracts.
.202 Clause for construction contracts.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. hapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42443, Sept. 19, 1983, nless otherwise noted.

.000 Scope of part.

This part prescribes policies and proedures for using and administering alue engineering techniques in conacts.

.001 Definitions.

Acquisition savings, as used in this art, means savings resulting from the pplication of a value engineering hange proposal (VECP) to contracts warded by the same contracting ffice of its successor for essentially he same unit. Acquisition savings inlude—

(a) Instant contract savings, which re the net cost reductions on the conract under which the VECP is submited and accepted, and which are equal o the instant unit cost reduction mulplied by the number of instant conract units affected by the VECP, less he contractor's allowable developnent and implementation costs;

(b) Concurrent contract savings, hich are net reductions in the prices f other contracts that are definitized nd ongoing at the time the VECP is ccepted; and

(c) Future contract savings, which re the product of the future unit cost eduction multiplied by the number of ture contract units scheduled for devery during the sharing period (but e 48.102(g)). If the instant contract a multiyear contract, future contract savings include savings on quantities funded after VECP acceptance.

Collateral costs, as used in this part, means agency costs of operation, maintenance logistic support, or Government-furnished property.

Collateral savings, as used in this part, means those measurable net reductions resulting from a VECP in the agency's overall projected collateral costs, exclusive of acquisition savings, whether or not the acquisition cost changes.

Contracting office, as used in this part, includes any contracting office that the acquisition is transferred to, such as another branch of the agency or another agency's office that is performing a joint acquisition action.

Contractor's development and implementation costs, as used in this part, means those costs the contractor incurs on a VECP specifically in developing, testing, preparing, and submitting the VECP, as well as those costs the contractor incurs to make the contractual changes required by Government acceptance of a VECP.

Future unit cost reduction, as used in this part, means the instant unit cost reduction adjusted as the contracting officer considers necessary for projected learning or changes in quantity during the sharing period. It is calculated at the time the VECP is accepted and applies either (a) throughout the sharing period, unless the contracting officer decides that recalculation is necessary because conditions are significantly different from those previously anticipated or (b) to the calculation of a lump-sum payment, which cannot later be revised.

Government costs, as used in this part, means those agency costs that result directly from developing and implementing the VECP, such as any net increases in the cost of testing, operations, maintenance, and logistics support. The term does not include the normal administrative costs of processing the VECP or any increase in instant contract cost or price resulting from negative instant contract savings.

Instant contract, as used in this part, means the contract under which the VECP is submitted. It does not include increases in quantities after acceptance of the VECP that are due to contract modifications, exercise of options, or additional orders. If the contract is a multiyear contract, the term does not include quantities funded after VECP acceptance. In a fixed-price contract with prospective price redetermination, the term refers to the period for which firm prices have been established.

Instant unit cost reduction means the amount of the decrease in unit cost of performance (without deducting any contractor's development or implementation costs) resulting from using the VECP on the instant contract. In service contracts, the instant unit cost reduction is normally equal to the number of hours per line-item task saved by using the VECP on the instant contract, multiplied by the appropriate contract labor rate.

Negative instant contract savings means the increase in the instant contract cost or price when the acceptance of a VECP results in an excess of the contractor's allowable development and implementation costs over the product of the instant unit cost reduction multiplied by the number of instant contract units affected.

Net acquisition savings means total acquisition savings, including instant, concurrent, and future contract savings, less Government costs.

Sharing base, as used in this part, means the number of affected end items on contracts of the contracting office accepting the VECP.

Sharing period, as used in this part, means the period beginning with acceptance of the first unit incorporating the VECP and ending at the later of (a) 3 years after the first unit affected by the VECP is accepted or (b) the last scheduled delivery date of an item affected by the VECP under the instant contract delivery schedule in effect at the time the VECP is accepted (but see 48.102(g)).

Unit, as used in this part, means the item or task to which the contracting officer and the contractor agree the VECP applies.

Value engineering, as used in this part, means an organized effort to analyze the functions of systems, equipment, facilities, services, and supplies for the purpose of achieving the essential functions at the lowest life cycle cost consistent with required performance, reliability, quality, and safety.

Value engineering change proposal (*VECP*) means a proposal that—

(a) Requires a change to the instant contract to implement; and

(b) Results in reducing the overall projected cost to the agency without impairing essential functions or characteristics; *provided,* that it does not involve a change—

(1) In deliverable end item quantities only;

(2) In research and development (R&D) items or R&D test quantities that are due solely to results of previous testing under the instant contract; or

(3) To the contract type only.

Value engineering proposal, as used in this part, means, in connection with an A-E contract, a change proposal developed by employees of the Federal Government or contractor value engineering personnel under contract to an agency to provide value engineering services for the contract or program.

[48 FR 42443, Sept. 19, 1983, as amended at 54 FR 5057, Jan. 31, 1989; 55 FR 3887, Feb. 5, 1990]

Subpart 48.1—Policies and Procedures

48.101 General.

(a) Value engineering is the formal technique by which contractors may (1) voluntarily suggest methods for performing more economically and share in any resulting savings or (2) be required to establish a program to identify and submit to the Government methods for performing more economically. Value engineering attempts to eliminate, without impairing essential functions or characteristics, anything that increases acquisition, operation, or support costs.

(b) There are two value engineering approaches:

(1) The first is an incentive approach in which contractor participation is voluntary and the contractor uses its own resources to develop and submit any value engineering change proposals (VECP's). The contract pro-

s for sharing of savings and for
ment of the contractor's allowable
elopment and implementation
s only if a VECP is accepted. This
ntary approach should not in
if increase costs to the Govern-
nt.

) The second approach is a manda-
program in which the Govern-
nt requires and pays for a specific
ie engineering program effort. The
tractor must perform value engi-
ring of the scope and level of effort
uired by the Government's pro-
m plan and included as a separate-
riced item of work in the contract
edule. No value engineering (VE)
ring is permitted in architect-engi-
r contracts. All other contracts
n a program clause share in savings
accepted VECP's, but at a lower
centage rate than under the volun-
approach. The objective of this
ie engineering program require-
nt is to ensure that the contractor's
ie engineering effort is applied to
s of the contract that offer oppor-
ities for considerable savings con-
ent with the functional require-
nts of the end item of the contract.

FR 42443, Sept. 19, 1983, as amended at
R 5057, Jan. 31, 1989]

02 Policies.

.) Agencies shall provide contrac-
a substantial financial incentive
develop and submit VECP's. Con-
cting activities will include value
ineering provisions in appropriate
ply, service, architect-engineer and
struction contracts as prescribed
48.201 and 48.202 except where ex-
ptions are granted on a case-by-case
is, or for specific classes of con-
cts, by the agency head.

) Agencies shall: (1) establish
delines for processing VECP's; (2)
cess VECP's objectively and expe-
ously; and (3) provide contractors a
share of the savings on accepted
CP's.

) Agencies shall consider requiring
rporation of value engineering
ses in appropriate subcontracts.

)(1) Agencies other than the De-
ment of Defense shall use the
e engineering program require-
t clause (52.248-1, Alternates I or
n initial production contracts for
major systems programs (see definition of major system in 34.001) and for contracts for major systems research and development except where the contracting officer determines and documents the file to reflect that such use is not appropriate

(2) In Department of Defense contracts, the VE program requirement clause (52.248-1, Alternates I or II), shall be placed in initial production solicitations and contracts (first and second production buys) for major system acquisition programs as defined in DoD Directive 5000.1, except as specified in subdivisions (d)(2)(i) and (ii) of this section. A program requirement clause may be included in initial production contracts for less than major systems acquisition programs if there is a potential for savings. The contracting officer is not required to include a program requirement clause in initial production contracts—

(i) Where, in the judgment of the contracting officer, the prime contractor has demonstrated an effective VE program during either earlier program phases, or during other recent comparable production contracts.

(ii) Which are awarded on the basis of competition.

(e) Value engineering incentive payments do not constitute profit or fee within the limitations imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b) (see 15.903(d)).

(f) Generally, profit or fee on the instant contact should not be adjusted downward as a result of acceptance of a VECP. Profit or fee shall be excluded when calculating instant or future contract savings.

(g) In the case of contracts for items requiring an extended period for production (e.g., ship construction, major system acquisition), agencies may prescribe sharing of future contract savings on all future contract units to be delivered under contracts awarded for essentially the same item during the sharing period, even if the scheduled delivery date is outside the sharing period. For engineering-development and low-rate-initial-production contracts, the future sharing shall be on scheduled deliveries equal in number to the quantity required over the highest 36 consecutive months of planned production, based on planning or production documentation at the time the VECP is accepted.

(h) In the case of contracts for architect-engineer services, the contract shall include a separately priced line item for mandatory value engineering of the scope and level of effort required in the statement of work. The objective is to ensure that value engineering effort is applied to specified areas of the contract that offer opportunities for significant savings to the Government. There shall be no sharing of value engineering savings in contracts for architect-engineer services.

(i) Agencies shall establish procedures for funding and payment of the contractor's share of collateral savings and future contract savings.

[48 FR 42443, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986; 54 FR 5057, Jan. 31, 1989; 55 FR 3887, Feb. 5, 1990]

48.103 Processing value engineering change proposals.

(a) Instructions to the contractor for preparing a VECP and submitting it to the Government are included in paragraphs (c) and (d) of the value engineering clauses prescribed in subpart 48.2. Upon receiving a VECP, the contracting officer or other designated official shall promptly process and objectively evaluate the VECP in accordance with agency precedures and shall document the contract file with the rationale for accepting or rejecting the VECP.

(b) The contracting officer is responsible for accepting or rejecting the VECP within 45 days from its receipt by the Government. If the Government will need more time to evaluate the VECP, the contracting officer shall notify the contractor promptly in writing giving the reasons and the anticipated decision date. The contractor may withdraw, in whole or in part, any VECP not accepted by the Government within the period specified in the VECP. Any VECP may be approved, in whole or in part, by a contract modification incorporating the VECP. Until the effective date of the contract modification, the contractor shall perform in accordance with the existing contract. If the Government accepts the VECP, but properly rejects units subsequently delivered or does not receive units on which a savings share was paid, the contractor shall reimburse the Government for the proportionate share of these payments. If the VECP is not accepted, the contracting officer shall provide the contractor with prompt written notification, explaining the reasons for rejection.

(c) The following Government decisions are not subject to the Disputes clause or otherwise subject to litigation under the Contract Disputes Act of 1978 (41 U.S.C. 601-613):

(1) The decision to accept or reject a VECP.

(2) The determination of collateral costs or collateral savings.

(3) The decision as to which of the sharing rates applies when Alternate II of the clause at 52.248-1, Value Engineering, is used.

[48 FR 42443, Sept. 19, 1983, as amended at 54 FR 5057, Jan. 31, 1989]

48.104 Sharing arrangements.

48.104-1 Sharing acquisition savings.

(a) *Supply or service contracts.* (1) The sharing base for acquisition savings is normally the number of affected end items on contracts of the contracting office accepting the VECP. The sharing rates (Government/contractor) for net acquisition savings for supplies and services are based on the type of contract, the value engineering clause or alternate used, and the type of savings, as follows:

GOVERNMENT/CONTRACTOR SHARES OF NET ACQUISITION SAVINGS

(figures in percent)

Contract Type	Sharing Arrangement			
	Incentive (voluntary)		Program requirement (mandatory)	
	Instant contract rate	Concurrent and future rate	Instant contract rate	Concurrent and future contract rate
Fixed-price (other than incentive)	50/50	50/50	75/25	75/25

GOVERNMENT/CONTRACTOR SHARES OF NET ACQUISITION SAVINGS—Continued

(figures in percent)

Contract Type	Sharing Arrangement			
	Incentive (voluntary)		Program requirement (mandatory)	
	Instant contract rate	Concurrent and future rate	Instant contract rate	Concurrent and future contract rate
ncentive (fixed-price or cost)	*	50/50	*	75/25
ost- reimbursement (other than incentive)**	75/25	75/25	85/15	85/15

*Same sharing arrangement as the contract's profit or fee djustment formula.

**Includes cost-plus-award-fee contracts.

(2) Acquisition savings may be real- zed on the instant contract, concur- ent contracts, and future contracts. The contractor is entitled to a percent- ge share (see subparagraph (1) above) f any net acquisition savings. Net ac- uisition savings result when the total f acquisition savings becomes greater han the total of Government costs nd any negative instant contract sav- ngs. This may occur on the instant ontract or it may not occur until re- luctions have been negotiated on con- urrent contracts or until future con- ract savings are calculated, either hrough lump-sum payment or as each uture contract is awarded.

(i) When the instant contract is not n incentive contract, the contractor's hare of new acquisition savings is cal- ulated and paid each time such sav- ngs are realized. This may occur once, several times, or, in rare cases, not at ll.

(ii) When the instant contract is an ncentive contract, the contractor shares in instant contract savings through the contract's incentive structure. In calculating acquisition savings under incentive contracts, the con- racting officer shall add any negative nstant contract savings to the target ost or to the target price and ceiling rice and then offset these negative nstant contract savings and any Gov- rnment costs against concurrent and uture contract savings.

(3) The contractor shares in the savings on all affected units scheduled for delivery during the sharing period (but see 48.102(g)). The contractor is responsible for maintaining, for 3 years after final payment on the contract under which the VECP was accepted, records adequate to identify the first delivered unit incorporating the applicable VECP.

(4) Contractor shares of savings are paid through the contract under which the VECP was accepted. On incentive contracts, the contractor's share of concurrent and future contract savings and of collateral savings shall be paid as a separate firm-fixed-price contract line item on the instant contract.

(5) Within 3 months after concurrent contracts have been modified to reflect price reductions attributable to use of the VECP, the contracting officer shall modify the instant contract to provide the contractor's share of savings.

(6) The contractor's share of future contract savings may be paid as subsequent contracts are awarded or in a lump-sum payment at the time the VECP is accepted. The lump-sum method may be used only if the contracting officer has established that this is the best way to proceed and the contractor agrees. The contracting officer ordinarily shall make calculations as future contracts are awarded and, within 3 months after their award, modify the instant contract to provide the contractor's share of savings. For future contract savings calculated under the optional lump-sum method, the sharing base is an estimate of the number of items that the contracting office will purchase for delivery during the sharing period. In deciding whether or not to use the more convenient lump-sum method for an individual VECP, the contracting officer shall consider—

(i) The accuracy with which the number of items to be delivered during the sharing period can be estimated and the probability of actual production of the projected quantity;

(ii) The availability of funds for a lump-sum payment; and

(iii) The administrative expense of amending the instant contract as future contracts are awarded.

(b) *Construction contracts.* Sharing on construction contracts applies only to savings on the instant contract and to collateral savings. The Government's share of savings is determined by subtracting Government costs from instant contract savings and multiplying the result by (1) 45 percent for fixed-price contracts; or (2) 75 percent for cost-reimbursement contracts. Value engineering sharing does not apply to incentive construction contracts.

(c) *Architect-engineering contracts.* There shall be no sharing of value engineering savings in contracts for architect-engineer services.

[48 FR 42443, Sept. 19, 1983, as amended at 54 FR 5057, Jan. 31, 1989; 55 FR 3887, Feb. 5, 1990]

48.104-2 Sharing collateral savings.

(a) The Government shares collateral savings with the contractor, unless the head of the contracting activity has determined that the cost of calculating and tracking collateral savings will exceed the benefits to be derived (see 48.201(e)).

(b) The contractor's share of collateral savings is 20 percent of the estimated savings to be realized during an average year of use but shall not exceed (1) the contract's firm-fixed-price, target price, target cost, or estimated cost, at the time the VECP is accepted, or (2) $100,000, whichever is greater. In determining collateral savings, the contracting officer shall consider any degradation of performance, service life, or capability. (See 48.104-1(a)(4) for payment of collateral savings through the instant contract.)

48.104-3 Sharing alternative—no-cost settlement method.

To minimize the administrative costs for both parties when there is a known continuing requirement for the unit, consideration should be given to the settlement of a VECP submitted against the VE Incentive clause of the contract at no cost to either party. Under this method of settlement, the contractor would keep all of the savings on the instant contract, and all savings on its concurrent contracts only. The Government would keep all savings resulting from concurrent contracts placed on other sources, savings from all future contracts and all collateral savings. Use of this method must be by mutual agreement of both parties for individual VECPs.

48.105 Relationship to other incentives.

Contractors should be offered the fullest possible range of motivation, yet the benefits of an accepted VECP should not be rewarded both as value engineering shares and under performance, design-to-cost, or similar incentives of the contract. To that end, when performance, design-to-cost, or similar targets are set and incentivized, the targets of such incentives affected by the VECP are not to be adjusted because of the acceptance of the VECP. Only those benefits of an accepted VECP not rewardable under other incentives are rewarded under a value engineering clause.

[48 FR 42443, Sept. 19, 1983, as amended at 54 FR 5057, Jan. 31, 1989]

Subpart 48.2—Contract Clauses

48.201 Clauses for supply or service contracts.

(a) *General.* The contracting officer shall insert a value engineering clause in solicitations and contracts when the contract amount is expected to be $100,000 or more, except as specified in subparagraphs (1) through (5) and in paragraph (f) below. A value engineering clause may be included in contracts of lesser value if the contracting officer sees a potential for significant savings. Unless the chief of the contracting office authorizes its inclusion, the contracting officer shall *not* include a value engineering clause in solicitations and contracts—

(1) For research and development other than full-scale development;

(2) For engineering services from not-for-profit or nonprofit organizations;

(3) For personal services (see subpart 37.1);

(4) Providing for product or component improvement, unless the value engineering incentive application is re-

stricted to areas not covered by provisions for product or component improvement;

(5) For commercial products (see part 11) that do not involve packaging specifications or other special requirements or specifications; or

(6) When the agency head has exempted the contract (or a class of contracts) from the requirements of part 48.

(b) *Value engineering incentive.* To provide a value engineering incentive, the contracting officer shall insert the clause at 52.248-1, Value Engineering, in solicitations and contracts except as provided in paragraph (a) above (but see subparagraph (e)(1) below).

(c) *Value engineering program requirement.* (1) If a mandatory value engineering effort is appropriate (i.e., if the contracting officer considers that substantial savings to the Government may result from a sustained value engineering effort of a specified level), the contracting officer shall use the clause with its Alternate I (but see subparagraph (e)(2) below).

(2) The value engineering program requirement may be specified by the Government in the solicitation or, in the case of negotiated contracting, proposed by the contractor as part of its offer and included as a subject for negotiation. The program requirement shall be shown as a separately priced line item in the contract Schedule.

(d) *Value engineering incentive and program requirement.* (1) If both a value engineering incentive and a mandatory program requirement are appropriate, the contracting officer shall use the clause with its Alternate II (but see subparagraph (e)(3) below).

(2) The contract shall restrict the value engineering program requirement to well-defined areas of performance designated by line item in the contract Schedule. Alternate II applies a value engineering program to the specified areas and a value engineering incentive to the remaining areas of the contract.

(e) *Collateral savings computation not cost-effective.* If the head of the contracting activity determines for a contract or class of contracts that the cost of computing and tracking collateral savings will exceed the benefits to be derived, the contracting officer shall use the clause with its—

(1) Alternate III if a value engineering incentive is involved;

(2) Alternate III and Alternate I if a value engineering program requirement is involved; or

(3) Alternate III and Alternate II if *both* an incentive and a program requirement are involved.

(f) *Architect-engineering contracts.* The contracting officer shall insert the clause at 52.248-2, Value Engineering—Architect-Engineer, in solicitations and contracts whenever the Government requires and pays for a specific value engineering effort in architect-engineer contracts. The clause at 52.248-1, Value Engineering, shall not be used in solicitations and contracts for architect-engineer services.

[48 FR 42443, Sept. 19, 1983, as amended at 54 FR 5057, Jan. 31, 1989; 55 FR 3887, Feb. 5, 1990]

48.202 Clause for construction contracts.

The contracting officer shall insert the clause at 52.248-3, Value Engineering—Construction, in construction solicitations and contracts when the contract amount is estimated to be $100,000 or more, unless an incentive contract is contemplated. The contracting officer may include the clause in contracts of lesser value if the contracting officer sees a potential for significant savings. The contracting officer shall not include the clause in incentive-type construction contracts. If the head of the contracting activity determines that the cost of computing and tracking collateral savings for a contract will exceed the benefits to be derived, the contracting officer shall use the clause with its Alternate I.

PART 49—TERMINATION OF CONTRACTS

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42447, Sept. 19, 1983, unless otherwise noted.

49.000 Scope of part.

This part establishes policies and procedures relating to the complete or partial termination of contracts for the convenience of the Government or for default. It prescribes contract clauses relating to termination and excusable delay and includes instructions for using termination and settlement forms.

49.001 Definitions.

Claim, as used in this part, means the same as the language in 33.201.

Continued portion of the contract, as used in this part, means the portion of a partially terminated contract that the contractor must continue to perform.

Effective date of termination means the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is received by the contractor subsequent to the date fixed for termination, then the effective date of termination means the date the notice is received.

Other work, as used in this part, means any current or scheduled work of the contractor, whether Goverment or commercial, other than work related to the terminated contract.

Partial termination means the termination of a part, but not all, of the work that has not been completed and accepted under a contract.

Settlement agreement, as used in this part, means a written agreement in the form of an amendment to a contract settling all or a severable portion of a settlement proposal.

Settlement proposal, as used in this part, means a proposal for effecting settlement of a contract terminated in whole or in part, submitted by a contractor or subcontractor in the form, and supported by the data, required by this part. A settlement proposal is included within the generic meaning of the word *claim* under false claims acts (see 18 U.S.C. 287 and 31 U.S.C. 3729).

Terminated portion of the contract means the portion of a terminated contract that relates to work or end items not completed and accepted before the effective date of termination that the contractor is not to continue to perform. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

Termination contracting officer means a contracting officer who is settling terminated contracts (see *Contracting officer* in 2.1).

Termination inventory means the same as the language in 45.601.

Unsettled contract change means any contract change or contract term for which a definitive modification is required but has not been executed.

[48 FR 42443, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986]

49.002 Applicability.

(a) This part applies to contracts that provide for termination for the convenience of the Government or for the default of the contractor (see also 13.504(b)).

(b) Contractors shall use this part, unless inappropriate, to settle subcontracts terminated as a result of modification of prime contracts. The contracting officer shall use this part as a guide in evaluating settlements of subcontracts terminated for the convenience of a contractor whenever the settlement will be the basis of a proposal for reimbursement from the Government under a cost-reimbursement contract.

(c) The contracting officer may use this part in determining an equitable adjustment resulting from a modification under the Changes clause of any contract, except cost-reimbursement contracts.

(d) When action to be taken or authority to be exercised under this part depends upon the *amount* of the settlement proposal, that amount shall be determined by deducting from the gross settlement proposed the amounts payable for completed articles or work at the contract price and amounts for the settlement of subcontractor settlement proposals. Credits for retention or other disposal of termination inventory and amounts for advance or partial payments shall not be deducted.

Subpart 49.1—General Principles

49.100 Scope of subpart.

(a) This subpart deals with—

(1) The authority and responsibility of contracting officers to terminate contracts in whole or in part for the convenience of the Government or for default;

(2) Duties of the contractor and the contracting officer after issuance of the notice of termination;

(3) General procedures for the settlement of terminated contracts; and

(4) Settlement agreements.

(b) Additional principles applicable to the termination for convenience and settlement of fixed-price and cost-reimbursement contracts are included in subparts 49.2 and 49.3. Additional principles applicable to the termination of contracts for default are included in subpart 49.4.

49.101 Authorities and responsibilities.

(a) The termination clauses or other contract clauses authorize contracting officers to terminate contracts for convenience, or for default, and to enter into settlement agreements under this regulation.

(b) The contracting officer shall terminate contracts, whether for default or convenience, only when it is in the Government's interest. The contracting officer shall effect a no-cost settlement instead of issuing a termination notice when (1) it is known that the contractor will accept one, (2) Government property was not furnished, and (3) there are no outstanding payments, debts due the Government, or other contractor obligations.

(c) When the price of the undelivered balance of the contract is less than $2,000, the contract should not normally be terminated for convenience but should be permitted to run to completion.

(d) After the contracting officer issues a notice of termination, the termination contracting officer (TCO) is responsible for negotiating any settlement with the contractor, including a no-cost settlement if appropriate. Auditors and TCO's shall promptly schedule and complete audit reviews and negotiations, giving particular attention to the need for timely action on settlements estimated at less than $100,000 involving small business concerns.

(e) If the same item is under contract with both large and small business concerns and it is necessary to terminate for convenience part of the units still to be delivered, preference shall be given to the continuing performance of small business contracts over large business contracts unless the chief of the contracting office determines that this is not in the Government's interest.

49.102 Notice of termination.

(a) *General.* The contracting officer shall terminate contracts for convenience or default only by a written notice to the contractor (see 49.601). When the notice is mailed, it shall be sent by certified mail, return receipt requested. When the contracting office arranges for hand delivery of the notice, a written acknowledgement shall be obtained from the contractor. The notice shall state—

(1) That the contract is being terminated for the convenience of the Government (or for default) under the contract clause authorizing the termination;

(2) The effective date of termination;

(3) The extent of termination;

(4) Any special instructions; and

(5) The steps the contractor should take to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force (see paragraph (g) of the notice in 49.601-2). If the termination notice is by telegram, include these *steps* in the confirming letter or modification.

(b) *Distribution of copies.* The contracting officer shall simultaneously send the termination notice to the contractor, and a copy to the contract administration office and to any known assignee, guarantor, or surety of the contractor.

(c) *Amendment of termination notice.* The contracting officer may amend a termination notice to—

(1) Correct nonsubstantive mistakes in the notice;

(2) Add supplemental data or instructions; or

(3) Rescind the notice if it is determined that items terminated had been completed or shipped before the contractor's receipt of the notice.

(d) *Reinstatement of terminated contracts.* Upon written consent of the contractor, the contracting office may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that—

(1) Circumstances clearly indicate a requirement for the terminated items; and

(2) Reinstatement is advantageous to the Government.

49.103 Methods of settlement.

Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by (a) negotiated agreement, (b) determination by the TCO, (c) costing-out under vouchers using SF 1034, Public Voucher for Purchases and Services Other Than Personal, for cost-reimbursement contracts (as prescribed in subpart 49.3), or (d) a combination of these methods. When possible, the TCO should negotiate a fair and prompt settlement with the contractor. The TCO shall settle a settlement proposal by determination only when it cannot be settled by agreement.

49.104 Duties of prime contractor after receipt of notice of termination.

After receipt of the notice of termination, the contractor shall comply with the notice and the termination clause of the contract, except as otherwise directed by the TCO. The notice and clause applicable to convenience terminations generally require that the contractor—

(a) Stop work immediately on the terminated portion of the contract and stop placing subcontracts thereunder;

(b) Terminate all subcontracts related to the terminated portion of the prime contract;

(c) Immediately advise the TCO of any special circumstances precluding the stoppage of work;

(d) Perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price for the continued portion, supported by evidence of any increase in the cost, if the termination is partial;

(e) Take necessary or directed action to protect and preserve property in the contractor's possession in which the Government has or may acquire an interest and, as directed by the TCO, deliver the property to the Government;

(f) Promptly notify the TCO in writing of any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;

(g) Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO;

(h) Promptly submit the contractor's own settlement proposal, supported by appropriate schedules; and

(l) Dispose of termination inventory, as directed or authorized by the TCO.

49.105 Duties of termination contracting officer after issuance of notice of termination.

(a) Consistent with the termination clause and the notice of termination, the TCO shall—

(1) Direct the action required of the prime contractor;

(2) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors;

(3) Promptly negotiate settlement with the contractor and enter into a settlement agreement; and

(4) Promptly settle the contractor's settlement proposal by determination for the elements that cannot be agreed on, if unable to negotiate a complete settlement.

(b) To expedite settlement, the TCO may request specially qualified personnel to—

(1) Assist in dealings with the contractor;

(2) Advise on legal and contractual matters;

(3) Conduct accounting reviews and advise and assist on accounting matters; and

(4) Perform the following functions regarding termination inventory (see subpart 45.6):

(i) Verify its existence.

(ii) Determine qualitative and quantitative allocability.

(iii) Make recommendations concerning serviceability.

(iv) Undertake necessary screening and redistribution.

(v) Assist the contractor in accomplishing other disposition.

(c) The TCO should promptly hold a conference with the contractor to develop a definite program for effecting the settlement. When appropriate in the judgment of the TCO, after consulting with the contractor, principal subcontractors should be requested to attend. Topics that should be discussed at the conference and documented include—

(1) General principles relating to the settlement of any settlement proposal, including obligations of the contractor under the termination clause of th contract;

(2) Extent of the termination, poin at which work is stopped, and status any plans, drawings, and informatio that would have been delivered ha the contract been completed;

(3) Status of any continuing work;

(4) Obligation of the contractor terminate subcontracts and gene principles to be followed in settlin subcontractor settlement proposals;

(5) Names of subcontractors involve and the dates termination notices wer issued to them;

(6) Contractor personnel handlin review and settlement of subcontractor settlement proposals and th methods being used;

(7) Arrangements for transfer title and delivery to the Governmen of any material required by the Government;

(8) General principles and procedures to be followed in the protectio preservation, and disposition of th contractor's and subcontractors' termination inventories, including the preparation of termination inventor schedules;

(9) Contractor accounting practice and preparation of SF 1439 (Schedul of Accounting Information (49.602-3);

(10) Form in which to submit settlement proposals;

(11) Accounting review of settlemen proposals;

(12) Any requirement for interim financing in the nature of partial payments;

(13) Tentative time schedule for negotiation of the settlement, includin submission by the contractor and subcontractors of settlement proposal termination inventory schedules, an accounting information schedules;

(14) Actions taken by the contracto to minimize impact upon employee affected adversely by the terminatio (see paragraph (g) of the letter notic in 49.601-2); and

(15) Obligation of the contractor t furnish accurate, complete, and current cost or pricing data, and to certify to that effect in accordance with 15.804-4(h) when the amount of a termination settlement agreement, or partial termination settlement agreement plus the estimate to complet

the continued portion of the contract exceeds the threshold in 15.804.

49.105-1 Termination status reports.

When the TCO and contracting officer are in different activities, the TCO will furnish periodic status reports on termination actions to the contracting office upon request. The contracting office shall specify the information required.

49.105-2 Release of excess funds.

(a) The TCO shall estimate the funds required to settle the termination at the earliest practical date. Based on this estimate, the TCO shall recommend the release of excess funds to the contracting office within 30 days after receipt of the termination notice. However, unless requested by the contracting office, the TCO shall not recommend amounts under $1,000.

(b) The TCO shall maintain continuous surveillance of required funds to permit timely release of any additional excess funds (a recommended format for release of excess funds is in 49.604). If previous releases of excess funds result in a shortage of the amount required for settlement, the TCO shall inform the contracting office, which shall reinstate the funds within 30 days.

49.105-3 Termination case file.

The TCO responsible for negotiating the final settlement shall establish a separate case file for each termination. This file will include memoranda and records of all actions relative to the settlement (see 4.801).

49.105-4 Cleanup of construction site.

In the case of terminated construction contracts, the contracting officer shall direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other action necessary to leave a safe and healthful site.

49.106 Fraud or other criminal conduct.

If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts under agency procedures.

49.107 Audit of prime contract settlement proposals and subcontract settlements.

(a) The TCO shall refer each prime contractor settlement proposal of $25,000 or more to the appropriate audit agency for review and recommendations. The TCO may submit settlement proposals of less than $25,000 to the audit agency. Referrals shall indicate any specific information or data that the TCO desires and shall include facts and circumstances that will assist the audit agency in performing its function. The audit agency shall develop requested information and may make any further accounting reviews it considers appropriate. After its review, the audit agency shall submit written comments and recommendations to the TCO. When a formal examination of settlement proposals under $25,000 is not warranted, the TCO will perform or have performed a desk review and include a written summary of the review in the termination case file.

(b) The TCO shall refer subcontract settlements received for approval or ratification to the appropriate audit agency for review and recommendations when (1) the amount exceeds $50,000 or (2) the TCO wants a complete or partial accounting review. The audit agency shall submit written comments and recommendations to the TCO. The review by the audit agency does not relieve the prime contractor or higher tier subcontractor of the responsibility for performing an accounting review.

(c) (1) The responsibility of the prime contractor and of each subcontractor (see 49.108) includes performance of accounting reviews and any necessary field audits. However, the TCO should request the Government audit agency to perform the accounting review of a subcontractor's settlement proposal when—

(i) A subcontractor objects, for competitive reasons, to an accounting review of its records by an upper tier contractor;

(ii) The Government audit agency is currently performing audit work at the subcontractor's plant, or can perform the audit more economically or efficiently;

(iii) Audit by the Government is necessary for consistent audit treatment and orderly administration; or

(iv) The contractor has a substantial or controlling financial interest in the subcontractor.

(2) The audit agency should avoid duplication of accounting reviews performed by the upper tier contractor on subcontractor settlement proposals. However, this should not preclude the Government from making additional reviews when appropriate. When the contractor is performing accounting reviews according to this section, the TCO should request the audit agency to periodically examine the contractor's accounting review procedures and performance, and to make appropriate comments and recommendations to the TCO.

(d) The audit report is advisory only, and is for the TCO to use in negotiating a settlement or issuing a unilateral determination. Government personnel handling audit reports must be careful not to reveal privileged information or information that will jeopardize the negotiation position of the Government, the prime contractor, or a higher tier subcontractor. Consistent with this, and when in the Government's interest, the TCO may furnish audit reports under paragraph (c) above to prime and higher tier subcontractors for their use in settling subcontract settlement proposals.

49.108 Settlement of subcontract settlement proposals.

49.108-1 Subcontractor's rights.

A subcontractor has no contractual rights against the Government upon the termination of a prime contract. A subcontractor may have rights against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the settlement proposals of their immediate subcontractors.

49.108-2 Prime contractor's rights and obligations.

(a) Termination for convenience clauses provide that after receipt of a termination notice the prime contractor shall, unless directed otherwise by the TCO, terminate all subcontracts to the extent that they relate to the performance of prime work terminated. Therefore, prime contractors should include a termination clause in their subcontracts for their own protection. Suggestions regarding use of subcontract termination clauses are in subpart 49.5.

(b) The failure of a prime contractor to include an appropriate termination clause in any subcontract, or to exercise the clause rights, shall not—

(1) Affect the Government's right to require the termination of the subcontract; or

(2) Increase the obligation of the Government beyond what it would have been if the subcontract had contained an appropriate clause.

(c) In any case, the reasonableness of the prime contractor's settlement with the subcontractor should normally be measured by the aggregate amount due under paragraph (f) of the subcontract termination clause suggested in 49.502(e). The TCO shall allow reimbursement in excess of that amount only in unusual cases and then only to the extent that the terms of the subcontract did not unreasonably increase the rights of the subcontractor.

49.108-3 Settlement procedure.

(a) Contractors shall settle with subcontractors in general conformity with the policies and principles relating to settlement of prime contracts in this subpart and subparts 49.2 or 49.3. However, the basis and form of the subcontractor's settlement proposal must be acceptable to the prime contractor or the next higher tier subcontractor. Each settlement must be supported by accounting data and other information sufficient for adequate review by the Government. In no event will the Government pay the prime contractor any amount for loss of anticipatory profits or consequential damages resulting from the termination of any subcontract (but see 49.108-5).

(b) Except as provided in 49.108-4, the TCO shall require that (1) all subcontractor termination inventory be disposed of and accounted for in accordance with part 45 and (2) the prime contractor submit, for approval or ratification, all termination settlements with subcontractors. The prime contractor shall certify that the subcontractor settlement proposals have been examined, that they are allocable to the terminated portion of the prime contract, and that the settlements are fair and reasonable, were negotiated in good faith, and are not more favorable to the subcontractors than if the Government were not involved. The contractor shall also certify that all immediate subcontractors have submitted substantially the same certification. For settlements with lower tier subcontractors, the contractor shall certify that there is no information known to the contractor that causes doubt about the reasonableness or allocability of the settlements to the terminated portion of the prime contract.

(c) The TCO shall promptly examine each subcontract settlement received to determine that the subcontract termination was made necessary by the termination of the prime contract (or by issuance of a change order—see 49.002(b)). The TCO will also determine if the settlement was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract (or, if allocable only in part, that the proposed allocation is reasonable). In considering the reasonableness of any subcontract settlement, the TCO shall generally be guided by the provisions of this part relating to the settlement of prime contracts, and shall comply with any applicable requirements of 49.107 and 49.111 relating to accounting and other reviews. After the examination, the TCO shall notify the contractor in writing of (1) approval or ratification, or (2) the reasons for disapproval.

49.108-4 Authorization for subcontract settlements without approval or ratification.

(a) (1) The TCO may, upon written request, give written authorization to the prime contractor to conclude settlements of subcontracts terminated in whole or in part without approval or ratification when the amount of settlement (see 49.002(d)) is $25,000 or less, if—

(i) The TCO is satisfied with the adequacy of the procedures used by the contractor in settling settlement proposals, including proposals for retention, sale, or other disposal of termination inventory of the immediate and lower tier subcontractors (the TCO shall obtain the advice and recommendations of (A) the appropriate audit agency relating to the adequacy of the contractor's audit administration, including personnel, and (B) the cognizant plant clearance officer relating to the adequacy of the contractor's procedures and personnel for the administration of property disposal matters);

(ii) Any termination inventory included in determining the amount of the settlement will be disposed of as directed by the prime contractor, generally using the requirements of 45.614, except that the disposition of the inventory shall not (A) be subject to review by the TCO under 49.108-3(c) or 45.607, or (B) be subject to the screening requirements in 45.608; and

(iii) A certificate similar to the certificate in the settlement proposal form in 49.602-1(a) will accompany the settlement.

(2) Except as provided in subparagraph (4) below, authority granted to a prime contractor under subparagraph (1) above by any TCO shall apply to all Executive agencies' prime contracts that are terminated, or modified by change orders.

(3) Except as provided in subparagraph (4) below, the TCO shall accept, as part of the prime contractor's settlement proposal, settlements of terminated lower tier subcontracts concluded by any of the prime contractor's immediate or lower tier subcontractors who have been granted authority as prime contractors to settle subcontracts; *provided*, that the settlement is within the limit of the authority. Authorization to settle proposals of lower tier subcontractors shall not be granted directly to subcontractors. However, a prime contractor authorized to approve subcontractor settlements may also exercise this authority in its capacity as a subcontractor, with

respect to its terminated subcontracts and orders. When exercising this authority as a subcontractor, the contractor shall notify the purchaser.

(4) The provisions of subparagraphs (1), (2), and (3) above shall not apply to contracts under the administration of any contracting officer if the contracting officer so notifies the prime contractor concerned. This notice shall (i) be in writing, and (ii) if subparagraph (3) above is involved, specify any subcontractor affected.

(b) Section 45.614 shall apply to disposal of completed end items allocable to the terminated subcontract. However, these items may be disposed of without review by the TCO under 49.108-3 or 45.607, and without screening under 45.608, if the total amount (at the subcontract price) when added to the amount of the settlement does not exceed the amount authorized under this subsection.

(c) A TCO granting the authorization in subparagraph (a)(1) above shall periodically (at least annually) make a selective review of settlements and settlement procedures to determine if the contractor is making adequate reviews and fair settlements, and whether the authorization should remain in effect. The TCO shall obtain the advice and recommendations of the appropriate audit agency and the cognizant plant clearance officer. When it is determined that the contractor's procedures are not adequate, or that improper settlements are being made, or when the authority has not been used in the preceding 2 years, the TCO shall revoke the authorization by written notice to the contractor, effective on the date of receipt.

(d) The contractor may make any number of separate settlements with a single subcontractor but shall not divide settlement proposals solely to bring them under an authorization limit. Separate settlement proposals that would normally be included in a single proposal, such as those based on a series of separate orders for the same item under one contract, shall be consolidated whenever possible.

(e) Upon written request of the contractor, the TCO may increase an authorization granted under subparagraph (a)(1) above to authorize the contractor to conclude settlements between $25,000 and $50,000 under a particular prime contract. The TCO may limit the increased authorization to specific subcontracts or classes of subcontracts.

(f) Authorizations granted under this 49.108-4 shall not authorize the settlement of requisitions or orders placed with any unit within the contractor's corporate entity.

(g) Recommended formats for a request to settle subcontractor settlement proposals and the TCO's letter of authorization to the contractor are in 49.605 and 49.606, respectively.

49.108-5 Recognition of judgments and arbitration awards.

(a) When a subcontractor obtains a final judgment against a prime contractor, the TCO shall, for the purposes of settling the prime contract, treat the amount of the judgment as a cost of settling with the contractor, to the extent the judgment is properly allocable to the terminated portion of the prime contract, if—

(1) The prime contractor has made reasonable efforts to include in the subcontract a termination clause described in 49.502(e), 49.503(c), or a similar clause excluding payment of anticipatory profits or consequential damages;

(2) The provisions of the subcontract relating to the rights of the parties upon its termination are fair and reasonable and do not unreasonably increase the common law rights of the subcontractor;

(3) The contractor made reasonable efforts to settle the settlement proposal of the subcontractor;

(4) The contractor gave prompt notice to the contracting officer of the initiation of the proceedings in which the judgment was rendered and did not refuse to give the Government control of the defense of the proceedings; and

(5) The contractor diligently defended the suit or, if the Government assumed control of the defense of the proceedings, rendered reasonable assistance requested by the Government.

(b) If the conditions in subparagraphs (a)(1) through (5) above are not all met, the TCO may allow the contractor the part of the judgment considered fair for settling the subcontract settlement proposal, giving due regard to the policies in this part for settlement of proposals.

(c) When a contractor and a subcontractor submit the subcontractor's settlement proposal to arbitration under any applicable law or contract provision, the TCO shall recognize the arbitration award as the cost of settling the proposal of the contractor to the same extent and under the same conditions as in paragraphs (a) and (b) above.

49.108-6 Delay in settling subcontractor settlement proposals.

When a prime contractor's inability to settle with a subcontractor delays the settlement of the prime contract, the TCO may settle with the prime contractor. The TCO shall except the subcontractor settlement proposal from the settlement in whole or part and reserve the rights of the Government and the prime contractor with respect to the subcontractor proposal.

49.108-7 Government assistance in settling subcontracts.

In unusual cases the TCO may determine, with the consent of the prime contractor, that it is in the Government's interest to provide assistance to the prime contractor in the settlement of a particular subcontract. In these situations, the Government, the prime contractor, and a subcontractor may enter into an agreement covering the settlement of one or more subcontracts. In these settlements, the subcontractor shall be paid through the prime contractor as part of the overall settlement with the prime contractor.

49.108-8 Assignment of rights under subcontracts.

(a) The termination for convenience clauses in 52.249, except the short-form clauses, obligate the prime contractor to assign to the Government, as directed by the TCO, all rights, titles, and interest under any subcontract terminated because of termination of the prime contract. The TCO shall not require the assignment unless it is in the Government's interest.

(b) The termination for convenience clauses (except the short-form clauses) also provide the Government the right, in its discretion, to settle and pay any settlement proposal arising out of the termination of subcontracts. This right does not obligate the Government to settle and pay settlement proposals of subcontractors. As a general rule, the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines that it is in the Government's interest, the TCO shall, after notifying the contractor, settle the subcontractor's proposal using the procedures for settlement of prime contracts. An example in which the Government's interest would be served is when a subcontractor is a sole source and it appears that a delay by the prime contractor in settlement or payment of the subcontractor's proposal will jeopardize the financial position of the subcontractor. Direct settlements with subcontractors are not encouraged.

49.109 Settlement agreements.

49.109-1 General.

When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO shall execute a settlement agreement on Standard Form 30 (Amendment of Solicitation/Modification of Contract) (see 49.603). The settlement shall cover (a) any setoffs that the Government has against the contractor that may be applied against the terminated contract and (b) all settlement proposals of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement.

49.109-2 Reservations.

(a) The TCO shall—

(1) Reserve in the settlement agreement any rights or demands of the parties that are excepted from the settlement;

(2) Ensure that the wording of the reservation does not create any rights for the parties beyond those in exist-

ence before execution of the settlement agreement;

(3) Mark each applicable settlement agreement with "This settlement agreement contains a reservation" and retain the contract file until the reservation is removed;

(4) Ensure that sufficient funds are retained to cover complete settlement of the reserved items; and

(5) At the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement.

(b) A recommended format for settlement of reservations appears in 49.603-9.

49.109-3 Government property.

Before execution of a settlement agreement, the TCO shall determine the accuracy of the Government property account for the terminated contract. If an audit discloses property for which the contractor cannot account, the TCO shall reserve in the settlement agreement the rights of the Government regarding that property or make an appropriate deduction from the amount otherwise due the contractor.

49.109-4 No-cost settlement.

The TCO shall execute a no-cost settlement agreement (see 49.603-6 or 49.603-7, as applicable) if (a) the contractor has not incurred costs for the terminated portion of the contract or (b) the contractor is willing to waive the costs incurred and (c) no amounts are due the Government under the contract.

49.109-5 Partial settlements.

The TCO should attempt to settle in one agreement all rights and liabilities of the parties under the contract except those arising from any continued portion of the contract. Generally, the TCO shall not attempt to make partial settlements covering particular items of the prime contractor's settlement proposal. However, when a TCO cannot promptly complete settlement under the terminated contract, a partial settlement may be entered into if (a) the issues on which agreement has been reached are clearly severable from other issues and (b) the partial settlement will not prejudice the Government's or contractor's interests in disposing of the unsettled part of the settlement proposal.

49.109-6 Joint settlement of two or more settlement proposals.

(a) With the consent of the contractor, the TCO or TCO's concerned may negotiate jointly two or more termination settlement proposals of the same contractor under different contracts, even though the contracts are with different contracting offices or agencies. In such cases, accounting work shall be consolidated to the greatest extent practical. The resulting settlement may be evidenced by one settlement agreement covering all contracts involved or by a separate agreement for each contract involved.

(b) When the settlement agreement covers more than one contract, it shall (1) clearly identify the contracts involved, (2) assign an amendment modification number to each contract, (3) apportion the total amount of the settlement among the several contracts on some reasonable basis, (4) have attached or incorporated a schedule showing the apportionment, and (5) be distributed and attached to each contract involved in the same manner as other contract modifications.

49.109-7 Settlement by determination.

(a) *General.* If the contractor and TCO cannot agree on a termination settlement, or if a settlement proposal is not submitted within the period required by the termination clause, the TCO shall issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference. The TCO shall comply with 49.109-1 through 49.109-6 in making a settlement by determination and with 49.203 in making an adjustment for loss, if any. Copies of determinations shall receive the same distribution as other contract modifications.

(b) *Notice to contractor.* Before issuing a determination of the amount due the contractor, the TCO shall give the contractor at least 15 days notice by certified mail (return receipt requested) to submit written evidence, so as to reach the TCO on or before a stated date, substantiating the amount previously proposed.

(c) *Justification of settlement proposal.* (1) The contractor has the burden of establishing, by proof satisfactory to the TCO, the amount proposed.

(2) The contractor may submit vouchers, verified transcripts of books of account, affidavits, audit reports, and other documents as desired. The TCO may request the contractor to submit additional documents and data, and may request appropriate accountings, investigations, and audits.

(3) The TCO may accept copies of documents and records without requiring original documents unless there is a question of authenticity.

(4) The TCO may hold any conferences considered appropriate (i) to confer with the contractor, (ii) to obtain additional information from Government personnel or from independent experts, or (iii) to consult persons who have submitted affidavits or reports.

(d) *Determinations.* After reviewing the information available, the TCO shall determine the amount due and shall transmit a copy of the determination to the contractor by certified mail (return receipt requested), or by any other method that provides evidence of receipt. The transmittal letter shall advise the contractor that the determination is a final decision from which the contractor may appeal under the Disputes clause, except as shown in paragraph (f) below. The determination shall specify the amount due the contractor and will be supported by detailed schedules conforming generally to the forms for settlement proposals prescribed in 49.602-1 and by additional information, schedules, and analyses as appropriate. The TCO shall explain each major item of disallowance. The TCO need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the TCO or another contracting officer.

(e) *Preservation of evidence.* The TCO shall retain all written evidence and other data relied upon in making a determination, except that copies of original books of account need not be made. The TCO shall return books of account, together with other original papers and documents, to the contractor within a reasonable time.

(f) *Appeals.* The contractor may appeal, under the Disputes clause, any settlement by determination, except when the contractor has failed to submit the settlement proposal within the time provided in the contract and failed to request an extension of time. The pendency of an appeal shall not affect the authority of the TCO to settle the settlement proposal or any part by negotiation with the contractor at any time before the appeal is decided.

(g) *Decision on the contractor's appeal.* The TCO shall give effect to a decision of the Claims Court or a board of contract appeals, when necessary, by an appropriate modification to the contract. When appropriate, the TCO should obtain a release from the contractor. TCO's are authorized to modify the formats of settlement agreements in 49.603 to agree with this provision.

[48 FR 42447, Sept. 19, 1983, as amended at 52 FR 19805, May 27, 1987]

49.110 Negotiation memorandum.

(a) The TCO shall, at the conclusion of negotiations, prepare a memorandum containing the principal elements of the settlement for inclusion in the termination case file and for use by reviewing authorities.

(b) If the settlement was negotiated on the basis of individual items, the TCO shall specify the factors considered for each item. If the settlement was negotiated on an overall lump-sum basis, the TCO need not evaluate each item or group of items individually, but shall support the total amount of the recommended settlement in reasonable detail. The memorandum shall include explanations of matters involving differences and doubtful questions settled by agreement, and the factors considered. The TCO should include any other matters that will assist reviewing authorities in understanding the basis for the settlement.

49.111 Review of proposed settlements.

Each agency shall establish procedures, when necessary, for the administrative review of proposed termination settlements. When one agency provides termination settlement services for another agency, the agency providing the services shall also perform the settlement review function.

49.112 Payment.

49.112-1 Partial payments.

(a) *General.* If the contract authorizes partial payments on settlement proposals before settlement, a prime contractor may request them on the form prescribed in 49.602-4 at any time after submission of interim or final settlement proposals. The Government will process applications for partial payments promptly. A subcontractor shall submit its application through the prime contractor which shall attach its own invoice and recommendations to the subcontractor's application. Partial payments to a subcontractor shall be made only through the prime contractor and only after the prime contractor has submitted its interim or final settlement proposal. Except for undelivered acceptable finished products, partial payments shall not be made for profit or fee claimed under the terminated portion of the contract. In exercising discretion on the extent of partial payments to be made, the TCO shall consider the diligence of the contractor in settling with subcontractors and in preparing its own settlement proposal.

(b) *Amount of partial payment.* Before approving any partial payment, the TCO shall obtain any desired accounting, engineering, or other specialized reviews of the data submitted in support of the contractor's settlement proposal. If the reviews and the TCO's examination of the data indicate that the requested partial payment is proper, reasonable payments may be authorized in the discretion of the TCO up to—

(1) 100 percent of the contract price, adjusted for undelivered acceptable items completed before the termination date, or later completed with the approval of the TCO (see 49.205);

(2) 100 percent of the amount of any subcontract settlement paid by the prime contractor if the settlement was approved or ratified by the TCO under 49.108-3(c) or was authorized under 49.108-4;

(3) 90 percent of the direct cost of termination inventory, including costs of raw materials, purchased parts, supplies, and direct labor;

(4) 90 percent of other allowable costs (including settlement expense and manufacturing and administrative indirect costs) allocable to the terminated portion of the contract and not included in subparagraphs (1), (2), or (3) above; and

(5) 100 percent of partial payments made to subcontractors under this section.

(c) *Recognition of assignments.* When an assignment of claims has been made under the contract, the Government shall not make partial payments to other than the assignee unless the parties to the assignment consent in writing (see 32.805(e)).

(d) *Security for partial payments.* If any partial payment is made for completed end items or for costs of termination inventory, the TCO shall protect the Government's interest. This shall be done by obtaining title to the completed end items or termination inventory, or by the creation of a lien in favor of the Government, paramount to all other liens, on the completed end items or termination inventory, or by other appropriate means.

(e) *Deductions in computing amount of partial payments.* The TCO shall deduct from the gross amount of any partial payment otherwise payable under 49.112-1(b)—

(1) All unliquidated balances of progress and advance payments (including interest) made to the contractor, which are allocable to the terminated portion of the contract; and

(2) The amounts of all credits arising from the purchase, retention, or sale of property, the costs of which are included in the application for payment.

(f) *Limitation on total amount.* The total amount of all partial payments shall not exceed the amount that will, in the opinion of the TCO, become due to the contractor because of the termination.

(g) *Effect of overpayment.* If the total of partial payments exceeds the amount finally determined due on the settlement proposal, the contractor shall repay the excess to the Government on demand, together with interest. The interest shall be computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2) from the date the excess payment was received by the contractor to the date of repayment. However, interest will not be charged for any (1) excess payment attributable to a reduction in the settlement proposal because of retention or other disposition of termination inventory, until 10 days after the date of the retention or disposition, or a later date determined by the TCO, or (2) overpayment under cost-reimbursement research and development contracts without profit or fee if the overpayments are repaid to the Government within 30 days after demand.

(h) *Certification and approval of partial payments.* (1) The contractor shall place the following certification on vouchers or invoices for partial payments:

> The payment covered by this voucher is a partial payment on the Contractor's settlement proposal under contract No. .... made under part 49 of the Federal Acquisition Regulation.

(2) The TCO shall approve the invoice or voucher by noting on it the following:

> Payment of $........ is approved.

49.112-2 Final payment.

(a) *Negotiated settlement.* After execution of a settlement agreement, the contractor shall submit a voucher or invoice showing the amount agreed upon, less any portion previously paid. The TCO shall attach a copy of the settlement agreement to the voucher or invoice and forward the documents to the disbursing officer for payment.

(b) *Settlement by determination.* If the settlement is by determination and—

(1) There is no appeal within the allowed time, the contractor shall submit a voucher or invoice showing the amount determined due, less any portion previously paid; or

(2) There is an appeal, the contractor shall submit a voucher or invoice showing the amount finally determined due on the appeal, less any portion previously paid. Pending determination of any appeal, the contractor may submit vouchers or invoices for charges that are not directly involved with the portion being appealed, without prejudice to the rights of either party on the appeal.

(c) *Construction contracts.* In the case of construction contracts, before forwarding the final payment voucher, the contracting officer shall ascertain whether there are any outstanding labor violations. If so, the contracting officer shall determine the amount to be withheld from the final payment (see subpart 22.4).

(d) *Interest.* The Government shall not pay interest on the amount due under a settlement agreement or a settlement by determination. The Government may, however, pay interest on a successful contractor appeal from a contracting officer's determination under the Disputes clause at 52.233-1.

49.113 Cost principles.

The cost principles and procedures in the applicable subpart of part 31 shall, subject to the general principles in 49.201, (a) be used in asserting, negotiating, or determining costs relevant to termination settlements under contracts with other than educational institutions, and (b) be a guide for the negotiation of settlements under contracts for experimental, developmental, or research work with educational institutions (but see 31.104).

49.114 Unsettled contract changes.

(a) Before settlement of a completely terminated contract, the TCO shall obtain from the contracting office a list of all related unsettled contract changes. The TCO shall settle, as part of final settlement, all unsettled contract changes after obtaining the recommendations of the contracting office concerning the changes.

(b) When the contract has been partially terminated, any outstanding unsettled contract changes will usually be handled by the contracting officer.

However, the contracting officer may delegate this function to the TCO.

49.115 Settlement of terminated incentive contracts.

(a) *Fixed-price incentive contracts.* The TCO shall settle terminated fixed-price incentive (FPI) contracts under the provisions of paragraph (j) of the clause at 52.216-16, Incentive Price Revision—Firm Target, and 52.249-2, Termination for Convenience of the Government (Fixed-Price).

(1) *Partial termination.* Under a partially terminated contract, the TCO shall negotiate a settlement as provided in the termination clause of the contract, and paragraph (j) of the clause at 52.216-16, Incentive Price Revision—Firm Target, or paragraph (l) of the clause at 52.216-17, Incentive Price Revision—Successive Targets. The contracting officer shall apply the incentive price revision provisions to completed items accepted by the Government, including any for which the contractor may request reimbursement in the settlement proposal. The TCO shall reimburse the contractor at target price for completed articles included in the settlement proposal for which a final price has not been established. The TCO shall incorporate in the settlement agreement an appropriate reservation as to final price for these completed articles.

(2) *Complete termination.* If any items were delivered and accepted by the Government, the contracting officer shall establish prices under the incentive provisions of the contract. On the terminated portion of the contract, the provisions of the termination clause (see 52.249-2, Termination for Convenience of the Government (Fixed-Price)) shall govern and the provisions of the incentive clause shall not apply. The TCO responsible for the termination settlement will ensure, on the basis of evidence considered proper (including coordination with the contracting officer), that no portion of the costs considered in the negotiations under the incentive provisions are included in the termination settlement.

(b) *Cost-plus-incentive-fee contracts.* The TCO shall settle terminated cost-plus-incentive-fee contracts under the clause at 52.249-6, Termination (Cost-Reimbursement).

(1) *Partial termination.* Under a partial termination, the TCO shall limit the settlement to an adjustment of target fee as provided in paragraph (e) of the clause at 52.216-10, Incentive Fee. The settlement agreement shall include a reservation regarding any adjustment of target cost resulting from the partial termination. The contracting officer shall adjust the target cost, if required.

(2) *Complete termination.* The parties shall negotiate the settlement under the provisions of subpart 49.3 and the clause at 52.249-6, Termination (Cost-Reimbursement). The fee shall be adjusted on the basis of the target fee, and the incentive provisions shall not be applied or considered.

Subpart 49.2—Additional Principles for Fixed-Price Contracts Terminated for Convenience

49.201 General.

(a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

(b) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.

(c) Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of recordkeeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.

49.202 Profit.

(a) The TCO shall allow profit on preparations made and work done by the contractor for the terminated portion of the contract but not on the settlement expenses. Anticipatory profits and consequential damages shall not be allowed (but see 49.108-5). Profit for the contractor's efforts in settling subcontractor proposals shall not be based on the dollar amount of the subcontract settlement agreements but the contractor's efforts will be considered in determining the overall rate of profit allowed the contractor. Profit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The TCO may use any reasonable method to arrive at a fair profit.

(b) In negotiating or determining profit, factors to be considered include—

(1) Extent and difficulty of the work done by the contractor as compared with the total work required by the contract (engineering estimates of the percentage of completion ordinarily should not be required, but if available should be considered);

(2) Engineering work, production scheduling, planning, technical study and supervision, and other necessary services;

(3) Efficiency of the contractor, with particular regard to—

(i) Attainment of quantity and quality production;

(ii) Reduction of costs;

(iii) Economic use of materials, facilities, and manpower; and

(iv) Disposition of termination inventory;

(4) Amount and source of capital and extent of risk assumed;

(5) Inventive and developmental contributions, and cooperation with the Government and other contractors in supplying technical assistance;

(6) Character of the business, including the source and nature of materials and the complexity of manufacturing techniques;

(7) The rate of profit that the contractor would have earned had the contract been completed;

(8) The rate of profit both parties contemplated at the time the contract was negotiated; and

(9) Character and difficulty of subcontracting, including selection, placement, and management of subcontracts, and effort in negotiating settlements of terminated subcontracts.

(c) When computing profit on the terminated portion of a construction contract, the contracting officer shall—

(1) Comply with paragraphs (a) and (b) above;

(2) Allow profit on the prime contractor's settlements with construction subcontractors for actual work in place at the job site; and

(3) Exclude profit on the prime contractor's settlements with construction subcontractors for materials on hand and for preparations made to complete the work.

49.203 Adjustment for loss.

(a) In the negotiation or determination of any settlement, the TCO shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed. The TCO shall negotiate or determine the amount of loss and make an adjustment in the amount of settlement as specified in paragraph (b) or (c) below. In estimating the cost to complete, the TCO shall consider expected production efficiencies and other factors affecting the cost to complete.

(b) If the settlement is on an inventory basis (see 49.206-2(a)), the contractor shall not be paid more than the total of the amounts in subparagraphs (1), (2), and (3) below, less all disposal credits and all unliquidated advance and progress payments previously made under the contract:

(1) The amount negotiated or determined for settlement expenses.

(2) The contract price, as adjusted, for acceptable completed end items (see 49.205).

(3) The remainder of the settlement amount otherwise agreed upon or determined (including the allocable portion of initial costs (see 31.205-42(c)), reduced by multiplying the remainder by the ratio of (i) the total contract price to (ii) the total cost incurred before termination plus the estimated cost to complete the entire contract.

(c) If the settlement is on a total cost basis (see 49.206-2(b)), the contractor shall not be paid more than the total of the amounts in subparagraphs (1) and (2) below, less all disposal and other credits, all advance and progress payments, and all other amounts previously paid under the contract:

(1) The amount negotiated or determined for settlement expenses.

(2) The remainder of the total settlement amount otherwise agreed upon or determined (lines 7 and 14 of SF 1436, Settlement Proposal (Total Cost Basis)) reduced by multiplying the remainder by the ratio of (i) the total contract price to (ii) the remainder plus the estimated cost to complete the entire contract.

49.204 Deductions.

From the amount payable to the contractor under a settlement, the TCO shall deduct—

(a) The agreed price for any part of the termination inventory purchased or retained by the contractor, and the proceeds from any materials sold that have not been paid or credited to the Government;

(b) The fair value, as determined by the TCO, of any part of the termination inventory that, before transfer of title to the Government or to a buyer under part 45, is destroyed, lost, stolen, or so damaged as to become undeliverable (normal spoilage is excepted, as is inventory for which the Government has expressly assumed the risk of loss); and

(c) Any other amounts as appropriate in the particular case.

49.205 Completed end items.

(a) Promptly after the effective date of termination, the TCO shall (1) have all undelivered completed end items inspected and accepted if they comply with the contract requirements, and (2) determine which accepted end items are to be delivered under the contract. The contractor shall invoice accepted and delivered end items at the contract price in the usual manner and shall not include them in the settlement proposal. When completed end items, though accepted, are not to be delivered under the contract, the contractor shall include them in the settlement proposal at the contract price, adjusted for any saving of freight or other charges, together with any credits for their purchase, retention, or sale.

(b) Work in place accepted by the Government under a construction contract is not considered a completed item even though that work may have been paid for at unit prices specified in the contract.

49.206 Settlement proposals.

49.206-1 Submission of settlement proposals.

(a) Subject to the provisions of the termination clause, the contractor should promptly submit to the TCO a settlement proposal for the amount claimed because of the termination. The final settlement proposal must be submitted within one year from the effective date of the termination, unless the period is extended by the TCO. Termination charges under a single prime contract involving two or more divisions or units of the prime contractor may be consolidated and included in a single settlement proposal.

(b) The settlement proposal must cover all cost elements including settlements with subcontractors and any proposed profit. With the consent of the TCO, proposals may be filed in successive steps covering separate portions of the contractor's costs. Such interim proposals shall include all costs of a particular type, except as the TCO may authorize otherwise.

(c) Settlement proposals must be on the forms prescribed in 49.602 unless the forms are inadequate for a particular contract. Settlement proposals must be in reasonable detail supported by adequate accounting data. Actual, standard (appropriately adjusted), or average costs may be used in preparing settlement proposals if they are determined under generally recognized accounting principles consistently followed by the contractor. When actual, standard, or average costs are not reasonably available, estimated costs may be used if the method of arriving at the estimates is approved by the TCO. Contractors shall not be required to maintain unduly elaborate cost accounting systems merely because their contracts may subsequently be terminated.

(d) The contractor may use the Settlement Proposal (Short Form), SF 1438 (see 49.602-1(d) and 53.249), when the total proposal is less than $10,000, unless otherwise instructed by the TCO. Settlement proposals that would normally be included in a single settlement proposal; e.g., those based on a series of separate orders for the same item under one contract, should be consolidated whenever possible and not divided to bring them below $10,000.

(e) The Schedule of Accounting Information, SF 1439, must be submitted for each termination under a contract for which a settlement proposal is submitted, except when the Standard Form 1438 is used. Although several interim proposals may be submitted, SF 1439 need be submitted only once unless, subsequent to filing the original form, major changes occur in the information submitted.

49.206–2 Bases for settlement proposals.

(a) *Inventory basis.* (1) Use of the inventory basis for settlement proposals is preferred. Under this basis, the contractor may propose only costs allocable to the terminated portion of the contract, and the settlement proposal must itemize separately—

(i) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;

(ii) Charges such as engineering costs, initial costs, and general administrative costs;

(iii) Costs of settlements with subcontractors;

(iv) Settlement expenses; and

(v) Other proper charges.

(2) An allowance for profit (49.202) or adjustment for loss (49.203(b)) must be made to complete the gross settlement proposal. All unliquidated advance and progress payments and all disposal and other credits known when the proposal is submitted must then be deducted.

(3) This inventory basis is also appropriate for use under the following circumstances:

(i) The partial termination of a construction or related professional services contract.

(ii) The partial or complete termination of supply orders under any terminated construction contract.

(iii) The complete termination of a unit-price (as distinguished from a lump-sum) professional services contract.

(b) *Total cost basis.* (1) When use of the inventory basis is not practicable or will unduly delay settlement, the total-cost basis (SF-1436) may be used if approved in advance by the TCO as in the following examples:

(i) If production has not commenced and the accumulated costs represent planning and preproduction or *get ready* expenses.

(ii) If, under the contractor's accounting system, unit costs for work in process and finished products cannot readily be established.

(iii) If the contract does not specify unit prices.

(iv) If the termination is complete and involves a letter contract.

(2) When the total-cost basis is used under a complete termination, the contractor must itemize all costs incurred under the contract up to the effective date of termination. The costs of settlements with subcontractors and applicable settlement expenses must also be added. An allowance for profit (49.202) or adjustment for loss (49.203(c)) must be made. The contract price for all end items delivered or to be delivered and accepted must be deducted. All unliquidated advance and progress payments and disposal and other credits known when the proposal is submitted must also be deducted.

(3) When the total-cost basis is used under a partial termination, the settlement proposal shall not be submitted until completion of the continued portion of the contract. The settlement

proposal must be prepared as in subparagraph (2) above, except that all costs incurred to the date of completion of the continued portion of the contract must be included.

(4) If a construction contract or a lump-sum professional services contract is completely terminated, the contractor shall—

(i) Use the total cost basis of settlement;

(ii) Omit Line 10 "Deduct-Finished Product Invoiced or to be Invoiced" from Section II of Standard Form-1436) Settlement Proposal (Total Cost Basis); and

(iii) Reduce the gross amount of the settlement by the total of all progress and other payments.

(c) *Other basis.* Settlement proposals may not be submitted on any basis other than paragraph (a) or (b) above without the prior approval of the chief of the contracting or contract administration office.

49.207 Limitation on settlements.

The total amount payable to the contractor for a settlement, before deducting disposal or other credits and exclusive of settlement costs, must not exceed the contract price less payments otherwise made or to be made under the contract.

49.208 Equitable adjustment after partial termination.

Under the termination clause, after partial termination, a contractor may request an equitable adjustment in the price or prices of the continued portion of a fixed-price contract. The TCO shall forward the proposal to the contracting officer except when negotiation authority is delegated to the TCO. The contractor shall submit the proposal on SF-1411, Contract Pricing Proposal Cover Sheet.

(a) When the contracting officer retains responsibility for negotiating the equitable adjustment and executing a supplemental agreement, the contracting officer shall ensure that no portion of an increase in price is included in a termination settlement made or in process.

(b) The TCO shall also ensure that no portion of the costs included in the equitable adjustment are included in the termination settlement.

Subpart 49.3—Additional Principles for Cost-Reimbursement Contracts Terminated for Convenience

49.301 General.

Termination clauses for cost-reimbursement contracts (see 49.503(a)) provide for the settlement of costs and fee, if any. The contract clauses governing costs shall determine what costs are allowable.

49.302 Discontinuance of vouchers.

(a) When the contract has been completely terminated, the contractor shall not use Standard Form 1034 (Public Voucher for Purchases and Services Other than Personal) after the last day of the sixth month following the month in which the termination is effective. The contractor may elect to stop using vouchers at any time during the 6-month period. When the contractor has vouchered out all costs within the 6-month period, a proposal for fee, if any, may be submitted on SF 1437 (see 49.602-1) or by letter appropriately certified. The contractor must submit a substantiated proposal for fee to the TCO within 1 year from the effective date of termination, unless the period is extended by the TCO. When the use of vouchers is discontinued, the contractor shall submit all unvouchered costs and the proposed fee, if any, as specified in 49.303.

(b) When the contract is partially terminated, 49.304 shall apply.

49.303 Procedure after discontinuing vouchers.

49.303-1 Submission of settlement proposal.

The contractor shall submit a final settlement proposal covering unvouchered costs and any proposed fee to the TCO within 1 year from the effective date of termination, unless the period is extended by the TCO. The contractor shall use the form prescribed in 49.602-1, unless the TCO authorizes otherwise. The proposal shall not include costs that have been—

(a) Finally disallowed by the contracting officer; or

(b) Previously vouchered and formally questioned by the Government but not yet decided as to allowability.

49.303-2 Audit of settlement proposal.

The TCO shall submit the settlement proposal to the appropriate audit agency for review (see 49.107). However, if the settlement proposal is limited to an adjustment of fee, no referral to the audit agency is required.

49.303-3 Adjustment of indirect costs.

(a) If the contract contains the clause at 52.216-7, Allowable Cost and Payment, and it appears that adjustment of indirect costs will unduly delay final settlement, the TCO, after obtaining information from the appropriate audit agency, may agree with the contractor to—

(1) Negotiate the amount of indirect costs for the contract period for which final indirect cost rates have not been negotiated, or to use billing rates as final rates for this period if the billing rates appear reasonable; or

(2) Reserve any indirect cost adjustment in the final settlement agreement, pending establishment of negotiated rates under subpart 42.7.

(b) When an amount of indirect cost is negotiated under subparagraph (a)(1) above, the contractor shall eliminate the indirect cost and the related direct costs on which it was based from the total pool and base used to compute indirect costs for other contracts performed during the applicable accounting period.

49.303-4 Final settlement.

(a) The TCO shall proceed with the settlement and execution of a settlement agreement upon receipt of the audit report, if applicable, and the contract audit closing statement covering vouchered costs.

(b) The TCO shall adjust the fee as provided in 49.305.

(c) The final settlement agreement may include all demands of the Government and proposals of the contractor under the terminated contract. However, no amount shall be allowed for any item of cost disallowed by the Government, nor for any other item of cost of the same nature.

(d) If an overall settlement of costs is agreed upon, agreement on each element of cost is not necessary. If appropriate, differences may be compromised and doubtful questions settled by agreement. An overall settlement shall not include costs that are clearly not allowable under the terms of the contract.

49.304 Procedure for partial termination.

49.304-1 General.

(a) In a partial termination, the TCO shall limit the settlement to an adjustment of the fee, if any, and with the concurrence of the contracting office, to a reduction in the estimated cost. The TCO shall adjust the fee as provided in 49.304-2 and 49.305, unless—

(1) The terminated portion is clearly severable from the balance of the contract; or

(2) Performance of the contract is virtually complete, or performance of any continued portion is only on subsidiary items or spare parts, or is otherwise not substantial.

(b) In the case of the exceptions in paragraph (a), the procedures in 49.302 and 49.303 apply.

49.304-2 Submission of settlement proposal (fee only).

The contractor shall limit the settlement proposal to a proposed reduction in the amount of fee. The final settlement proposal shall be submitted to the TCO within one year from the effective date of termination, unless the period is extended by the TCO. The proposal may be submitted in the form prescribed in 49.602-1 or by letter appropriately certified. The contractor shall substantiate the amount of fee claimed (see 49.305).

49.304-3 Submission of vouchers.

When a partial termination settlement is limited to adjustment of fee, the contractor shall continue to submit the SF 1034, Public Voucher for Purchases and Services Other than Personal, for costs reimbursable under the contract. The contractor shall not be reimbursed for costs of settlements with subcontractors unless required approvals or ratifications have been obtained (see 49.108).

49.305 Adjustment of fee.

49.305-1 General.

(a) The TCO shall determine the adjusted fee to be paid, if any, in the manner provided by the contract. The determination is generally based on a percentage of completion of the contract or of the terminated portion. When this basis is used, factors such as the extent and difficulty of the work performed by the contractor (e.g., planning, scheduling, technical study, engineering work production and supervision, placing and supervising subcontracts, and work performed by the contractor in (1) stopping performance, (2) settling terminated subcontracts, and (3) disposing of termination inventory) shall be compared with the total work required by the contract or by the terminated portion. The contractor's adjusted fee shall not include an allowance for fee for subcontract effort included in subcontractors' settlement proposals.

(b) The ratio of costs incurred to the total estimated cost of performing the contract or the terminated portion is only one factor in computing the percentage of completion. This percentage may be either greater or less than that indicated by the ratio of costs incurred, depending upon the evaluation by the TCO of other pertinent factors.

49.305-2 Construction contracts.

(a) The percentage of completion basis refers to the contractor's total effort and not solely to the actual construction work. Generally, the effort of a contractor under a cost-reimbursement construction or professional services contract can be segregated into factors such as (1) mobilization including organization, (2) use of finances, (3) contracting for and receipt of materials, (4) placement of subcontracts, (5) preparation of shop drawings, (6) work in place performed by own forces, (7) supervision of subcontractors' work (8) job administration, and (9) demobilization.

(b) Each of the applicable factors in paragraph (a) above shall be assigned a weighted value depending on its importance and difficulty. The total weight value of all factors should be easily divisible (e.g., by 100) to determine percentages. The percentage of completion of each factor must be established based upon the specific facts of each contract. When totaled, the percentage of completion of each factor applied to the weighted value of each factor results in the overall percentage of contract completion. The percentage of completion is then applied to the total contract fee or to the fee applicable to the terminated portion of the contract to arrive at an equitable adjustment.

Subpart 49.4—Termination for Default

49.401 General.

(a) Termination for default is generally the exercise of the Government's contractual right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations.

(b) If the contractor can establish, or it is otherwise determined that the contractor was not in default or that the failure to perform is excusable; i.e., arose out of causes beyond the control and without the fault or negligence of the contractor, the default clauses prescribed in 49.503 and located at 52.249 provide that a termination for default will be considered to have been a termination for the convenience of the Government, and the rights and obligations of the parties governed accordingly.

(c) The Government may, in appropriate cases, exercise termination or cancellation rights in addition to those in the contract clauses (see for example, paragraph (h) of the Default clause at 52.249-8).

(d) For default terminations of orders under Federal Supply Schedule contracts, see subpart 8.4.

(e) Notwithstanding the provisions of this 49.401, the contracting officer may, with the written consent of the contractor, reinstate the terminated contract by amending the notice of termination, after a written determination is made that the supplies or services are still required and reinstatement is advantageous to the Government.

49.402 Termination of fixed-price contracts for default.

49.402-1 The Government's right.

Under contracts containing the Default clause at 52.249-8, the Government has the right, subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to (a) make delivery of the supplies or perform the services within the time specified in the contract, (b) perform any other provision of the contract, or (c) make progress and that failure endangers performance of the contract.

49.402-2 Effect of termination for default.

(a) Under a termination for default, the Government is not liable for the contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments, if any, applicable to that work. The Government may elect, under the Default clause, to require the contractor to transfer title and deliver to the Government completed supplies and manufacturing materials, as directed by the contracting officer.

(b) The contracting officer shall not use the Default clause as authority to acquire any completed supplies or manufacturing materials unless it has been ascertained that the Government does not already have title under some other provision of the contract. The contracting officer shall acquire manufacturing materials under the Default clause for furnishing to another contractor only after considering the difficulties the other contractor may have in using the materials.

(c) Subject to paragraph (d) below, the Government shall pay the contractor the contract price for any completed supplies, and the amount agreed upon by the contracting officer and the contractor for any manufacturing materials, acquired by the Government under the Default clause.

(d) The Government must be protected from overpayment that might result from failure to provide for the Government's potential liability to laborers and material suppliers for lien rights outstanding against the completed supplies or materials after the Government has paid the contractor for them. To accomplish this, before paying for supplies or materials, the contracting officer shall take one or more of the following measures:

(1) Ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all lienors' claims or whether it is feasible to obtain similar bonds to cover outstanding liens.

(2) Require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have to the supplies and materials.

(3) Obtain appropriate agreement by the Government, the contractor, and lienors ensuring release of the Government from any potential liability to the contractor or lienors.

(4) Withhold from the amount due for the supplies or materials any amount the contracting officer determines necessary to protect the Government's interest, but only if the measures in subparagraphs (d)(1), (2), and (3) above cannot be accomplished or are considered inadequate.

(5) Take other appropriate action considering the circumstances and the degree of the contractor's solvency.

(e) The contractor is liable to the Government for any excess costs incurred in acquiring supplies and services similar to those terminated for default (see 49.402-6), and for any other damages, whether or not repurchase is effected (see 49.402-7).

49.402-3 Procedure for default.

(a) When a default termination is being considered, the Government shall decide which type of termination action to take (i.e., default, convenience, or no-cost cancellation) only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action.

(b) The administrative contracting officer shall not issue a show cause notice or cure notice without the prior approval of the contracting office, which should be obtained by the most expeditious means.

(c) Subdivision (a)(1)(i) of the Default clause covers situations when the contractor has defaulted by failure to make delivery of the supplies or to perform the services within the specified time. In these situations, no notice of failure or of the possibility of termination for default is required to be sent to the contractor before the actual notice of termination (but see paragraph (e) below). However, if the Government has taken any action that might be construed as a waiver of the contract delivery or performance date, the contracting officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice shall reserve the Government's rights under the Default clause.

(d) Subdivisions (a)(1)(ii) and (a)(1)(iii) of the Default clause cover situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger performance of the contract. If the termination is predicated upon this type of failure, the contracting officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. When appropriate, this notice may be made a part of the notice described in subparagraph (e)(1) below. Upon expiration of the 10 days (or longer period), the contracting officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured. A format for a cure notice is in 49.607.

(e)(1) If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination. This notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default, and request the contractor to show cause why the contract should not be terminated
default. The notice may further s
that failure of the contractor
present an explanation may be ta
as an admission that no valid expla
tion exists. When appropriate,
notice may invite the contractor to
cuss the matter at a conference
format for a show cause notice i
49.607.

(2) When a termination for defa
appears imminent, the contracting
ficer shall provide a written notif
tion to the surety. If the contracto
subsequently terminated for defaul
copy of the notice of default shall
sent to the surety.

(3) If requested by the surety,
agreed to by the contractor and
assignees, arrangements may be m
to have future checks mailed to
contractor in care of the surety.
this case, the contractor must forw
a written request to the designa
disbursing officer specifically direct
a change in address for mai
checks.

(4) If the contractor is a small b
ness firm, the contracting officer sh
immediately provide a copy of
cure notice or show cause notice to
contracting office's small business
cialist and the Small Business Adm
istration Regional Office nearest
contractor. The contracting off
should, whenever practicable, con
with the small business specia
before proceeding with a default
mination (see also 49.402-4).

(f) The contracting officer shall
sider the following factors in de
mining whether to terminate a
tract for default:

(1) The terms of the contract
applicable laws and regulations.

(2) The specific failure of the
tractor and the excuses for the fail

(3) The availability of the supp
or services from other sources.

(4) The urgency of the need for
supplies or services and the period
time required to obtain them fr
other sources, as compared with
time delivery could be obtained fr
the delinquent contractor.

(5) The degree of essentiality of
contractor in the Government acqu
tion program and the effect of a ter
nation for default upon the cont

tor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

(g) If, after compliance with the procedures in paragraphs (a) through (f) of this 49.402-3, the contracting officer determines that a termination for default is proper, the contracting officer shall issue a notice of termination stating—

(1) The contract number and date;

(2) The acts or omissions constituting the default;

(3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;

(4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;

(5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;

(6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and

(7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.

(h) The contracting officer shall make the same distribution of the termination notice as was made of the contract. A copy shall also be furnished to the contractor's surety, if any, when the notice is furnished to the contractor. The surety should be requested to advise if it desires to arrange for completion of the work. In addition, the contracting officer shall notify the disbursing officer to withhold further payments under the terminated contract, pending further advice, which should be furnished at the earliest practicable time.

(i) In the case of a construction contract, promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed.

(j) If the contracting officer determines before issuing the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the Government's interest, the contracting officer may terminate the contract for the convenience of the Government.

(k) If the contracting officer has not been able to determine, before issuance of the notice of termination whether the contractor's failure to perform is excusable, the contracting officer shall make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes clause.

[48 FR 42447, Sept. 19, 1983, as amended at 54 FR 48990, Nov. 28, 1989]

49.402-4 Procedure in lieu of termination for default.

The following courses of action, among others, are available to the contracting officer in lieu of termination for default when in the Government's interest:

(a) Permit the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule.

(b) Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Government are adequately preserved.

(c) If the requirement for the supplies and services in the contract no longer exists, and the contractor is not liable to the Government for damages as provided in 49.402-7, execute a no-cost termination settlement agreement using the formats in 49.603-6 and 49.603-7 as a guide.

49.402-5 Memorandum by the contracting officer.

When a contract is terminated for default or a procedure authorized by 49.402-4 is followed, the contracting officer shall prepare a memorandum for the contract file explaining the reasons for the action taken.

49.402-6 Repurchase against contractor's account.

(a) When the supplies or services are still required after termination, the contracting officer shall repurchase the same or similar supplies or services against the contractor's account as soon as practicable. The contracting officer shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements. The contracting officer may repurchase a quantity in excess of the undelivered quantity terminated for default when the excess quantity is needed, but excess cost may not be charged against the defaulting contractor for more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract). Generally, the contracting officer will make a decision whether or not to repurchase before issuing the termination notice.

(b) If the repurchase is for a quantity not over the undelivered quantity terminated for default, the Default clause authorizes the contracting officer to use any terms and acquisition method deemed appropriate for the repurchase. However, the contracting officer shall obtain competition to the maximum extent practicable for the repurchase. The contracting officer shall cite the Default clause as the authority. If the repurchase is for a quantity over the undelivered quantity terminated for default, the contracting officer shall treat the entire quantity as a new acquisition. If the repurchase is for a quantity over the undelivered quantity terminated for default, the contracting officer shall treat the entire quantity as a new acquisition.

(c) If repurchase is made at a price over the price of the supplies or services terminated, the contracting officer shall, after completion and final payment of the repurchase contr
make a written demand on the
tractor for the total amount of
excess, giving consideration to any
creases or decreases in other c
such as transportation, discounts,
If the contractor fails to make
ment, the contracting officer s
follow the procedures in subpart
for collecting contract debts due
Government.

[48 FR 42447, Sept. 19, 1983, as amende
50 FR 1745, Jan. 11, 1985; 50 FR 52429,
23, 1985]

49.402-7 Other damages.

(a) If a contract is terminated for
fault or if a course of action in lie
termination for default is follo
(see 49.402-4), the contracting off
shall promptly ascertain and m
demand for any liquidated damage
which the Government is enti
under the contract. Under the c
tract clauses for liquidated damage
52.212-4, these damages are in a
tion to any excess repurchase costs.

(b) If the Government has suffe
any other ascertainable damages
result of the contractor's default,
contracting officer shall, on the b
of legal advice, take appropriate act
as prescribed in subpart 32.6 to as
the Government's demand for
damages.

49.403 Termination of cost-reimbursem contracts for default.

(a) The right to terminate a cost
imbursement contract for default
provided for in the Termination
Default or for Convenience of
Government clause at 52.249-6. A
day notice to the contractor bef
termination for default is required
every case by the clause.

(b) Settlement of a cost-reimbu
ment contract terminated for defa
is subject to the principles in subp
49.1 and 49.3 the same as when a c
tract is terminated for convenie
except that—

(1) The costs of preparing the c
tractor's settlement proposal are
allowable (see subparagraph (g)(3)
the clause); and

(2) The contractor is reimbursed
allowable costs, and an appropriate

duction is made in the total fee, if any, (see subparagraph (g)(4) of the clause).

(c) The contracting officer shall use the procedures in 49.402 to the extent appropriate in considering the termination for default of a cost-reimbursement contract. However, a cost-reimbursement contract does not contain any provision for recovery of excess repurchase costs after termination for default (but see paragraph (g) of the clause at 52.246-3 with respect to failure of the contractor to replace or correct defective supplies).

49.404 Surety-takeover agreements.

(a) The procedures in this section apply primarily, but not solely, to fixed-price construction contracts terminated for default.

(b) Because of the surety's liability for damages resulting from the contractor's default, the surety has certain rights and interests in the completion of the contract work and application of any undisbursed funds. Accordingly, the contracting officer shall carefully consider proposals by the surety concerning completion of the work. The contracting officer shall take action on the basis of the Government's interest, including the possible effect of the action upon the Government's rights against the surety.

(c) If the surety offers to complete the contract work, this should normally be permitted unless the contracting officer has reason to believe that the persons or firms proposed by the surety to complete the work are not competent and qualified and the interests of the Government would be substantially prejudiced.

(d) Because of the possibility of conflicting demands for unpaid prior earnings (retained percentages and unpaid progress estimates) of the defaulting contractor, the surety may condition its offer of completion upon the execution by the Government of a *takeover* agreement fixing the surety's rights to payment from those funds. In that event, the contracting officer may (but not before the effective date of termination) enter into a written agreement with the surety. The contracting officer should consider including in the agreement both the surety and the defaulting contractor in order to eliminate any disagreement concerning the contractor's residual rights, including assertions to unpaid prior earnings.

(e) The agreement shall provide for the surety to complete the work according to all the terms and conditions of the contract and for the Government to pay the surety the balance of the contract price unpaid at the time of default, but not in excess of the surety's costs and expenses, in the manner provided by the contract subject to the following conditions:

(1) Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, shall be subject to debts due the Government by the contractor, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion of the work, exclusive of its payments and obligations under the payment bond given in connection with the contract.

(2) The agreement shall not waive or release the Government's right to liquidated damages for delays in completion of the work, except to the extent that they are excusable under the contract.

(3) If the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings, unless the assignee consents to the payment in writing.

(4) The surety shall not be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor. Furthermore, payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor shall be only on authority of—

(i) Mutual agreement between the Government, the defaulting contractor, and the surety;

(ii) Determination of the Comptroller General as to payee and amount; or

(iii) Order of a court of competent jurisdiction.

49.405 Completion by another contractor.

If the surety does not arrange for completion of the contract, the contracting officer normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications. The new contract may be the result of sealed bidding or any other appropriate contracting method or procedure. The contracting officer shall exercise reasonable diligence to obtain the lowest price available for completion.

[48 FR 42447, Sept. 19, 1983, as amended at 50 FR 1746, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

49.406 Liquidation of liability.

The contract provides that the contractor and the surety are liable to the Government for resultant damages. The contracting officer shall use all retained percentages of progress payments previously made to the contractor and any progress payments due for work completed before the termination to liquidate the contractor's and the surety's liability to the Government. If the retained and unpaid amounts are insufficient, the contracting officer shall take steps to recover the additional sum from the contractor and the surety.

Subpart 49.5—Contract Termination Clauses

49.501 General.

This subpart prescribes the principal contract termination clauses. In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this regulation.

49.502 Termination for convenience of the Government.

(a) *Fixed-price contracts of $100,000 or less (short form).*

(1) *General use.* The contracting officer shall insert the clause at 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be $100,000 or less, except (i) if use of the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form) is appropriate, (ii) in contracts for research and development work with an educational or nonprofit institution on a no-profit basis, (iii) in contracts for architect-engineer services, or (iv) if one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

(2) *Dismantling and demolition.* If the contract is for dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I.

(b) *Fixed-price contracts over $100,000.*

(1) (i) *General use.* The contracting officer shall insert the clause at 52.249-2, Termination for Convenience of the Government (Fixed-Price), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be over $100,000, except in contracts for (i) dismantling and demolition, (ii) research and development work with an educational or nonprofit institution on a no-profit basis, or (iii) architect-engineer services; it shall not be used if the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), is appropriate (see 49.502(c)), or one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

(ii) *Construction.* If the contract is for construction, the contracting officer shall use the clause with its Alternate I.

(iii) *Partial payments.* If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate II. In such contracts for construction, the contracting officer shall use the clause with its Alternate III.

(2) *Dismantling and demolition.* The contracting officer shall insert the clause at 52.249-3, Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements) in solicitations and contracts for dismantling, demolition, or removal of improvements, when a fixed-price contract is contemplated

and the contract amount is expected to be over $100,000. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate I.

(c) *Service contracts (short form).* The contracting officer shall insert the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), in solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the contracting officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination. Examples of services where this clause may be appropriate are contracts for rental of unreserved parking space, laundry and drycleaning, etc.

(d) *Research and development contracts.* The contracting officer shall insert the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), in solicitations and contracts when either a fixed-price or cost-reimbursement contract is contemplated for research and development work with an educational or nonprofit institution on a no-profit or no-fee basis.

(e) *Subcontracts.* (1) *General use.* The prime contractor may find the clause at 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), or at 52.249-2, Termination for Convenience of the Government (Fixed-Price), as appropriate, suitable for use in fixed-price subcontracts, except as noted in subparagraph (2) below; *provided*, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (c)) in 52.249-2 should be deleted and the periods reduced for submitting the subcontractor's termination settlement proposal (e.g., 6 months), and for requesting an equitable price adjustment (e.g., 45 days).

(2) *Research and development.* The prime contractor may find the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), suitable for use in subcontracts placed with educational or nonprofit institutions on a no-profit or no-fee basis; *provided*, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (g)) should be deleted, the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g., 6 months), the subcontract should be placed on a no-profit or no-fee basis, and the subcontract should incorporate or be negotiated on the basis of the cost principles in part 31 of the Federal Acquisition Regulation.

49.503 Termination for convenience of the Government and default.

(a) *Cost-reimbursement contracts.*

(1) *General use.* The contracting officer shall insert the clause at 52.249-6, Termination (Cost-Reimbursement), in solicitations and contracts when a cost-reimbursement contract is contemplated, except in contracts for architect-engineer services and for research and development with an educational or nonprofit institution on a no-fee basis.

(2) *Construction.* If the contract is for construction, the contracting officer shall use the clause with its Alternate I.

(3) *Partial payments.* If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate II. In such contracts for construction, the contracting officer shall use the clause with its Alternate III.

(4) *Time-and-material and labor-hour contracts.* If the contract is a time-and-material or labor-hour contract, the contracting officer shall use

the clause with its Alternate IV. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate V.

(b) *Fixed-price contracts.* The contracting officer shall insert the clause at 52.249-7, Termination (Fixed-Price Architect-Engineer), in solicitations and contracts for architect-engineer services, when a fixed-price contract is contemplated.

(c) *Subcontracts.* The prime contractor may find the clause at 52.249-6, Termination (Cost-Reimbursement), suitable for use in cost-reimbursement subcontracts; *provided,* that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraphs (d), (i) and (m)) should be deleted and the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g., 6 months).

49.504 Termination of fixed-price contracts for default.

(a) (1) *Supplies and services.* The contracting officer shall insert the clause at 52.249-8, Default (Fixed-Price Supply and Service), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may use the clause when the contract amount is not expected to exceed the small purchase limitation, if appropriate (e.g., if the acquisition involves items with a history of unsatisfactory quality).

(2) *Transportation.* If the contract is for transportation or transportation-related services, the contracting officer shall use the clause with its Alternate I.

(b) *Research and development.* The contracting officer shall insert the clause at 52.249-9, Default (Fixed-Price Research and Development), in solicitations and contracts for research and development when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation, except those with educational or nonprofit institutions on a no-profit basis. The contracting officer may use the clause when the contract amount is not expected to exceed the small purchase limitation, if appropriate (e.g., if the contracting officer believes that key personnel essential to the work may be devoted to other programs).

(c) (1) *Construction.* The contracting officer shall insert the clause at 52.249-10, Default (Fixed-Price Construction), in solicitations and contracts for construction, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may use the clause when the contract amount is not expected to exceed the small purchase limitation, if appropriate (e.g., if completion dates are essential).

(2) *Dismantling and demolition.* If the contract is for dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I.

(3) *National emergencies.* If the contract is to be awarded during a period of national emergency, the contracting officer may use the clause (i) with its Alternate II when a fixed-price contract for construction is contemplated, or (ii) with its Alternate III when a contract for dismantling, demolition, or removal of improvements is contemplated.

49.505 Other termination clauses.

(a) *Facilities.* The contracting officer shall insert the clause at 52.249-11, Termination of Work (Consolidated Facilities or Facilities Acquisition), in consolidated facilities contracts and facilities acquisition contracts. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate I.

(b) *Personal service contracts.* The contracting officer shall insert the clause at 52.249-12, Termination (Personal Services), in solicitations and contracts for personal services (see part 37).

(c) *Failure to perform.* The contracting officer shall insert the clause at 52.249-13, Failure to Perform, in facilities contracts, except facilities use contracts with nonprofit educational institutions.

(d) *Excusable delays.* The contracting officer shall insert the clause at 52.249-14, Excusable Delays, in solicitations and contracts for supplies, services, construction, and research and development on a fee basis, when a cost-reimbursement contract is contemplated. The contracting officer shall also insert the clause in time-and-material contracts, labor-hour contracts, consolidated facilities contracts, and facilities acquisition contracts.

(e) *Communication service contracts.* This regulation does not prescribe a clause for the cancellation or termination of orders under communication service contracts with common carriers because of special agency requirements that apply to these services. An appropriate clause, however, shall be prescribed at agency level, within those agencies contracting for these services.

Subpart 49.6—Contract Termination Forms and Formats

49.601 Notice of termination for convenience.

(See 49.402-3(g) for notice of termination for default.)

49.601-1 Telegraphic notice.

(a) *Complete termination.* The following telegraphic notice is suggested for use if a supply contract is being completely terminated for convenience. If appropriately modified, the notice may be used for other than supply contracts.

DATE————————

XYZ Corporation
New York, NY 12345

Contract No. .... is completely terminated under clause ...., effective .... [*insert* "immediately" *or* "on ...., 19..", or "as soon as you have delivered, including prior deliveries, the following items:" (*list*)]. Immediately stop all work, terminate subcontracts, and place no further orders except to the extent [*insert if applicable* "necessary to complete items not terminated or"] that you or a subcontractor wish to retain and continue for your own account any work-in-process or other materials. Telegraph similar instructions to all subcontractors and suppliers. Detailed instructions follow.

____

Contracting Officer

(b) *Partial termination.* The following telegraphic notice is suggested for use if a supply contract is being partially terminated for convenience. If appropriately modified, the notice may be used for other than supply contracts.

DATE————————

XYZ Corporation
New York, NY 12345

Contract No. ..... is partially terminated under clause ...., effective .... [*insert* "immediately" *or* "on ...., 19.."]. Reduce items to be delivered as follows: [*insert instructions*]. Immediately stop all work, terminate subcontracts, and place no further orders except as necessary to perform the portion not terminated or that you or a subcontractor wish to retain and continue for your account any work-in-process or other materials. Telegraph similar instructions to all subcontractors and suppliers. Detailed instructions follow.

____

Contracting Officer

49.601-2 Letter notice.

The following letter notice of termination is suggested for use if a contract for supplies is being terminated for convenience. With appropriate modifications, it may be used in terminating contracts for other than supplies and in terminating subcontracts. This notice shall be sent by certified mail, return receipt requested. If no prior telegraphic notice was issued, use the alternate notice that follows this notice.

NOTICE OF TERMINATION TO PRIME CONTRACTORS

[*At the top of the notice, set out all special details relating to the particular termination; e.g., name and address of company,* *contract number of terminated contract, items, etc.*]

(a) *Effective date of termination.* This confirms the Government's telegram to you dated ...., 19...., terminating .... [*insert* "completely" *or* "in part"] Contract No. ...... (referred to as "the contract") for the Government's convenience under the clause entitled .... [*insert title of appropriate termination clause*]. The termination is effective on the date and in the manner stated in the telegram.

(b) *Cessation of work and notification to immediate subcontractors.* You shall take the following steps:

(1) Stop all work, make no further shipments, and place no further orders relating to the contract, except for—

(i) The continued portion of the contract, if any;

(ii) Work-in-process or other materials that you may wish to retain for your own account; or

(iii) Work-in-process that the Contracting Officer authorizes you to continue (A) for safety precautions, (B) to clear or avoid damage to equipment, (C) to avoid immediate complete spoilage of work-in-process having a definite commercial value, or (D) to prevent any other undue loss to the Government. (If you believe this authorization is necessary or advisable, immediately notify the Contracting Officer by telephone or personal conference and obtain instructions.)

(2) Keep adequate records of your compliance with subparagraph (1) above showing the—

(i) Date you received the Notice of Termination;

(ii) Effective date of the termination; and

(iii) Extent of completion of performance on the effective date.

(3) Furnish notice of termination to each immediate subcontractor and supplier that will be affected by this termination. In the notice—

(i) Specify your Government contract number;

(ii) State whether the contract has been terminated completely or partially;

(iii) Provide instructions to stop all work, make no further shipments, place no further orders, and terminate all subcontracts under the contract, subject to the exceptions in subparagraph (1) above;

(iv) Provide instructions to submit any settlement proposal promptly; and

(v) Request that similar notices and instructions be given to its immediate subcontractors.

(4) Notify the Contracting Officer of all pending legal proceedings that are based on subcontracts or purchase orders under the contract, or in which a lien has been or may be placed against termination inventory to be reported to the Government. Also, promptly notify the Contracting Officer of any such proceedings that are filed after receipt of this Notice.

(5) Take any other action required by the Contracting Officer or under the Termination clause in the contract.

(c) *Termination inventory.* (1) As instructed by the Contracting Officer, transfer title and deliver to the Government all termination inventory of the following types or classes, including subcontractor termination inventory that you have the right to take [*Contracting Officer insert proper identification or* "None"].

(2) To settle your proposal, it will be necessary to establish that all prime and subcontractor termination inventory has been properly accounted for. For detailed information, see part 45.

(d) *Settlements with subcontractors.* You remain liable to your subcontractors and suppliers for proposals arising because of the termination of their subcontracts or orders. You are requested to settle these settlement proposals as promptly as possible. For purposes of reimbursement by the Government, settlements will be governed by the provisions of part 49.

(e) *Completed end items.* (1) Notify the Contracting Officer of the number of items completed under the contract and still on hand and arrange for their delivery or other disposal (see 49.205).

(2) Invoice acceptable completed end items under the contract in the usual way and do not include them in the settlement proposal.

(f) *Patents.* If required by the contract, promptly forward the following to the Contracting Officer:

(1) Disclosure of all inventions, discoveries, and patent applications made in the performance of the contract.

(2) Instruments of license or assignment on all inventions, discoveries, and patent applications made in the performance of the contract.

(g) *Employees affected.* (1) If this termination, together with other outstanding terminations, will necessitate a significant reduction in your work force, you are urged to—

(i) Promptly inform the local State Employment Service of your reduction-in-force schedule in numbers and occupations, so that the Service can take timely action in assisting displaced workers;

(ii) Give affected employees maximum practical advance notice of the employment reduction and inform them of the facilities and services available to them through the local State Employment Service offices;

(iii) Advise affected employees to file applications with the State Employment Service to qualify for unemployment insurance, if necessary;

(iv) Inform officials of local unions having agreements with you of the impending reduction-in-force; and

(v) Inform the local Chamber of Commerce and other appropriate organizations which are prepared to offer practical assistance in finding employment for displaced workers of the impending reduction-in-force.

(2) If practicable, urge subcontractors to take similar actions to those described in subparagraph (1) above.

(h) *Administrative.* The contract administration office named in the contract will identify the Contracting Officer who will be in charge of the settlement of this termination and who will, upon request, provide the necessary settlement forms. Matters not covered by this notice should be brought to the attention of the undersigned.

(i) Please acknowledge receipt of this notice as provided below.

____

(Contracting Officer)

____

____

(Name of Office)

____

(Address)

Acknowledgment of Notice

The undersigned acknowledges receipt of a signed copy of this notice on ...., 19...... Two signed copies of this notice are returned.

____

(Name of Contractor)

By ______________________________

(Name)

____

(Title)

(End of notice)

Alternate notice. If no prior telegraphic notice was issued, substitute the following paragraph (a) for paragraph (a) of the notice above:

(a) *Effective date of termination.* You are notified that Contract No. ...... (referred to as "the contract") is terminated .... [*insert* "completely" *or* "in part"] for the Government's convenience under the clause entitled .... [*insert title of appropriate termination clause*]. The termination is effective .... [*insert either* "immediately upon receipt of this Notice" *or* "on ...., 19...," *or* "as soon as you have delivered, including prior deliveries, the following items:" (*list*)]. Reduce items to be delivered as follows: [*insert instructions*].

49.602 Forms for settlement of terminated contracts.

The standard forms listed below shall be used for settling terminated prime contracts. The forms at 49.602-1 and 49.602-2 may also be used for settling terminated subcontracts. Standard forms are illustrated in subpart 53.3.

49.602-1 Termination settlement proposal forms.

(a) Standard Form 1435, Settlement Proposal (Inventory Basis), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the proposals are computed on an inventory basis (see 49.206-2(a)).

(b) Standard Form 1436, Settlement Proposal (Total Cost Basis), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the proposals are computed on a total cost basis (see 49.206-2(b)).

(c) Standard Form 1437, Settlement Proposal for Cost-Reimbursement Type Contracts, shall be used to submit settlement proposals resulting from the termination of cost-reimbursement contracts (see 49.302).

(d) Standard Form 1438, Settlement Proposal (Short Form), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the total proposal is less than $10,000 (see 49.206-1(d)).

49.602-2 Inventory schedule forms.

The following forms shall be used to support settlement proposals submitted on the forms specified in 49.602-1(a), (b), and (c) (see 45.606):

(a) Standard Form 1426, Inventory Schedule A (Metals in Mill Product Form), and Standard Form 1427, Inventory Schedule A - Continuation Sheet (Metals in Mill Product Form).

(b) Standard Form 1428, Inventory Schedule B, and Standard Form 1429, Inventory Schedule B - Continuation Sheet (used for reporting raw materials, purchased parts, finished components, finished product, plant equipment, and miscellaneous inventory).

(c) Standard Form 1430, Inventory Schedule C - (Work-in-Process), and Standard Form 1431, Inventory Schedule C - Continuation Sheet (Work-in-Process).

(d) Standard Form 1432, Inventory Schedule D (Special Tooling and Special Test Equipment), and Standard Form 1433, Inventory Schedule D - Continuation Sheet (Special Tooling and Special Test Equipment).

(e) Standard Form 1434, Termination Inventory Schedule E (Short Form for use with SF 1438 Only).

49.602-3 Schedule of accounting information.

Standard Form 1439, Schedule of Accounting Information, shall be filed in support of a settlement proposal unless the proposal is filed on Standard Form 1438, Settlement Proposal (Short Form) (see 49.206-1(e)).

49.602-4 Partial payments.

Standard Form 1440, Application for Partial Payment, shall be used to apply for partial payments (see 49.112-1).

49.602-5 Settlement agreement.

Standard Form 30 (SF 30), Amendment of Solicitation/Modification of Contract, shall be used to execute a settlement agreement (see 49.109-1).

49.603 Formats for termination for convenience settlement agreements.

The formats to be used for termination for convenience settlement agreements should be substantially as shown in this section (see 49.109). Termination contracting officers (TCO's) may, however, modify the contents of these agreements to conform with special termination clauses prescribed or authorized by their agencies (e.g., see 49.501 and 49.505(e)).

49.603-1 Fixed-price contracts—complete termination.

[*Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts completely terminated.*]

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated ....

(b) The parties agree to the following:

(1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(2) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Of-

best copy available

ficer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(4) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(5) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(6) (i) The Contractor has received $......... for work and services performed, or items delivered, under the completed portion of the contract. The Government confirms the right of the Contractor, subject to paragraph (7) below, to retain this sum and agrees that it constitutes a portion of the total amount to which the Contractor is entitled in settlement of the contract.

(ii) Further, the Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of $.......... [*insert net amount of settlement*], arrived at by deducting from the sum of $.......... [*for proposals on an inventory basis insert gross amount of settlement; for proposals on a total cost basis, insert gross amount of settlement less amount shown in subdivision (6)(i) above*], (A) the amount of $......... for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest) and (B) the amount of $......... for all applicable property disposal credits [*insert if appropriate,* "and (C) the amount of $.......... for all other amounts due the Government under this contract, except as provided in paragraph (7) below"].

(iii) The net settlement of $.......... in subdivision (ii) above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and of all other demands and liabilities of the Contractor and the Government under the contract except as provided in paragraph (7) below.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

[*The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109-2). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.*]

(i) All rights and liabilities, if any, of the parties, as to matters covered by and regulations made implementing 10 U.S.C. 2382, as amended, and any other renegotiation authority.

(ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.

(iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, employment of aliens, and "officials not to benefit." [*If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.*]

(iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.

(vii) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(viii) All rights and liabilities of the parties relating to Government property furnished to the Contractor for the performance of this contract.

(ix) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(x) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective cost or pricing data.

(End of agreement)

49.603-2 Fixed-price contracts—partial termination.

[*Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts partially terminated.*]

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated ....

(b) The parties agree to the following:

(1) The terminated portion of the contract is as follows: [*specify the terminated portion clearly as to* (*i*) *item numbers,* (*ii*) *descriptions,* (*iii*) *quantity terminated,* (*iv*) *unit price of items,* (*v*) *total price of terminated items, and* (*vi*) *any other explanation necessary to avoid uncertainty or misunderstanding*].

(2) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(3) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(4) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(5) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(6) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(7) (i) The Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of $.......... [*insert net amount of settlement*], arrived at by deducting from $.......... [*insert gross amount of settlement*], (A) the amount of $.......... for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest) applicable to the terminated portion of the contract and (B) the amount of $.......... for all applicable property disposal credits.

(ii) The net settlement of $.......... in subdivision (i) above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the terminated portion of the contract, except as provided in subparagraph (8) below.

(iii) Upon payment of the net settlement of $.........., all obligations of the Contractor to perform further work or services or to make further deliveries under the terminated portion of the contract and all obligations of the Government to make further payments or carry out other undertakings concerning the terminated portion of the contract shall cease; *provided*, that nothing in this agreement shall impair or affect any covenants, terms, or conditions of the contract relating to the completed or continued portion of this contract.

(8) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

[*The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109-2). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.*]

(i) All rights and liabilities, if any, of the parties, as to matters covered by, and regulations made implementing 10 U.S.C. 2382, as amended, and any other renegotiation authority.

(ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.

(iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, employment of aliens, and "officials not to benefit." [*If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.*]

(iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.

(vii) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective cost or pricing data.

(End of agreement)

49.603-3 Cost-reimbursement contracts—complete termination, if settlement includes cost.

[*Insert the following in Block 14 of SF 30 for settlement of cost-reimbursement contracts that are completely terminated, if settlement includes costs.*]

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated ....

(b) The parties agree to the following:

(1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(2) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do
not include any items reaso
usable without loss to the Contr
on its other work. The Contractor
ther certifies that the Contractin
ficer has been informed of any
stantial change in the status of
items between the dates of the t
nation inventory schedules and
date of this agreement.

(4) The Contractor transfers,
veys, and assigns to the Govern
all the right, tit'e, and interest, if
that the Contractor has received,
entitled to receive, in and to sub
tract termination inventory not ot
wise properly accounted for.

(5) The Contractor shall, withi
days after receipt of the paym
specified in this agreement, pay
each of its immediate subcontrac
(or their respective assignees)
amounts to which they are entit
after deducting any prior paym
and, if the Contractor so elects,
amounts due and payable to the
tractor by those subcontractors.

(6) (i) The Contractor has rece
$.......... for work and services
formed, or articles delivered, u
the contract before the effective
of termination. The Government
firms the right of the Contractor,
ject to paragraph (7) below, to re
this sum and agrees that it constit
a portion of the total amount to w
the Contractor is entitled in comp
and final settlement of the contrac

(ii) Further, the Government ag
to pay to the Contractor or its ass
ee, upon presentation of a proper
voice or voucher, the sum of $...
[*insert net amount of settlement*],
rived at by deducting from the sum
$.......... [*insert gross amount of se
ment less amount shown in subd
sion (6)(i) above*] (A) the amount
$.......... for all unliquidated partial
progress payments previously made
the Contractor or its assignee and
unliquidated advance payments (
any interest), (B) the amount of $...
for all applicable property disp
credits [*insert if appropriate*, "and
the amount of $.......... for all ot
amounts due the Government un
this contract, except as provided
paragraph (7) below."]

(iii) The net settlement of $........
subdivision (ii) above, together

sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and of all other demands and liabilities of the Contractor and the Government under the contract, except as provided in paragraph (7) below.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

[*The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109-2). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.*]

(i) All rights and liabilities, if any, of the parties, as to matters covered by, and regulations made implementing 10 U.S.C. 2382, as amended, and any other renegotiation authority.

(ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.

(iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, employment of aliens, and "officials not to benefit." [*If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.*]

(iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.

(vii) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(viii) All rights and liabilities of the parties relating to Government property furnished to the Contractor for the performance of this contract.

(ix) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(x) Unresolved demands or assertions by the Contractor against the Government for costs under General Accounting Office exceptions or other costs of the same nature that are excluded from the settlement without prejudice to the rights of either party, as follows: [*Insert amount and describe charges not waived.*]

(xi) Claims by the Contractor against the Government, when the Contractor's rights of reimbursement are disputed, that are excluded without prejudice to the rights of either party are as follows: [*Insert the amounts and describe the claims on which the Contracting Officer has made findings and has disallowed and on which the Contractor has taken, or intends to take, timely appeal.*]

(xii) Unresolved demands or assertions by the Contractor against the Government that are unknown in amount and involve costs alleged to be reimbursable under the contract are as follows: [*Insert the estimated amounts and describe the charges.*]

(xiii) Unknown amounts alleged by the Contractor against the Government, based upon responsibility of the Contractor to third parties that involve costs reimbursable under the contract.

(xiv) Debts due the Government by the Contractor that are based on refunds, rebates, credits, or other amounts not now known to the Government, with interest, now due or that may become due the Contractor from third parties, if the amounts arise out of transactions for which reimbursement has been made to the Contractor under the contract. The Contractor shall pay to the Government, within 30 days after receipt, any of these amounts that become due from any third party or any other source. Interest at the rate established by the Secretary of the Treasury under 50 U.S.C. (App.) 1215(b)(2) shall accrue and shall be paid to the Government on any amounts that remain unpaid after the 30-day period.

(xv) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective cost or pricing data.

(End of agreement)

49.603-4 Cost-reimbursement contracts—complete termination, with settlement limited to fee.

[*Insert the following in Block 14 of SF 30 for settlement of cost-reimbursement contracts that are completely terminated, if settlement is limited to fee.*]

(a) This supplemental agreement settles the amount of fee due under the contract, terminated in its entirety by Notice of Termination dated ....

(b) The parties agree to the following:

(1) The Contractor has received $.......... on account of its fee under the contract before the effective date of termination.

(2) The Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, $.......... [*insert net amount to be paid on account of fee*]. This sum, with sums previously paid, constitutes payment in full and complete sett
ment of the amount due the Contr
tor on account of its fee under t
contract.

(3) The Contractor's allowable co
under the contract will be paid und
the terms and conditions of the co
tract and parts 31 and 49 of the Fede
al Acquisition Regulation.

[*Insert subparagraph (3) only
there are costs to be vouchered out* (
*49.302) or if there are costs to be co
ered later by a separate settleme
agreement.*]

(4) Regardless of any other provisi
of this agreement, the following righ
and liabilities of the parties under t
contract are reserved:

[*The following list of reserved or
cepted rights and liabilities is inten
ed to cover those that should most f
quently be reserved and that should
scrutinized at the time a settleme
agreement is negotiated* (*see 49.109-
The suggested language of the except
items on the list may be varied at t
discretion of the contracting officer.
accuracy or completeness can
achieved by referencing the number
a contract clause or provision cov
ing the matter in question, then foll
that method of enumerating reserv
rights and liabilities. Omit any of t
following that are not applicable a
add any additional exceptions or r
ervations required.*]

(i) All rights and liabilities, if any,
the parties, as to matters covered b
and regulations made implementing
U.S.C. 2382, as amended, and a
other renegotiation authority.

(ii) All rights and liabilities, if an
of the parties under those clauses
serted in the contract because of t
requirements of Acts of Congress a
Executive Orders, including, witho
limitation, any applicable clauses
lating to: labor law, contingent fe
domestic articles, employment
aliens, and "officials not to benefit
[*If the contract contains clauses
this character inserted for reaso
other than requirements of Acts
Congress or Executive Orders, the su
gested language should be appropria
ly modified.*]

(iii) All rights and liabilities of t
parties arising under the contract a
relating to reproduction rights, pate

infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(iv) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(v) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(vi) All rights and liabilities of the parties relating to Government property furnished to, or acquired by, the Contractor for the performance of the contract.

(vii) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(viii) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective cost or pricing data.

(End of agreement)

49.603–5 Cost-reimbursement contracts—partial termination.

[*Insert the following in Block 14 of SF 30, Amendment of Solicitation/Modification of Contract, for settlement agreements for cost-reimbursement contracts as a result of partial termination.*]

(a) This supplemental agreement settles the termination settlement proposal resulting from the Notice of Termination dated ....

(b) The parties agree as follows:

(1) The contract is amended by deleting the terminated portion as follows: [*specify the terminated portion clearly as to (i) item numbers, (ii) descriptions, (iii) quantity terminated, (iv) unit and total price of terminated items, and (v) any other explanation necessary to avoid uncertainty or misunderstanding*].

(2) The fee stated in the contract is decreased by $.........., from $.......... to $.......... .

[*Insert, if appropriate,* "(3) The estimated cost of the contract is decreased by $.........., from $.......... to $........".]

(c) The Contractor's allowable costs and earned fee, if any, for the terminated portion of the contract will continue to be reimbursed on SF 1034, Public Voucher for Purchase and Services Other Than Personal, under the applicable provisions of the contract and part 31 of the Federal Acquisition Regulation.

(End of agreement)

49.603–6 No-cost settlement agreement—complete termination.

[*Insert the following in Block 14 of SF 30 if a no-cost settlement agreement, under a complete termination, is to be executed.*]

(a) This supplemental agreement .... [*insert* "modifies the contract to reflect a no-cost settlement agreement with respect to the Notice of Termination dated ...." *or, if not previously terminated,* "terminates the contract in its entirety".]

(b) The parties agree as follows:

The Contractor unconditionally waives any charges against the Government because of the termination of the contract and, except as set forth below, releases it from all obligations under the contract or due to its termination. The Government agrees that all obligations under the contract are concluded, except as follows:

[*List reserved or excepted rights and liabilities. See 49.109–2 and 49.603–1(b)(7).*]

(End of agreement)

49.603–7 No-cost settlement agreement—partial termination.

[*Insert the following in Block 14 of SF 30 if a no-cost settlement agreement, under a partial termination, is to be executed.*]

(a) This supplemental agreement modifies the contract to reflect a no-cost settlement agreement with respect to the Notice of Termination dated ....

(b) The parties agree as follows:

(1) The terminated portion of the contract is as follows: [*Specify (i) item numbers, (ii) descriptions, (iii) quantity terminated, (iv) unit and total price of terminated items, and (v) any other explanation necessary to avoid uncertainty or misunderstanding.*]

(2) The Contractor unconditionally waives any charges against the Government arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of the Government to make further payments or to carry out any further undertakings under the terminated portion of the contract. The Government acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries under the terminated portion of the contract. Nothing in this paragraph affects any other covenants, terms, or conditions of the contract. Under the terminated portion of the contract, the following rights and liabilities of the parties are reserved:

[*List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).*]

(End of agreement)

49.603-8 Fixed-price contracts—settlements with subcontractors only.

[*Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts covering only settlements with subcontractors.*]

(a) This agreement settles that portion of the settlement proposal of the Contractor that is based upon termination of the following subcontracts entered into in performing this contract:

[*Insert a list of the terminated subcontracts included in this settlement.*]

(b) The parties agree to the following:

(1) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by the agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(2) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(3) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(4) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(5) The Government agrees to pay the Contractor or its assignee, upon presentation of a proper invoice or voucher, $.......... [*insert net amount of settlement*], which, together with the amount of $.......... previously paid the Contractor as partial, progress, or advance payments, constitutes payment in full and complete settlement, except as provided in subparagraph (b)(6) below, of the amount due the

Contractor for that portion of its settlement proposal that is based upon termination of the subcontracts listed above.

(6) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved: [*List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).*]

(End of agreement)

49.603-9 Settlement of reservations.

[*Insert the following in Block 14 of SF 30 for settlement of reservations.*]

(a) Supplemental Agreement No. ———, dated ———, was executed to reflect the settlement of the termination of this contract. The supplemental agreement excepted from the settlement certain items described in the agreement including the items described in paragraph (b) below. This supplemental agreement settles those items listed in paragraph (b) below.

(b) The parties agree to the following:

(1) The Government agrees to pay the Contractor $ ——— for the following reserved or excepted items:* [*List items.*]

(2) The Contractor releases and forever discharges the Government from all liability and from all existing and future claims and demands that it may have under this contract, insofar as it pertains to the contract, for the items described in subparagraph (1) above.*

[**When payment is due the Government, reverse the words Government* and *Contractor* in subparagraphs (b)(1) and (b)(2).]

(End of agreement)

49.604 Release of excess funds under terminated contracts.

The following format shall be used to recommend the release of excess funds under terminated contracts, except if the contracting office retains responsibility for settlement of the termination:

FROM: Termination Contracting Officer ——— [address]
TO: Contracting office ——— [address]
SUBJ: Terminated Contract No. ——— with ——— [Contractor]
Refs:

(a) [*Cite termination notice and effective date.*]

(b) [*Cite prior letters releasing excess funds, if any.*]

1. Referenced termination notice, ——— [*insert* "completely" *or* "partially"] terminated contract ———.

2. Based on the best information available, it is estimated that the gross settlement cost will be $ ———. The amount available for release as excess to the contract is $ ———. Any payments previously made to the Contractor for terminated items have been considered in arriving at the above amounts.

[*If prior letters recommending release of excess funds are cited, use the following as paragraph 2*:

"The estimated settlement costs previously reported by reference (b) in the amount of $ ——— are revised. On the best evidence now available, it is estimated that the settlement costs will be $ ———. The additional amount available for release is $ ———".]

3. The related appropriations and amounts involved are:

Appropriations	Allocated Amounts

Copies to:
Paying Office
Accounting and Finance Office
Other

49.605 Request to settle subcontractor settlement proposals.

Contractors requesting authority to settle subcontractor settlement proposals shall furnish applicable information from the list below and any additional information required by the contracting officer:

(a) Name of contractor and address of principal office.

(b) Name and location of divisions of the applicant's plant for which authorization is requested.

(c) An explanation of the necessity and justification for the authorization requested.

(d) A full description of the applicant's organization for handling terminations, including the names of the officials in charge of processing and settling proposals.

(e) The number and dollar amount (estimated if necessary) of uncompleted contracts with Government agencies and the percentage applicable to each agency.

(f) The number and dollar amount (estimated if necessary) of uncompleted subcontracts under Government contracts and the percentage applicable to each agency.

(g) The extent of the applicant's experience in termination matters, including the handling of proposals of subcontractors.

(h) The approximate amount and general nature of terminations of the applicant currently in process.

(i) A statement that no other application has been made for any division of the applicant's plant covered by the application or, if one has been made, a full statement of the facts.

(j) The limit of authorization requested.

49.606 Granting subcontract settlement authorization.

Contracting officers shall use the following format when granting subcontract settlement authorization:

LETTER OF AUTHORIZATION

(a) Your request of —— (date) is approved, and you are authorized, subject to the limitations of subsection 49.108-4 and those stated below, to settle, without further approval of the Government, all subcontracts and purchase orders terminated by you as a result of a Government contract being terminated or modified (1) for the convenience of the Government or (2) under any other circumstances that may require the Government to bear the cost of their settlement.

(b) This authorization does not extend to the disposition of Government-furnished material or articles completed but undelivered under the subcontract or purchase order, as these require screening and approval of disposal actions by the Government, except that allocable completed articles may be disposed of without Government approval or screening if the total amount (at subcontract price) when added to the amount of settlement (as computed below) does not exceed $ ——— [*insert limit of authorization being granted*].

(c) This authorization is subject to the following conditions and requirements:

(1) The amount of the subcontract termination settlement does not exceed $ —— [*insert limit of authorization being granted*], computed as follows:

(i) Do not deduct advance or partial payments or credits for retention or other disposal of termination inventory allocated to the settlement proposal.

(ii) Deduct amounts payable for completed articles or work at the contract price or for the settlement of termination proposals of subcontractors (except those settlements that have not been approved by the Government).

(2) Any termination inventory involved has been disposed of under subsection 49.108-4, except that screening and Government approval of scrap and salvage determinations are not required.

(3) The Contracting Officer may incorporate into each Notice of Termination specific instructions about the disposition of specific items of termination inventory, or the Contracting Officer may, at any time before final settlement, issue specific instructions. These instructions will not affect any disposal action taken by you or your subcontractors before their receipt.

(4) The settlements made by you with your subcontractors and suppliers under this authorization, including sales, retention, or other dispositions of property involved in making these settlements, are reimbursable under part 49 and the Termination clause of the contract, and do not require approval of the Contracting Officer.

(5) Any number of separate settlements of $ —— [*insert limit of authorization granted*] or less may be made with a single subcontractor. Settlement proposals that would normally be included in a single proposal; e.g., those based on a series of separate orders for the same item under one contract, should be consolidated whenever possible and shall not be divided to bring them within the authorization.

(6) This authorization does not apply if a subcontractor or supplier is affiliated with you. For this purpose, you should consider a contractor to be affiliated with you if you are under common control or if there is any common interest between you by reason of stock ownership, or otherwise, that is sufficient to create a reasonable doubt that the bargaining between you is completely at arm's length.

(7) A representative of this office will, from time to time, review the methods used in negotiating settlements with your subcontractors and will make a selective examination of the settlements made by you. If the review indicates that you are not adequately protecting the Government's interest, this delegation will be revoked.

(End of letter)

49.607 Delinquency notices.

The formats of the delinquency notices in this section may be used to satisfy the requirements of 49.402-3. All notices will be sent with proof of delivery requested. (See subpart 12.5 for stop-work orders.)

(a) *Cure notice.* If a contract is to be terminated for default before the delivery date, a *Cure Notice* is required by the Default clause. Before using this notice, it must be ascertained that an amount of time equal to or greater than the period of *cure* remains in the contract delivery schedule or any extension to it. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic *cure* period of 10 days or more, the *Cure Notice* should not be issued. The *Cure Notice* may be in the following format:

CURE NOTICE

You are notified that the Government considers your ——— [*specify the contractor's failure or failures*] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice [*or insert any longer time that the Contracting Officer may consider reasonably necessary*], the Government may terminate for default under the terms and conditions of the ——— [*insert clause title*] clause of this contract.

(End of notice)

(b) *Show cause notice.* If the time remaining in the contract delivery schedule is not sufficient to permit a realistic *cure* period of 10 days or more, the following *Show Cause Notice* may be used. It should be sent immediately upon expiration of the delivery period.

SHOW CAUSE NOTICE

Since you have failed to ——— [*insert* "perform Contract No. ——— within the time required by its terms", *or* "cure the conditions endangering performance under Contract No. ——— as described to you in the Government's letter of ——— (date)"], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to ——— [*insert the name and complete address of the contracting officer*], within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(End of notice)

PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS

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50.403 Special procedures for unusually hazardous or nuclear risks.
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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42471, Sept. 19, 1983, unless otherwise noted.

50.000 Scope of part.

This part prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Pub. L. 85-804 as amended by Pub. L. 93-155 (50 U.S.C. 1431-1435), as amended, referred to in this part as *the Act*, and Executive Order (EO) 10789, dated November 14, 1958, as amended, referred to in this part as *the Executive Order*. It does not cover advance payments (see subpart 32.4).

50.001 Definitions.

Approving authority, as used in this part, means an agency official or contract adjustment board authorized to approve actions under the Act and Executive Order.

Secretarial level, as used in this part, means a level at or above the level of a deputy assistant agency head, or a contract adjustment board.

Subpart 50.1—General

50.101 Authority.

(a) The Act empowers the President to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense.

(b) The Executive Order authorizes the heads of the following agencies to exercise the authority conferred by the Act and to delegate it to other officials within the agency: the Government Printing Office; the Federal Emergency Management Agency; the
Tennessee Valley Authority; th
tional Aeronautics and Space Ad
tration; the General Services Ad
tration; the Defense, Army, Nav
Force, Treasury, Interior, Agric
Commerce, and Transportatio
partments; the Department of E
for functions transferred to th
partment from other authorized
cies; and any other agency that
be authorized by the President.

50.102 Policy.

(a) The authority conferred b
Act may not (1) be used in a m
that encourages carelessness
laxity on the part of persons en
in the defense effort or (2) be
upon when other adequate leg
thority exists within the agency.

(b) Actions authorized under th
shall be accomplished as expediti
as practicable, consistent with
care, restraint, and exercise of
judgment appropriate to the u
such extraordinary authority.

(c) Certain kinds of relief previ
available only under the Act; e.
cission or reformation for mutual
take, are now available under th
thority of the Contract Dispute
of 1978. In accordance with sub
graph (a)(2) above, part 33 mu
followed in preference to part 5
such relief. In case of doubt
whether part 33 applies, the cont
ing officer should seek legal advic

50.103 Deviations.

Any deviations to this part 50
not be effective for defense age
until approved by the Secretary o
fense, and for civilian agencies
approved by the agency head.

50.104 Reports.

(a) The Act and Executive Orde
quire that each agency listed
50.101(b) shall submit to Congre
nually by March 15 a report of ac
taken on requests for relief, inclu
indemnity, under the Act's author

(b) The report shall contain th
formation in subparagraph (1) b
for all actions on approved requ
and in subparagraph (2) below fo
requests denied. In addition, for
approved request that involves a

pages tightly bound

or potential cost to the Government in excess of $50,000, the report shall include the name of the contractor, the actual cost or estimated potential cost, a description of the property or services involved, and a statement of the circumstances justifying the action.

(1) For actions on approved requests, the report shall contain—

(i) The total number of requests, total dollar amount requested, and total dollar amount approved; and

(ii) By type of request (amendments without consideration, correction of mistakes, formalization of informal commitments, and other requests as appropriate), the number of requests, dollar amount requested, and dollar amount approved.

(2) For requests denied, the report shall contain—

(i) The total number of requests and total dollar amount requested; and

(ii) By type of request, the number of requests and dollar amount requested.

(c) The report should omit any information classified *Confidential* or higher.

(d) A request is not reportable until a Memorandum of Decision is issued approving or denying relief.

50.105 Records.

Agencies shall maintain complete records of all actions taken under this part 50. For each request for relief processed, these records shall include, as a minimum—

(a) The contractor's request;

(b) All relevant memorandums, correspondence, affidavits, and other pertinent documents;

(c) The Memorandum of Decision (see 50.306 and 50.402); and

(d) A copy of the contractual document implementing an approved request.

Subpart 50.2—Delegation of and Limitations on Exercise of Authority

50.201 Delegation of authority.

An agency head may delegate in writing authority under the Act and Executive Order, subject to the following limitations:

(a) Authority delegated shall be to a level high enough to ensure uniformity of action.

(b) Authority to approve requests to obligate the Government in excess of $50,000 may not be delegated below the secretarial level.

(c) Regardless of dollar amount, authority to approve any amendment without consideration that increases the contract price or unit price may not be delegated below the secretarial level, except in extraordinary cases or classes of cases when the agency head finds that special circumstances clearly justify such delegation.

(d) Regardless of dollar amount, authority to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, shall be exercised only by the Secretary or Administrator of the agency concerned, the Public Printer, or the Chairman of the Board of Directors of the Tennessee Valley Authority (see 50.403).

50.202 Contract adjustment boards.

An agency head may establish a contract adjustment board with authority to approve, authorize, and direct appropriate action under this part 50 and to make all appropriate determinations and findings. The decisions of the board shall not be subject to appeal; however, the board may reconsider and modify, correct, or reverse its previous decisions. The board shall determine its own procedures and have authority to take all action necessary or appropriate to conduct its functions.

50.203 Limitations on exercise of authority.

(a) The Act is not authority for—

(1) Using a cost-plus-a-percentage-of-cost system of contracting;

(2) Making any contract that violates existing law limiting profit or fees;

(3) Providing for other than full and open competition for award of contracts for supplies or services; or

(4) Waiving any bid bond, payment bond, performance bond, or other bond required by law.

(b) No contract, amendment, or modification shall be made under the Act's authority—

(1) Unless the approving authority finds that the action will facilitate the national defense;

(2) Unless other legal authority within the agency concerned is deemed to be lacking or inadequate;

(3) Except within the limits of the amounts appropriated and the statutory contract authorization (however, indemnification agreements authorized by an agency head (50.403) are not limited to amounts appropriated or to contract authorization); and

(4) That will obligate the Government for any amount over $25 million, unless the Senate and House Committees on Armed Services are notified in writing of the proposed obligation, 60 days of continuous session of Congress have passed since the transmittal of such notification, and neither House of Congress has adopted a resolution disapproving the obligation. However, this subparagraph (4) does not apply to indemnification agreements authorized under 50.403.

(c) No contract shall be amended or modified unless the contractor submits a request before all obligations (including final payment) under the contract have been discharged. No amendment or modification shall increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder, if the contract was negotiated under 10 U.S.C. 2304(a)(15) or 41 U.S.C. 252(c)(14), or FAR 15.103.

(d) No informal commitment shall be formalized unless—

(1) The contractor submits a written request for payment within 6 months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment; and

(2) The approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures.

(e) The exercise of authority by officials below the secretarial level is subject to the following additional limitations:

(1) The action shall not—

(i) Release a contractor from performance of an obligation over $50,000;

(ii) Result in an increase in cost to the Government over $50,000;

(iii) Deal with, or directly affect, any matter that has been submitted to the General Accounting Office; or

(iv) Involve disposal of Government surplus property.

(2) Mistakes shall not be corrected by an action obligating the Government for over $1,000, unless the contracting officer receives notice of the mistake before final payment.

(3) The correction of a contract because of a mistake in its making shall not increase the original contract price to an amount higher than the next lowest responsive offer of a responsible offeror.

[48 FR 42471, Sept. 19, 1983, as amended at 50 FR 1746, Jan. 1, 1985; 50 FR 52429, Dec. 23, 1985]

Subpart 50.3—Contract Adjustments

50.300 Scope of subpart.

This subpart prescribes standards and procedures for processing contractors' requests for contract adjustment under the Act and Executive Order.

50.301 General.

The fact that losses occur under a contract is not sufficient basis for exercising the authority conferred by the Act. Whether appropriate action will facilitate the national defense is a judgment to be made on the basis of all of the facts of the case. Although it is impossible to predict or enumerate all the types of cases in which action may be appropriate, examples are included in 50.302 below. Even if all of the factors in any of the examples are present, other considerations may warrant denying a contractor's request for contract adjustment. The examples are not intended to exclude other cases in which the approving authority determines that the circumstances warrant action.

50.302 Types of contract adjustment.

50.302-1 Amendments without consideration.

(a) When an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(b) When a contractor suffers a loss (not merely a decrease in anticipated profits) under a defense contract because of Government action, the character of the action will generally determine whether any adjustment in the contract will be made, and its extent. When the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted in the interest of fairness. Thus, when Government action, while not creating any liability on the Government's part, increases performance cost and results in a loss to the contractor, fairness may make some adjustment appropriate.

50.302-2 Correcting mistakes.

(a) A contract may be amended or modified to correct or mitigate the effect of a mistake. The following are examples of mistakes that may make such action appropriate:

(1) A mistake or ambiguity consisting of the failure to express, or express clearly, in a written contract, the agreement as both parties understood it.

(2) A contractor's mistake so obvious that it was or should have been apparent to the contracting officer.

(3) A mutual mistake as to a material fact.

(b) Amending contracts to correct mistakes with the least possible delay normally will facilitate the national defense by expediting the contracting program and assuring contractors that mistakes will be corrected expeditiously and fairly.

50.302-3 Formalizing informal commitments.

Under certain circumstances, informal commitments may be formalized to permit payment to persons who have taken action without a formal contract; for example, when a person, responding to an agency official's written or oral instructions and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor or subcontractor, without formal contractual coverage. Formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

50.303 Contractor requests.

A contractor seeking a contract adjustment shall submit a request in duplicate to the contracting officer or an authorized representative. The request, normally a letter, shall state as a minimum—

(a) The precise adjustment requested;

(b) The essential facts, summarized chronologically in narrative form;

(c) The contractor's conclusions based on these facts, showing, in terms of the considerations set forth in 50.301 and 50.302 above, when the contractor considers itself entitled to the adjustment; and

(d) Whether or not—

(1) All obligations under the contracts involved have been discharged;

(2) Final payment under the contracts involved has been made;

(3) Any proceeds from the request will be subject to assignment or other transfer, and to whom; and

(4) The contractor has sought the same, or a similar or related, adjustment from the General Accounting Office or any other part of the Government, or anticipates doing so.

50.304 Facts and evidence.

(a) *General.* When it is appropriate, the contracting officer or other agency official shall request the contractor to support any request made under

50.303 with any of the following information:

(1) A brief description of the contracts involved, the dates of execution and amendments, the items being acquired, the price or prices, the delivery schedules, and any special contract provisions relevant to the request.

(2) A history of performance indicating when work under the contracts or commitments began, the progress made to date, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion.

(3) A statement of payments received, due, and yet to be received or to become due, including advance and progress payments; amounts withheld by the Government; and information as to any obligations of the Government yet to be performed under the contracts.

(4) A detailed analysis of the request's monetary elements, including precisely how the actual or estimated dollar amount was determined and the effect of approval or denial on the contractor's profits before Federal income taxes.

(5) A statement of the contractor's understanding of why the request's subject matter cannot now, and could not at the time it arose, be disposed of under the contract terms.

(6) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits.

(7) Relevant financial statements, cost analyses, or other such data, preferably certified by a certified public accountant, as necessary to support the request's monetary elements.

(8) A list of persons connected with the contracts who have factual knowledge of the subject matter, including, when possible, their names, offices or titles, addresses, and telephone numbers.

(9) A statement and evidence of steps taken to reduce losses and claims to a minimum.

(10) Any other relevant statements or evidence that may be required.

(b) *Amendments without consideration—essentiality a factor.* When a request involves possible amendment without consideration, and essentiality to the national defense is a facto (50.302-1(a)), the contractor may b asked to furnish, in addition to th facts and evidence listed in paragrap (a) of this section, any of the followin information:

(1) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(2) A statement and evidence of the contractor's present estimate of total costs under the contracts involved if it is enabled to complete them, broken down between costs accrued to date and completion costs, and between costs paid and those owed.

(3) A statement and evidence of the contractor's estimate of the final price of the contracts, taking into account all known or contemplated escalation, changes, extras, and the like.

(4) A statement of any claims known or contemplated by the contractor against the Government involving the contracts, other than those stated in response to subparagraph (3) above.

(5) An estimate of the contractor's total profit or loss under the contracts if it is enabled to complete them at the estimated final contract price, broken down between profit or loss to date and completion profit or loss.

(6) An estimate of the contractor's total profit or loss from other Government business and all other sources, from the date of the first contract involved to the estimated completion date of the last contract involved.

(7) A statement of the amount of any tax refunds to date, and an estimate of those anticipated, for the period from the date of the first contract involved to the estimated completion date of the last contract involved.

(8) A detailed statement of efforts the contractor has made to obtain funds from commercial sources to enable contract completion.

(9) A statement of the minimum amount the contractor needs as an amendment without consideration to enable contract completion, and the detailed basis for that amount.

(10) An estimate of the time required to complete each contract if the request is granted.

(11) A statement of the factors causing the loss under the contracts involved.

(12) A statement of the course of events anticipated if the request is denied.

(13) Balance sheets, preferably certified by a certified public accountant, (i) for the contractor's fiscal year immediately preceding the date of the first contract, (ii) for each subsequent fiscal year, (iii) as of the request date, and (iv) projected as of the completion date of all the contracts involved (assuming the contractor is enabled to complete them at the estimated final prices), together with income statements for annual periods subsequent to the date of the first balance sheet. Balance sheets and income statements should be both consolidated and broken down by affiliates. They should show all transactions between the contractor and its affiliates, stockholders, and partners, including loans to the contractor guaranteed by any stockholder or partner.

(14) A list of all salaries, bonuses, and other compensation paid or furnished to the principal officers or partners, and of all dividends and other withdrawals, and of all payments to stockholders in any form since the date of the first contract involved.

(c) *Amendments without consideration—essentiality not a factor.* When a request involves possible amendment without consideration because of Government action, and essentiality to the national defense is not a factor (50.302-1(b)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this section, any of the following information:

(1) A clear statement of the precise Government action that the contractor considers to have caused a loss under the contract, with evidence to support each essential fact.

(2) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(3) The estimated total loss under the contract, with detailed supporting analysis.

(4) The estimated loss resulting specifically from the Government action, with detailed supporting analysis.

(d) *Correcting mistakes.* When a request involves possible correction of a mistake (50.302-2), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this section, any of the following information:

(1) A statement and evidence of the precise error made, ambiguity existing, or misunderstanding arising, showing what it consists of, how it occurred, and the intention of the parties.

(2) A statement explaining when the mistake was discovered, when the contracting officer was given notice of it, and whether this notice was given before completion of work under, or the effective termination date of, the contract.

(3) An estimate of profit or loss under the contract, with detailed supporting analysis.

(4) An estimate of the increase in cost to the Government resulting from the adjustment requested, with detailed supporting analysis.

(e) *Formalizing informal commitments.* When a request involves possible formalizing of an informal commitment (50.302-3), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this section, any of the following information:

(1) Copies of any written instructions or assurances (or a sworn statement of any oral instructions or assurances) given the contractor, and identification of the Government official who gave them.

(2) A statement as to when the contractor furnished or arranged to furnish the supplies or services involved, and to whom.

(3) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances that led to this reliance.

(4) Evidence that, when performing the work, the contractor expected to be compensated directly for it by the Government and did not anticipate recovering the costs in some other way.

(5) A cost breakdown supporting the amount claimed as fair compensation for the work performed.

(6) A statement and evidence of the impracticability of providing, in an appropriate contractual instrument, for the work performed.

50.305 Processing cases.

(a) In response to a contractor request made in accordance with 50.303, the contracting officer or an authorized representative shall make a thorough investigation to establish the facts necessary to decide a given case. Facts and evidence, including signed statements of material facts within the knowledge of individuals when documentary evidence is lacking, and audits if considered necessary to establish financial or cost facts, shall be obtained from contractor and Government personnel.

(b) When a case involves matters of interest to more than one Government agency, the interested agencies should maintain liaison with each other to determine whether joint action should be taken.

(c) When additional funds are required from another agency, the contracting agency may not approve adjustment requests before receiving advice that the funds will be available. The request for this advice shall give the contractor's name, the contract number, the amount of proposed relief, a brief description of the contract, and the accounting classification or fund citation. If the other agency makes additional funds available, the agency considering the adjustment request shall be solely responsible for any action taken on the request.

(d) When essentiality to the national defense is an issue (50.302-1(a)), agencies considering requests for amendment without consideration involving another agency shall obtain advice on the issue from the other agency before making the final decision. When this advice is received, the agency considering the request for amendment without consideration shall be responsible for taking whatever action is appropriate.

50.306 Disposition.

When approving or denying a contractor's request made in accordance with 50.303, the approving authority shall sign and date a Memorandum
Decision containing—

(a) The contractor's name and a
dress, the contract identification, a
the nature of the request;

(b) A concise description of the su
plies or services involved;

(c) The decision reached and t
actual cost or estimated potential co
involved, if any;

(d) A statement of the circumstanc
justifying the decision;

(e) Identification of any of the fo
going information classified *Confide*
tial or higher (instead of being inclu
ed in the memorandum, such inform
tion may be set forth in a separa
classified document referenced in t
memorandum); and

(f) If some adjustment is approved,
statement in substantially the follo
ing form: "I find that the action a
thorized herein will facilitate the n
tional defense." The case files suppo
ing this statement will show the de
vation and rationale for the doll
amount of the award. When the doll
amount exceeds the amounts suppo
ed by audit or other independent
views, the approving authority w
further document the rationale for d
viating the recommendation.

[48 FR 42471, Sept. 19, 1983, as amended
51 FR 31426, Sept. 3, 1986]

50.307 Contract requirements.

(a) The Act and Executive Order
quire that every contract entered in
amended, or modified under this pa
50 shall contain—

(1) A citation of the Act and Exec
tive Order;

(2) A brief statement of the circu
stances justifying the action; and

(3) A recital of the finding that t
action will facilitate the national
fense.

(b) The authority in 50.101(a) sh
not be used to omit from contrac
when otherwise required, the clau
at 52.203-5, Covenant Against Cont
gent Fees; 52.215-1, Examination
Records by Comptroller Gene
52.222-4, Contract Work Hours a
Safety Standards Act—Overtime Co
pensation; 52.222-6, Davis-Bacon A
52.222-10, Compliance With Copela
Act Requirements; 52.222-20, Wals

Healey Public Contracts Act; 52.222-26, Equal Opportunity; and 52.232-23, Assignment of Claims.

[48 FR 42471, Sept. 19, 1983, as amended at 51 FR 31426, Sept. 3, 1986; 53 FR 4945, Feb. 18, 1988]

Subpart 50.4—Residual Powers

50.400 Scope of subpart.

This subpart prescribes standards and procedures for exercising residual powers under the Act. The term *residual powers* includes all authority under the Act except (a) that covered by subpart 50.3 and (b) the authority to make advance payments (see subpart 32.4).

50.401 Standards for use.

Subject to the limitations in 50.203, residual powers may be used in accordance with the policies in 50.102 when necessary and appropriate, all circumstances considered. In authorizing the inclusion of the clause at 52.250-1, Indemnification Under Pub. L. 85-804, in a contract or subcontract, an agency head may require the indemnified contractor to provide and maintain financial protection of the type and amount determined appropriate. In deciding whether to approve use of the indemnification clause, and in determining the type and amount of financial protection the indemnified contractor is to provide and maintain, an agency head shall consider such factors as self-insurance, other proof of financial responsibility, workers' compensation insurance, and the availability, cost, and terms of private insurance. The approval and determination shall be final.

50.402 General.

(a) When approving or denying a proposal for the exercise of residual powers, the approving authority shall sign and date a Memorandum of Decision containing substantially the same information called for by 50.306.

(b) Every contract entered into, amended, or modified under residual powers shall comply with the requirements of 50.307.

50.403 Special procedures for unusually hazardous or nuclear risks.

50.403-1 Indemnification requests.

(a) Contractor requests for the indemnification clause to cover unusually hazardous or nuclear risks should be submitted to the contracting officer and shall include the following information:

(1) Identification of the contract for which the indemnification clause is requested.

(2) Identification and definition of the unusually hazardous or nuclear risks for which indemnification is requested, with a statement indicating how the contractor would be exposed to them.

(3) A statement, executed by a corporate official with binding contractual authority, of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous or nuclear, including—

(i) Names of insurance companies, policy numbers, and expiration dates;

(ii) A description of the types of insurance provided (including the extent to which the contractor is self-insured or intends to self-insure), with emphasis on identifying the risks insured against and the coverage extended to persons or property, or both;

(iii) Dollar limits per occurrence and annually, and any other limitation, for relevant segments of the total insurance coverage;

(iv) Deductibles, if any, applicable to losses under the policies;

(v) Any exclusions from coverage under such policies for unusually hazardous or nuclear risks; and

(vi) Applicable workers' compensation insurance coverage.

(4) The controlling or limiting factors for determining the amount of financial protection the contractor is to provide and maintain, with information regarding the availability, cost, and terms of additional insurance or other forms of financial protection.

(5) Whether the contractor's insurance program has been approved or accepted by any Government agency; and whether the contractor has an indemnification agreement covering similar risks under any other Govern-

ment program, and, if so, a brief description of any limitations.

(6) If the contractor is a division or subsidiary of a parent corporation, (i) a statement of any insurance coverage of the parent corporation that bears on the risks for which the contractor seeks indemnification and (ii) a description of the precise legal relationship between parent and subsidiary or division.

(b) If the dollar value of the contractor's insurance coverage varies by 10 percent or more from that stated in an indemnification request submitted in accordance with paragraph (a) above, or if other significant changes in insurance coverage occur after submission and before approval, the contractor shall immediately submit to the contracting officer a brief description of the changes.

50.403-2 Action on indemnification requests.

(a) The contracting officer, with assistance from legal counsel and cognizant program office personnel, shall review the indemnification request and ascertain whether it contains all required information. If the contracting officer, after considering the facts and evidence, denies the request, the contracting officer shall notify the contractor promptly of the denial and of the reasons for it. If recommending approval, the contracting officer shall forward the request (as modified, if necessary, by negotiation) through channels to the appropriate official specified in 50.201(d). The contracting officer's submission shall include all information submitted by the contractor and—

(1) All pertinent information regarding the proposed contract or program, including the period of performance, locations, and facilities involved;

(2) A definition of the unusually hazardous or nuclear risks involved in the proposed contract or program, with a statement that the parties have agreed to it;

(3) A statement by responsible authority that the indemnification action would facilitate the national defense;

(4) A statement that the contract will involve unusually hazardous or nuclear risks that could impose liability upon the contractor in excess of financial protection reasonably available;

(5) A statement that the contractor is complying with applicable Government safety requirements;

(6) A statement of whether the indemnification should be extended to subcontractors; and

(7) A description of any significant changes in the contractor's insurance coverage (see 50.403-1(b)) occurring since submission of the indemnification request.

(b) Approval of a request to include the indemnification clause in a contract shall be by a Memorandum of Decision executed by the appropriate official specified in 50.201(d).

(c) When use of the indemnification clause is approved under paragraph (b) above, the definition of unusually hazardous or nuclear risks (see subparagraph (a)(2) above) shall be incorporated into the contract, along with the clause.

(d) When approval is (1) authorized in the Memorandum of Decision and (2) justified by the circumstances, the contracting officer may approve the contractor's written request to provide for indemnification of subcontractors, using the same procedures as those required for contractors.

50.403-3 Contract clause.

The contracting officer shall insert the clause at 52.250-1, Indemnification Under Public Law 85-804, in contracts whenever the approving official determines that the contractor shall be indemnified against unusually hazardous or nuclear risks (also see 50.403-2(c)). In cost-reimbursement contracts, the contracting officer shall use the clause with its Alternate I.

PART 51—USE OF GOVERNMENT SOURCES BY CONTRACTORS

Sec.
51.000 Scope of part.

Subpart 51.1—Contractor Use of Government Supply Sources

51.100 Scope of subpart.
51.101 Policy.

Sec.
51.102 Authorization to use Government supply sources.
51.103 Ordering from Government supply sources.
51.104 Furnishing assistance to contractors.
51.105 Payment for shipments.
51.106 Title.
51.107 Contract clause.

Subpart 51.2—Contractor Use of Interagency Fleet Management System (IFMS)

51.200 Scope of subpart.
51.201 Policy.
51.202 Authorization.
51.203 Means of obtaining service.
51.204 Use of Interagency Fleet Management System (IFMS) vehicles and related services.
51.205 Contract clause.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42476, Sept. 19, 1983, unless otherwise noted.

51.000 Scope of part.

This part prescribes policies and procedures for the use by contractors of Government supply sources and interagency motor pool vehicles and related services.

Subpart 51.1—Contractor Use of Government Supply Sources

51.100 Scope of subpart.

This subpart prescribes policies and procedures for the use of Government supply sources (see 51.102(c)) by contractors. In this subpart, the terms *contractors* and *contracts* include *subcontractors* and *subcontracts.*

51.101 Policy.

(a) If it is in the Government's interest, and if supplies or services required in the performance of a Government contract are available from Government supply sources, contracting officers may authorize contractors to use these sources in performing—

(1) Government cost-reimbursement contracts; or

(2) Other types of negotiated contracts when the agency determines that a substantial dollar portion of the contractor's contracts are of a Government cost-reimbursement nature.

(b) Contractors with fixed-price Government contracts that require protection of security classified information may acquire security equipment through GSA sources (see 41 CFR 101-26.407).

51.102 Authorization to use Government supply sources.

(a) Before issuing an authorization to a contractor to use Government supply sources, the contracting officer shall place in the contract file a written finding supporting issuance of the authorization. The determination shall be based on, but not limited to, considerations of the following factors:

(1) The administrative cost of placing orders with Government supply sources and the program impact of delay factors, if any.

(2) The lower cost of items available through Government supply sources.

(3) Suitability of items available through Government supply sources.

(4) Delivery factors such as cost and time.

(5) Recommendations of the contractor.

(b) Authorizations to subcontractors shall be issued through, and with the approval of, the contractor.

(c) Upon deciding to authorize a contractor to use Government supply sources, the contracting officer shall request, in writing, as applicable—

(1) A FEDSTRIP activity address code, through the agency's central contact point for matters involving activity address codes, from the General Services Administration (GSA), FSR, Washington, DC 20406;

(2) A MILSTRIP activity address code from the appropriate Department of Defense (DOD) service point listed in Section 1 of the Introduction to the DOD Activity Address Directory;

(3) Approval for the contractor to use Department of Veterans Affairs (VA) supply sources from the Assistant Administrator for Supply Services (Code 90), Office of Supply Services, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420;

(4) Approval for the contractor to acquire helium from the Department of the Interior, Bureau of Mines, Division of Helium Operations, Box H-4372, Herring Plaza, Amarillo, Texas 79101; or

(5) Approval from the appropriate agency for the contractor to use a Government supply source other than those identified in (1) through (4) above.

(d) Each request made under paragraph (c) above shall contain—

(1) The complete address(es) to which the contractor's mail, freight, and billing documents are to be directed;

(2) A copy of the contracting officer's letter of authorization to the contractor;

(3) The prime contract number(s); and

(4) The effective date and duration of each contract.

(e) In each authorization to the contractor, the contracting officer—

(1) Shall cite the contract number(s) involved;

(2) Shall, when practicable, limit the period of the authorization;

(3) Shall specify, as appropriate, that—

(i) When requisitioning from GSA or DOD, the contractor shall use FEDSTRIP or MILSTRIP, as appropriate, and include the activity address code assigned by GSA or DOD;

(ii) When requisitioning from the VA, the contractor should use FEDSTRIP or MILSTRIP, as appropriate, Optional Form 347, Order for Supplies or Services (see 53.302-347), or an agency-approved form; and

(iii) When placing orders for helium with the Bureau of Mines, the contractor shall reference the Federal contract number on the purchase order;

(4) May include any other limitations or conditions deemed necessary. For example, the contracting officer may—

(i) Authorize purchases from Government supply sources of any overhead supplies, but no production supplies;

(ii) Limit any authorization requirement to use Government sources to a specific dollar amount, thereby leaving the contractor free to make smaller purchases from other sources if so desired;

(iii) Restrict the authorization to certain facilities or to specific contracts; or

(iv) Provide specifically if vesting of title is to differ from other property acquired or otherwise furnished by the contractor for use under the contract; and

(5) Shall instruct the contractor to comply with the applicable policies and procedures prescribed in this subpart.

(f) After issuing the authorization, the authorizing agency shall be responsible for—

(1) Ensuring that contractors comply with the terms of their authorizations and that supplies and services obtained from Government supply sources are properly accounted for and properly used;

(2) Any indebtedness incurred for supplies or services and not satisfied by the contractor; and

(3) Submitting, in writing, to the appropriate Government sources, address changes of the contractor and deletions when contracts are completed or terminated.

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

51.103 Ordering from Government supply sources.

(a) Contractors placing orders under Federal Supply Schedules shall follow the terms of the applicable schedule and authorization and include with each order—

(1) A copy of the authorization (unless a copy was previously furnished to the Federal Supply Schedule contractor); and

(2) The following statement:

This order is placed under written authorization from......................dated............ In the event of any inconsistency between the terms and conditions of this order and those of your Federal Supply Schedule contract, the latter will govern.

(b) If a Federal Supply Schedule contractor refuses to honor an order placed by a Government contractor under an agency authorization, the contracting agency shall report the circumstances to the General Services Administration, FCO, Washington, DC 20406.

(c) Contractors placing orders under nonmandatory schedule contracts and requirements contracts issued by GSA, Information Resources Management Service, for automated data processing equipment, software and maintenance, communications equipment and supplies, and teleprocessing services shall follow the terms of the applicable contract and the procedures in 51.103(a)(1) and (2).

(d) Contractors placing orders for Government stock shall—

(1) Comply with the requirements of the contracting officer's authorization, using FEDSTRIP or MILSTRIP procedures, as appropriate;

(2) Use only the GSA Form 1948-A, Retail Services Shopping Plate, when ordering from GSA Self-Service Stores; and

(3) Order only those items required in the performance of their contracts.

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

51.104 Furnishing assistance to contractors.

After receiving an activity address code, the contracting officer will notify the appropriate GSA regional office or military activity, which will contact the contractor and—

(a) Provide initial copies of ordering information and instructions; and

(b) When necessary, assist the contractor in preparing and submitting, as appropriate—

(1) The initial FEDSTRIP or MILSTRIP requisitions, the Optional Form 347, or the agency-approved forms;

(2) A completed GSA Form 457, FSS Publications Mailing List Application, so that the contractor will automatically receive current copies of required publications; or

(3) A completed GSA Form 3525, Application for Customer Supply Center Services and (Address Change).

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

51.105 Payment for shipments.

GSA, DOD, and VA will not forward bills to contractors for supplies ordered from Government stock until after the supplies have been shipped. Receipt of billing is sufficient evidence to establish contractor liability and to provide a basis for payment. Contracting officers should direct their contractors to make payment promptly upon receipt of billings.

51.106 Title.

(a) Title to all property acquired by the contractor under the contracting officer's authorization shall vest in the parties as provided in the contract, unless specifically provided for otherwise.

(b) If contracts are with educational institutions and the Government Property clause at 52.245-2, Alternate II, or 52.245-5, Alternate I, is used, title to property having an acquisition cost of less than $1,000 shall vest in the contractor as provided in the clause. Agencies may provide higher thresholds, if appropriate.

51.107 Contract clause.

The contracting officer shall insert the clause at 52.251-1, Government Supply Sources, in solicitations and contracts when the contracting officer may authorize the contractor to acquire supplies or services from a Government supply source. If a facilities contract is contemplated, the contracting officer shall use the clause with its Alternate I.

Subpart 51.2—Contractor Use of Interagency Fleet Management System (IFMS)

51.200 Scope of subpart.

This subpart prescribes policies and procedures for the use by contractors of interagency fleet management system (IFMS) vehicles and related services. In this subpart, the terms *contractors* and *contracts* include *subcontractors* and *subcontracts.*

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

51.201 Policy.

(a) If it is in the Government's interest, the contracting officer may authorize cost-reimbursement contractors to obtain, for official purposes only, interagency fleet management system (IFMS) vehicles and related services, including (1) fuel and lubricants, (2) vehicle inspection, maintenance, and repair, (3) vehicle storage, and (4) commercially rented vehicles for short-term use.

(b) Complete rebuilding of major components of contractor-owned or leased equipment requires the approval of the contracting officer in each instance.

(c) Government contractors shall not be authorized to obtain interagency fleet management system (IFMS) vehicles and related services for use in performance of any contract other than a cost-reimbursement contract, except as otherwise specifically approved by the Administrator of the General Services Administration at the request of the agency involved.

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

51.202 Authorization.

(a) The contracting officer may authorize a cost-reimbursement contractor to obtain interagency fleet management system (IFMS) vehicles and related services, if the contracting officer has—

(1) Determined that the authorization will accomplish the agency's contractual objectives and effect demonstrable economies;

(2) Received evidence that the contractor has obtained motor vehicle liability insurance covering bodily injury and property damage, with limits of liability as required or approved by the agency, protecting the contractor and the Government against third-party claims arising from the ownership, maintenance, or use of an interagency fleet management system (IFMS) vehicle;

(3) Arranged for periodic checks to ensure that authorized contractors are using vehicles and related services exclusively under cost-reimbursement contracts;

(4) Ensured that contractors shall establish and enforce suitable penalties for their employees who use or authorize the use of Government vehicles for other than performance of Government contracts (see 41 CFR 101-38.301-1);

(5) Received a written statement that the contractor will assume, without the right of reimbursement from the Government, the cost or expense of any use of interagency fleet management system (IFMS) vehicles and services not related to the performance of the contract; and

(6) Considered any recommendations of the contractor.

(b) The authorization shall—

(1) Be in writing;

(2) Cite the contract number;

(3) Specify any limitations on the authority, including its duration, and any other pertinent information; and

(4) Instruct the contractor to comply with the applicable policies and procedures provided in this subpart.

(c) Authorizations to subcontractors shall be issued through, and with the approval of, the contractor.

(d) Contracting officers authorizing contractor use of interagency fleet management system (IFMS) vehicles and related services subject their agencies to the responsibilities and liabilities provided in 41 CFR 101-39.4 regarding accidents and claims.

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

51.203 Means of obtaining service.

(a) Authorized contractors shall submit requests for interagency fleet management system (IFMS) vehicles and related services in writing to the appropriate GSA regional Federal Supply Service Bureau, Attention: Regional fleet manager, except that requests for more than five vehicles shall be submitted to General Services Administration, FBF, Washington, DC 20406, and not to the regions. Each request shall include the following:

(1) Two copies of the agency authorization to obtain vehicles and related services from GSA.

(2) The number of vehicles and related services required and period of use.

(3) A list of the contractor's employees who are authorized to request vehicles and related services.

(4) A listing of the make, model, and serial numbers of contractor-owned or -leased equipment authorized to be serviced.

(5) Billing instructions and address.

(b) Contractors requesting unusual quantities of vehicles should do so as far in advance as possible to facilitate availability.

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, 29283, July 11, 1989]

51.204 Use of Interagency Fleet Management System (IFMS) vehicles and related services.

Contractors authorized to use interagency fleet management system (IFMS) vehicles and related services shall comply with the requirements of 41 CFR part 101-38 and the operator's packet furnished with each vehicle.

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, 29283, July 11, 1989]

51.205 Contract clause.

The contracting officer shall insert the clause at 52.251-2, Interagency Fleet Management System (IFMS) Vehicles and Related Services, in solicitations and contracts when a cost-reimbursement contract is contemplated and the contracting officer may authorize the contractor to use interagency fleet management system (IFMS) vehicles and related services.

[48 FR 42476, Sept. 19, 1983, as amended at 54 FR 29282, July 11, 1989]

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